

A COMPARISON OF THE AMERICAN AND FRENCH(–INSPIRED) APPELLATE MODEL

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by

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Both the American and the French legal system have a three-tiered structure. However, the respective roles and functions of the courts on each step of the ladder is vastly different in both. Whereas the general system in the U.S. is to have one trial court and two 'higher' courts (a court of appeals and a supreme court), the French / European continental system consists of two 'factual' courts (the basic level and the court of appeals), and one 'legal' (the supreme court) with limited or even inexistent possibilities to look at the facts.

The purpose of this thesis is to look at these two models of division of labor between the three tiers through the lens of (i) the procedural leeway each of the courts has and (ii) their focus on fact or law, in function of what questions can be raised in appeal and have to be answered by the courts. We will add Germany to the comparison, as (i) the structure of its court system was inspired by the French, but (ii) has evolved over the years and has been recently (2002) overhauled specifically as to appeals, both to the second level of courts and to the supreme court.

We will do so by examining the avenues open for the parties in filing an appeal as well as for the courts in adjudicating those. It will be clear that the distinct philosophies regarding the appellate systems have influence on the entire organization of the different court systems.

We conclude that the present-day German system offers the best differentiation of roles between the three tiers while balancing access to the appellate and supreme court level.

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I. INTRODUCTION

1. An appeal is “[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal <the case is on appeal>.”¹

This is of course the most general and ample definition possible. Yet we see this feature of judicial organization in almost all modern systems, among which the European continental and in the American, both Federal and State systems although neither the U.S. Constitution nor the E.C.H.R. guarantee a right to appeal.

2. The American (Federal) judicial system was shaped by the Judiciary Act of 1789. The French system is notably contemporaneous: the revolutionary rule overhauled the judiciary by Acts of August 4, 1789 and August 16–24, 1790. Although it was not the case initially, both models crystallized into a three-tiered system. The French model was spread around Europe together with Napoleon’s expansionist wars and proved influential for even those countries that he did not happen to invade.

Of course, this system itself is not foolproof: a second decision by a ‘higher’ court does not guarantee a better result, as Ulpian already wrote: “As everybody knows, the practice of appeals is both frequent and necessary, inasmuch as it corrects the partiality or inexperience of judges; not but what it may sometimes alter well-delivered judgments for the worse, for it is not [necessarily] the case that the last person to pronounce judgment judges better.”²

II. HISTORY

A. Origins and Roman law

3. Our present-day appellate system can be retraced to Pharaonic Egypt: administrative and civil suits could be brought before local administrators, whose decisions could be appealed before the *nomarchs*, higher judges of the 42 judicial districts. In turn, their decisions could be appealed before the pharaoh, in Alexandria. The rationale was that both administrators and nomarchs

¹ BRYAN GARNER (ed.), BLACK’S LAW DICTIONARY (10th ed. 2014).

² DIG. 49.1.1.pr. (Ulpian, De appellationibus 1), in the translation by ALAN WATSON, THE DIGEST OF JUSTINIAN (vol. 4, 2009), originally: “*Appellandi usus quam sit frequens quamque necessarius, nemo est qui nesciat, quippe cum iniquitatem iudicantium vel imperitiam recorrigat: licet nonnumquam bene latas sententias in peius reformet, neque enim utique melius pronuntiat qui novissimus sententiam laturus est.*”

ruled in name of the pharaoh. Their reaching a wrong decision would bring ‘dishonor’ upon him, so a corrective had to be put in place.³ The benefits of this system were evident: the ruler would keep in touch with a sample of everyday life problems from all over his territory, while a single legal order would exist all over this territory, bringing legal certainty and facilitating trade.⁴

By the Late Roman Empire, the procedure was part of the standard practice, as is shown by Chapters 1–13 of Book XLIC of the Digests of Justinian which lay out the rules in a considerable degree of detail.⁵

B. Revolutionary systems

4. The French revolutionary took another shot at what the kings had attempted but systematically failed at before: curtailing the power of the (predecessors of) the regional courts of appeals (the *Parlements*) in what would be called nowadays ‘legislating from the bench’. Therefore, the *Tribunal de cassation* — the first court ever having jurisdiction over the entire French territory — was instituted with the power to quash judgments that would have violated the law. Importantly, this tribunal was not seen as a court of the judicial order, but as an organ of the legislative power, according to the principle *eius est interpretare legem cuius [est] condere*.⁶ The courts were forbidden from interpreting the law: questions of interpretation should be certified to the legislator (*référé facultatif*).⁷ This utopia did not last, however: by 1803, the *Tribunal de cassation* had become the *Cour de cassation* and the *référé facultatif* abolished.

That the absolute interdiction from interpreting the law was unworkable was soon evidenced by the faculty of interpretation that the *Tribunal* would award itself, starting with the absurdity canon.⁸ In 1801, it ruled that the law should be understood as being neither moot, nor impossi-

³ LAURENT WAELKENS, *CIVIL CAUSA* 179 (2014).

⁴ *Id.* This is essentially the goal of the Commerce Clause (Article I, Section 8, Clause 3) of the U.S. Constitution as well as the ‘four freedoms’ that lay on the basis of the E.U.

⁵ For the evolution of the appellate systems from the Roman Empire through the Middle Ages, we refer to the works of MARCEL FOURNIER, *ESSAI SUR L’HISTOIRE DU DROIT D’APPEL SUIVI D’UNE ÉTUDE SUR LA RÉFORME DE L’APPEL* (1881), and ANTONIO PADOA SCHIOPPA, *RICERCHE SULL’APPELLO NEL DIRITTO INTERMEDIO I* (1967) and *RICERCHE SULL’APPELLO NEL DIRITTO INTERMEDIO II — I GLOSSATORI CIVILISTI* (1970).

⁶ Whoever is authorized to establish the law is authorized to interpret it (AARON X. FELLMETH AND MAURICE HORWITZ, *GUIDE TO LATIN IN INTERNATIONAL LAW* (2011)).

⁷ Article 12 of the Law of 16/24 August 1790. This certification process was compulsory (*référé obligatoire*) in case the lower courts did not relent to the decisions of the *Tribunal de cassation* (Article 22 of the Decree of 27 November / 1 December 1790).

⁸ *See, in general*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL*

ble, nor absurd.⁹

5. One will notice the almost perfect — albeit fortuitous and unconscious — lockstep with the early days of the U.S. Supreme Court founded in 1789–90 and knowing a shaky start during its first decade, then affirming its role under Chief Justice John Marshall from 1801 on and certainly after having bestowed upon itself the faculty of constitutional review of acts of Congress in 1803¹⁰.

6. It should be noted that by comparison, the German Federal Supreme Court (*Bundesgerichtshof*; *BGH*), is of fairly recent creation. The German Empire had a supreme court as the *Reichskammergericht* (from 1495 to 1806) and under unified Germany the *Reichsgericht* fulfilled that role from 1879 to 1845.¹¹ The *BGH* itself started its activities in 1950.

III. APPEALS: COMMON FEATURES

A. Typology

I. Appeals to the second level

7. Almost all modern systems know some type of mechanism that makes it possible to have the decisions of the initial court reviewed by another, ‘higher’ court.

Historically, a difference existed between the ‘*error in iudicando*’ (a mistake concerning the grounds of the opinion) and ‘*error in procedendo*’ (a procedural, formal mistake). The latter will be considered a ‘disciplinary’ appeal (as it tends to check the lower court’s handling of the case, not the substantial validity of the judgment) while the former has the function of checking the substance of the decision. These distinctions are mainly of historical importance as they have little practical relevance nowadays. The conceptual difference, however, is interesting to keep in mind.



TEXTS 234 (2012).

⁹ Tribunal de cassation [Supreme judicial court (1790 – 1810)] 4 Thermidor IX (July 23, 1801), Sirey 1801, 39, 41: “[L]es organes de la loi doivent toujours l’entendre dans un sens qui ne soit, ni sans objet, ni impossible, ni absurde.”

¹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹¹ Hannskarl Salger, *La cour fédérale de justice de la république fédérale d’Allemagne*, in PIERRE BELLET & ANDRÉ TUNC (EDS), *LA COUR JUDICIAIRE SUPRÊME — UNE ÉTUDE COMPARATIVE* 311, 311–12 (1978).

II. Appeals to the supreme court

8. In most modern systems, a supreme court, usually unique to the system, will cap the judicial organization. As indicated in the historical introduction, this institution will have the primary function to enhance the unity of the law. It is only as a secondary function, but one that is exercised through the former, that justice towards the individual parties will be obtained.¹²

9. In some systems, the supreme court will be entrusted with constitutional review and have the possibility to set aside or even quash statutes that are found to be unconstitutional. This feature is fairly recent compared to regular appellate review, which was generalized since the Roman Empire. As ‘constitutions’ are a fairly modern phenomenon, constitutional review — if any — had to be patched into existing systems. There are, roughly, three options: entrusting the ordinary courts (and ultimately the supreme court) with judicial review¹³, creating a separate constitutional court¹⁴, or have no constitutional review¹⁵.

B. General features — Theoretical model

I. The Platonic appellate and supreme court

10. After having noticed that most countries have three levels of courts, André Tunc wondered why not a fourth or a fifth?¹⁶ This is not as far-fetched a question as it sounds. Examples from

¹² André Tunc, *La cour suprême idéale*, in PIERRE BELLET & ANDRÉ TUNC (EDS), *LA COUR JUDICIAIRE SUPRÊME — UNE ÉTUDE COMPARATIVE* 433, 436 (1978) and in *30 REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.T.D.C.], no. 1, 1978 at 433, 436.

¹³ E.g. in the U.S., Japan, Greece, Switzerland and in the Scandinavian countries.

¹⁴ The model was laid out by Hans Kelsen in his draft of the Austrian Constitution of 1920, that created such a court (and to which he was unsurprisingly appointed himself). See in general Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942). This is the case of most Western and Eastern European countries. Estonia has a distinct feature where the justices of the supreme judicial court doubles as justices of the constitutional court.

¹⁵ This is notably the case, among Western democracies, in the Netherlands. See GEERT CORSTENS, *UNDERSTANDING THE RULE OF LAW* 57–58 (Annette Mills trans., 2017), who (as former chief justice of the *Hoge Raad der Nederlanden*, the supreme judicial court) labels his country as the “Odd Man Out” in that respect, and furthermore expresses relief in the fact that the legislator did not change this by installing a ‘Kelsen court’, as he argues that constitutional questions best percolate through three levels of jurisdictions.

¹⁶ André Tunc, *La cour suprême idéale*, in PIERRE BELLET & ANDRÉ TUNC (EDS), *LA COUR JUDICIAIRE SUPRÊME — UNE ÉTUDE COMPARATIVE* 433, 437 (1978) and in *30 REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.T.D.C.], no. 1, 1978 at 433, 437.

pre-modern European systems on the one hand show that such models have indeed existed, and on the other hand several proposals have been made over the years to tweak the U.S. Federal system and add a fourth level¹⁷ — if the Circuit courts of Appeals sitting *en banc* cannot already be considered to be such a fourth level. The cost — both in a literal and figurative sense — is high: public funding of the court systems is not unlimited, and it already takes parties a considerable amount of time to obtain a final decision — if ever. It is therefore no coincidence that the general, albeit unconscious consensus among nations seems to gravitate around a three-tiered structure. As we will see farther down in the discussion of the American Federal, French and German flavors of the same recipe, the actual concretization of each level's role is vastly different. The question is: what function to allocate to each level?

The first element of an answer seems to be situated in the rational design of the system. If no specialization, or distinction between roles is built into the system, the necessary consequence will be a repetition of judicial tasks within the same system. The logical consequence thereof will be an inefficient use of tax money.

Second, the system should be designed to maximize the proportion between the 'serious' appeals and the meritless ones, facilitating the former while discouraging the latter. There are, of course, several ways to achieve this. Few of those are rational or efficient though. In general, formal thresholds — like a minimal requirement of monetary value of the case — are arbitrary and do not reflect the cumulative effect that a low-value case can have if the same situation occurs frequently.

It seems therefore preferable to regulate access to the higher court through substantive rather than formal restrictions. This brings us back to our first point, the need of differentiated roles for each court.

A few general principles can be taken into account:

- a novel review of the facts should be avoided: this is merely a repeat of the work of the first court
- therefore, the appellate court should be mainly concerned with the question whether the

¹⁷ The 1970s saw a short-lived animus to create a National Court of Appeals, which would have been responsible for screening petitions to the Supreme Court (see the REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), as well as Paul A. Freund, *Why We Need the National Court of Appeals*, 59-3 A.B.A. J. 247 (1973); Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. and Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 52 Ind. L.J. 327 (1976)). See also Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 433 (1987), discussing an idea that would have created a fifth level within the Federal judiciary, manned by District and perhaps Circuit judges sitting in panels of three, and situated between the District and Circuit courts.

first court applied the law correctly (part of this is of course whether this court has determined the facts in a legally acceptable way and has, for instance, applied the law of evidence correctly)

- *errores in procedendo*, the ‘disciplinary appeals’, should be (exclusively) corrected at the appellate level, while *errores in iudicando*, mistakes on the substance of the applicable law, are the domain of both the appellate and supreme court
- the system should be designed so that the risk of (new) *errores in procedendo* at the appellate level are minimized; the appellate court should not have jurisdiction over any facts that have not been decided on by the initial court;
- the supreme court should not have to deal with any facts (with the same caveat as above)
- the supreme court should not merely check whether the law has been correctly applied in the case at hand (as this is the main attribution of the appellate court), but also have the uniform application of the law in mind
- a balance should be struck between discouraging pointless appeals and guaranteeing access to appellate review for the cases where it is warranted.

It is with these principles in mind that we should flesh out the various pivotal aspects of the appeals.

II. Input

- a. Formal requirements: who can appeal, what can be appealed, when can it be appealed?

11. The first question about an appellate system is who can appeal a lower decision. Does the appellant have to have been a party during the original proceedings? Or is it sufficient that his interests are affected by the decision? And if this is allowed, how concrete should these interests be?

To maximize the differentiation between the first instance and the appellate level, it is necessary that only parties to the initial proceedings should be able to bring the case to the appellate court. Of course, it is possible that third parties are affected by a ruling. In this case they should be allowed to bring the case back before the initial court without having to appeal the judgment. When a party is detrimentally affected by a ruling, the possibility of appellate review should be readily available.

12. The second question concerns the access to the higher level. Which are the lower court decisions against which an appeal can be lodged? Is an appeal always permissible or is it conditional? Are there subject matters where appeals are disallowed?

Third, we should examine the point in time when appeals can be lodged. Can every decision

be appealed right away (also after each interlocutory judgment)? Or is it necessary to await a final ruling? And are there limitations in time thereafter?¹⁸

These points, which can be considered together, basically raise the question of the appropriateness of interlocutory appeals. It is evident that the possibility of appeal after each and every ruling by the first court will grind the trial to a virtual halt. On the other hand, a wrong ruling by the first instance court — especially on a ‘threshold issue’ such as jurisdiction, standing, mootness, exhaustion, the political question doctrine, ...¹⁹ — will result in an actually useless trial to go forward, with all the costs this implies for the parties and the taxpayer. An ideal appellate system would therefore preserve a balance between those interests, for example by creating a way of expedited appeals in those instances. We do not see, however, why there should be farther, artificial limits to the appealability of such rulings.

b. Substantive requirements

13. Another aspect of the admissibility of appeals is the question about substantial requirements. What are the grounds on which a decision can be appealed? Should the petitioner state grounds for his appeal from the onset or can these be developed later on?

It seems necessary that at least some substantive requirements would be imposed on the parties considering appealing a judgment. It is not too much to ask for them to state (1) what part of the decision they feel disadvantaged by, and (2) on what ground(s) they feel the lower court has erred. A party who already had the opportunity to submit their case to the judicial branch of government can reasonably be asked to be explicit in their reasons for submitting the same case to another court.

It is also preferable that this should be stated in the appellate petition itself. This statement will require the party thoroughly to carry out the thinking process required to buttress the arguments on appeal, at least in rough form, from the onset. The opposite situation, where a mere declaration of appeal is enough, encourages knee-jerk appeals that are not carefully thought through on their merits and that would ultimately fall flat. A liminary filter through a self-imposed reflection by the appellant would therefore save the parties and the taxpayer a lot of unnecessary expenses.

¹⁸ We will not dwell on factors that purely formal and hence contingent to the system, such as the time frame for filing appeals: these aspects merely reflect practical, not conceptual choices of the legislator.

¹⁹ See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 178 – 182 (2007).

III. Output

a. Devolution

14. A first characteristic of the ideal appellate process is the question of what is the decisional basis of the appellate court: can the case be re-evaluated in its entirety, or is the scope limited? If so, is the limitation due to certain boundaries that are built into the system (can both questions of fact and law be appealed), or does it depend on a decision of the petitioner (who might be able to choose to appeal the whole ruling or just some points of it)?

This aspect is the flip side of the previous point regarding the substantive requirements that can be asked from the appellant. Indeed, it seems counterproductive to have the appellate court re-examine the whole case over again as the general rule: parties knowing the appellate court will generally have the same scope as the first instance court will be tempted just to try again. This would adversely affect the authority of the lower courts. An unsuccessful trial does not entitle one to a mulligan, though. Furthermore, it should be ruled out that parties can appeal on grounds for which they are responsible themselves. The party that uses unsound arguments or does not take care of evidence and whose claim is rejected as a result should generally not be able to appeal on these grounds. New arguments on appeal should be ruled out — unless they result from elements the parties could not reasonably have known initially.

Similarly, there should be a distinction between the degree to which the appellate court can examine facts and law. To avoid repetition, appellate courts should not be entrusted with a review of the facts themselves — merely (1) with an assessment of the *process of determination* of these facts, and (2) possibly with the reservation stated above regarding facts that could not have been known. Besides that, the main task of the appellate court should be the assessment of the legal validity of the lower decision.

b. Standards of review

15. Next, the question arises on which basis the appellate court ought to evaluate the appeal and, consequently, what degree of deference — if any — is due to the lower court's decision.

This question is quite similar to the previous point. The less deferential the court of appeals on most aspects of a case, the less distinction there will be between the different levels.

c. *Sua sponte* decisions

16. A third problem is the question is whether the appellate court can raise issues that the petitioner has left aside (intentionally or by mistake)?

The main consequence of the answer to this question is whether parties could expect to be thrown a 'lifeline' by the appellate court. If they know the court has the possibility to raise issues (and effectively spot problems in the lower court opinion that the parties themselves have not

seen), they might be more tempted to file 'desperate' appeals with little chance of success.

d. The fate of reversals

17. Finally, the question arises what to do with cases that get reversed on appeal? Should they be remanded to the lower court or should the appellate court dispose of the merits?

The problem with courts deciding on the merits themselves after having reversed a lower court judgment (at least in part) is twofold: first, the appellate court is not always as familiar with the practical issues of any given subject matter, therefore running the risk of reaching egregious decisions. Second, this eventuality entails the possibility of the appellate court ruling on certain aspects for the first time. The scope of the appellate review by the supreme court being different, this would result in certain decisions not actually being reviewable. It is therefore to be preferred that the appellate courts would remand the case to the former level when they reverse a decision (unless nothing is left to decide and remanding would be moot).

IV. Conclusion

18. An ideal model of appellate system will show a differentiation of roles between the courts of the several levels. Ideally, the appellate court will review the decision of the first instance court on a legal basis, hereby checking *how* the facts were determined but without re-interpreting them, will correct mistakes by the lower court and will remand the case to the lower court for further disposition after a reversal.

We will now turn to the specificities of the three systems at hand.

IV. THE DIFFERENT NATIONAL SYSTEMS

A. The American Model

I. Appellate review

a. General principles

19. We will not dwell in great detail on the organization of American Federal or State courts. Suffice to point out the general uniformity of a three-tiered structure consisting of trial courts, one or more appellate courts and a supreme court. It is however noteworthy that not all States have the same three-tiered structure: some do not have an intermediate court of appeals.²⁰

20. It is striking that appellate review was not inherited from English common law: before the fusion between law and equity, no such feature was known²¹. The initial common law remedy consisted in a quasi-criminal procedure against the first judge or jury. This was eventually replaced by the *writ of attain*, which led to an examination of the record of the original proceedings by another court. As the error had to appear on the record, no rehearing of the case was involved. The English Chancery courts however had a system of *de novo* appeals. The situation was the same in the Colonies, and remained after the adoption of the Constitution, which specifically mentions this distinction.²²

21. The basic level is the *trial level*. The court — the judge, the jury or both — finds the facts, applies a legal rule or principle and determines the outcome of this equation. Appeals, however, “are not re-trials.”²³

22. At the appellate level, three aspects are of interest:

- the distinction between appeals as of right and appeals by permission
- the standards of reviews; parties are required to state both the question they want to pre-

²⁰ This is the case in Delaware, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia and Wyoming. And of course besides that, Texas has split the supreme jurisdiction between the Supreme Court and the Court of Criminal Appeals.

²¹ Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 15–16 (1994); ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* 1–5 (1990).

²² U.S. CONST. art. III, § 2, cl. 1: “The judicial Power shall extend to all Cases, in Law and Equity, ...”.

²³ FED. CT. APP. MANUAL § 31:1 (6th ed.).

sent, as well as the standard of review they deem applicable²⁴

- the question of whether the applicable standard of review leads to a review in law or regarding fact finding.

23. The basic rule in the Federal appellate procedure is that “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts”²⁵. This means “that an appeal ordinarily will not lie until after final judgment has been entered in a case”²⁶. There is also an appeal as of right against interlocutory orders, mainly those “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions”²⁷. There is, however, a discretionary appeal in cases that “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation”²⁸.

b. The importance of standards of review

24. Standards of review²⁹ can be established by constitution, statute, court rule, or judicial decree.³⁰ They play a crucial role as they “distribute power within the judicial branch by defining the relationship between the trial and appellate courts”³¹ and “frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review”³².

As there is no fixed typology, a plethora of standards have been identified.³³ As a general mat-

²⁴ FED. R. APP. P. 28(5) and 28(8)(B).

²⁵ 28 U.S.C. § 1291.

²⁶ *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999).

²⁷ 28 U.S.C. § 1292(a)(1).

²⁸ 28 U.S.C. § 1292(b).

²⁹ We limit the discussion to the standard of review of judicial decisions, and will pay no attention to the levels of scrutiny of constitutional review (rational basis, intermediate review and strict scrutiny) nor to the standards of review of administrative agency decisions (under, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Christensen v. Harris County*, 529 U.S. 576 (2000)).

³⁰ See Richard H. W. Maloy, “Standards of Review” — *Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 609 (2000).

³¹ Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 378–79 (1984).

³² Steven A. Childress, *A Primer on Standards of Review*, 293 F.R.D. 156, 159 (2013).

³³ Richard H. W. Maloy, “Standards of Review” — *Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 610–11 (2000) catalogues forty-one of them.

ter, however, we can refine the following pattern:

- appeals from bench trials are reviewed according to the *de novo* standard regarding errors of law, and to the **clearly erroneous** (or clear error) standard as far as the finding of fact is concerned;
- findings in a jury trial will be submitted to the **substantial evidence** (or reasonableness) standard as far as the verdict is concerned as well as regarding the fact-finding and award of damages;
- the oversight by the trial judge as to the evidence as well as regarding the control of the trial will be done under the **abuse of discretion** standard.

These four main standards can be laid out on a spectrum ranging from least (*de novo*) to greatest (abuse of discretion) deference to the trial court.³⁴

25. As it is the strictest of the standards, the appellant will prefer *de novo* review.³⁵ The consequence is that there will be no deference due to the lower court's legal reasoning.³⁶ This does not mean, however, new fact-finding by the appellate court.³⁷ The appellate court will therefore have much more authority to reverse under this standard than under one of the others.³⁸

26. The "next step"³⁹ in the level of hierarchy after the *de novo* standard is the clearly erroneous standard, under which the appellate court may not substitute its views for those of the trial court⁴⁰. The U.S. Supreme Court defined that "[a] finding is 'clearly erroneous' when, although

³⁴ Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 287 (2001).

³⁵ *Id.*, at 289.

³⁶ Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982): "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis" (by the Court of Appeals); *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

³⁷ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 fn 31 (1984).

³⁸ Amanda Peters, *The Meaning, Measure and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 234, 246 (2009).

³⁹ *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983) (Nies, J., additional views).

⁴⁰ *Anderson v. City of Bessemer*, 470 U.S. 564, 573–74 (1985): "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. ... This is so even when the district court's findings do not rest on credibility determinations but are based instead on physical or documentary evidence or inferences from other facts."

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”⁴¹ This standard also has a statutory basis.⁴² Whereas this standard has a logical basis in the fact that the trial court is best suited to review witness evidence, it is also applicable to documentary evidence under Rule 52(a) (“*oral or other evidence*”) and has therefore been criticized for being illogically applied without having regard to the policy behind.⁴³

The appellate court will only have the authority to reverse factual determination by the lower court when there is no substantial evidence to support it. Findings can be clearly erroneous even if supported by substantial evidence, but findings unsupported by substantial evidence are clearly erroneous.⁴⁴ In practice, this test may often work out the same as the clearly erroneous standard.⁴⁵

27. The most deferential standard to the lower court is the abuse of discretion standard.

According to the Court of Appeals for the Second Circuit, “[a] district court ‘abuses’ or ‘exceeds’ the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions.”⁴⁶ In other words, discretionary decisions will not be disturbed so long as they remain within the range of permitted choices.⁴⁷

28. Although these standards seem clear, there seem to be a consensus among commentators that their practical application is not straightforward.⁴⁸ Of course, a major difficulty is the perennial

⁴¹ United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

⁴² Anderson v. City of Bessemer, *supra* n. 40, and FED. R. CIV. P. 52(a)(6): “Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility”.

⁴³ Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 38–39 (1994); Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 303–04 (2001); Amanda Peters, *The Meaning, Measure and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 234, 246 (2009).

⁴⁴ Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 Fed. Cir. B.J. 279, 308 (2001).

⁴⁵ Steven A. Childress, *A Primer on Standards of Review*, 293 F.R.D. 156, 162 (2013).

⁴⁶ Zervos v. Verizon New York, Inc., 252 F.3d 163, 169 (2001).

⁴⁷ HARRY T. EDWARDS, LINDA A. ELLIOTT & MARIN K. LEVY, FEDERAL STANDARDS OF REVIEW 74 (2nd ed., 2013).

⁴⁸ See Amanda Peters, *The Meaning, Measure and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 234, 247–75 (2009), who identifies five problems: (i) their ambiguous language, (ii) the fact that judges fail

vagueness of the distinction between law and fact.⁴⁹

In his last opus preceding his untimely resignation, Dick Posner spends considerable effort voicing his distaste for the standards of review.⁵⁰ This discussion is not very helpful, however, and can be summarized in his comment on the *de novo* standard: “This is the only standard of review I pay attention to, though I’d substitute ‘plenary’ for *de novo*.”⁵¹ We will come back to his criticism later.

c. *En banc* review

29. We mentioned André Tunc’s rhetorical question; why not a fourth or a fifth level of courts?⁵² The system of *en banc* review in the Circuit Court of Appeals effectively installs such a fourth level. As Dean Carrington notes: “Presently, four levels to the judiciary exist, albeit only three ranks of judges, a situation redolent of the Judiciary Act of 1798, which called for three level of courts but only two ranks of judges. This newest penultimate level sits judges in exceptionally large numbers infrequently to exercise discretionary appellate jurisdiction over one another.”⁵³

The statutory rule is that cases “shall be heard and determined by a court or panel of not more than three judges ... unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.”⁵⁴

Sitting *en banc* originated as a practice in certain Circuit courts of appeals⁵⁵, after which the



to recognize standards of review, (iii) the use of standards of review as boilerplate, (iv) the fact that courts ignore changed standards of review and (v) the fact that judges manipulate the standards of review.

⁴⁹ Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 21–23 (1994).

⁵⁰ RICHARD A. POSNER, *THE FEDERAL JUDICIARY; STRENGTHS AND WEAKNESSES* 239–78 (2017). Pp. 243–257 and 258–261 are addressing administrative and constitutional review respectively. The rest of his criticisms of the appellate courts merely refer to the use of the *Bluebook* and to bad judicial writing.

⁵¹ *Id.*, at 243.

⁵² André Tunc, *La cour suprême idéale*, in PIERRE BELLET & ANDRÉ TUNC (EDS), *LA COUR JUDICIAIRE SUPRÊME — UNE ÉTUDE COMPARATIVE* 433, 437 (1978) and in 30 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.T.D.C.], no. 1, 1978 at 433, 437.

⁵³ Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 426 (1987).

⁵⁴ 28 U.S.C. § 46(c).

⁵⁵ See Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2009–12 (2014).

Supreme Court approved of the principle in 1941⁵⁶. It was incorporated into the statute in 1948 as part of the present-day Title 28 of the U.S.C.⁵⁷ and standardized by Congress in 1967⁵⁸ only in the Federal Rules of Appellate Procedure. Compared to the history of the Federal Courts, sitting *en banc* is only a fairly recent practice, at least in the way we know it today in a uniform way among circuits.⁵⁹

Although the number of cases heard *en banc* each year has been increasing, the percentage of those cases has been declining since the overall caseload has been increasing even faster.⁶⁰ The total number of cases remains under a hundred a year nationwide⁶¹, and is hence comparable in magnitude to the number of cases heard by the Supreme Court.

II. Supreme Court review

30. The Supreme Court was established by the U.S. Constitution and started to function in 1790, after ratification. It is the only court specifically mentioned in the Constitution.⁶² Noting that ‘[t]here is relatively little disagreement about the function of the Supreme Court in the

⁵⁶ *Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326 (1941).

⁵⁷ Act June 25, 1948, ch. 646, § 1, 62 STAT. 869.

⁵⁸ FED. R. APP. P. 35.

⁵⁹ This does not mean, however, that the practice is the same among circuits; *see e.g.* Mario Lucero, Note, *The Second Circuit’s En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32 (2013) and Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 256 N.Y. L. JOURNAL Aug. 24, 2016, 3 available at <https://www.paulweiss.com/media/3679578/24august2016flumenbaumkarp.pdf>.

⁶⁰ Compare Figures 1 and 2 of Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 177–78 (2001).

⁶¹ *See* the figures from 1947 to 1999 by Tracey E. George & Michael E. Solimine, at 200, from 2000 to 2010 from FEDERAL BAR COUNCIL — SECOND CIRCUIT COURTS COMM, EN BANC PRACTICES IN THE SECOND CIRCUIT; TIME FOR A CHANGE? 5 (2011), available at <http://studylib.net/doc/8734563/en-banc---federal-bar-council> and those from 2011 to 2016 by Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 3.

⁶² Article III, Section 1. This article further mentions “such inferior Courts as the Congress may from time to time ordain and establish”. This was done by the Judiciary Act of 1789 (1 Stat. 73, § 1), which also set the number of Supreme Court Justices at six (the current number is nine, per Act of 10 April 1869, 16 Stat. 44). Of course, the ‘original public meaning’ of the term *inferior* does not imply less value, but denotes what present judges of these courts would rather see referred to as ‘lower’ courts. *See* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY, 124 (2016); *see also* *DeBoer v. Snyder*, 772 F.3d 388, 399 (6th Cir. 2014): “(the Constitution’s preferred term, not ours)”.

American system of government’, Dean Chemerinsky summarises four functions⁶³:

- ‘it serves as authoritative voice as to the meaning of the United States Constitution’
- ‘to ensure the supremacy of federal law’
- to resolve ‘conflicting interpretations of federal law among the various state and federal courts’
- ‘it is the definitive voice in interpreting federal statutes’.

31. The Judiciary Act of 1789 provided for the possibility of appeals through a *writ of error* and the Court had no discretion in deciding whether to take the case or not. Before the creation of the Circuit Court of Appeals⁶⁴, the Supreme Court was thus what could be described as a national court of appeals.

The present Supreme Court does have the prerogative to select whatever cases it will hear, by granting or denying *certiorari*. This method was introduced by the Judiciary Act of 1925⁶⁵. Since the Supreme Court Case Selections Act of 1988⁶⁶, no right of direct appeal to the Supreme Court remains.⁶⁷ An unwritten custom within the Court, in place at least since 1924⁶⁸, requires a case to be heard whenever four Justices decide so.

Few cases nowadays come to the Supreme Court through original jurisdiction⁶⁹.

In any given term, the Court routinely hears about 1 % of the cases in which *certiorari* was applied for. The Supreme Court Rules explicitly state⁷⁰ that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion”. The Rules give three indicative reasons for the Court to consider a case, of which the ‘circuit split’⁷¹ is the most controlling one^{72, 73}. We will see that

⁶³ ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 656 (5th ed. 2007).

⁶⁴ Judiciary Act of 1891, 26 STAT. 826.

⁶⁵ 43 STAT. 936.

⁶⁶ 102 STAT. 662.

⁶⁷ 28 U.S.C. § 1257 (a).

⁶⁸ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 118 (1998); Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981–82 (1957). See also *New York v. Uplinger*, 467 U.S. 246, 249 (1984) (Stevens J., concurring).

⁶⁹ 28 U.S.C. § 1251.

⁷⁰ SUP CT R 1.

⁷¹ *Id.*: “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”.

⁷² H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 251

this extreme latitude is in stark contrast with the prerogatives of the French supreme court. The Court does not engage in error correction, i.e. “reversing lower courts simply because they are wrong”.⁷⁴

In State law, appeals as of right to the supreme court are not uncommon.⁷⁵

32. In general, petitions for *certiorari* should be filed after final judgment, but the statute allows review of (1) judgments of Circuit Court of Appeals, even before judgment⁷⁶; (2) interlocutory or permanent injunctions from three-judge district courts⁷⁷; and (3) final judgments of the highest state courts that implicate or involve the federal Constitution, treaties, or federal laws^{78, 79}.

The Supreme Court will, as a rule, “will not decide questions not raised or involved in the lower court”⁸⁰

33. The U.S. Supreme Court is a constitutional court (as are the state supreme courts), since it



(1991).

⁷³ Rule 10 adds: ‘A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.’

See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 672–80 (5th ed. 2007); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV 271, 278–80 (2006); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV., forthcoming, Washington University in St. Louis Legal Studies Research Paper No. 17-03-05, available at <https://ssrn.com/abstract=2928275>, 5–10 and for a view from the inside regarding this process, WILLIAM H. REHNQUIST, THE SUPREME COURT 232–36 (2002).

⁷⁴ Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV 271, 278–80 (2006).

⁷⁵ For instance, in North Carolina, there is an appeal of right to the State Supreme Court of decisions of the Court of Appeals (1) when the case “directly involves a substantial question arising under the Constitution of the United States or of this State”, but also (2) in cases “[i]n which there is a dissent” (N.C. GEN. STAT. § 7A-30). See, e.g., *Christie v. Hartley Constr.*, 766 S.E. 2d 283, 367 N.C. 534 (2014).

⁷⁶ 28 U.S.C. § 1254(1).

⁷⁷ 28 U.S.C. § 1253.

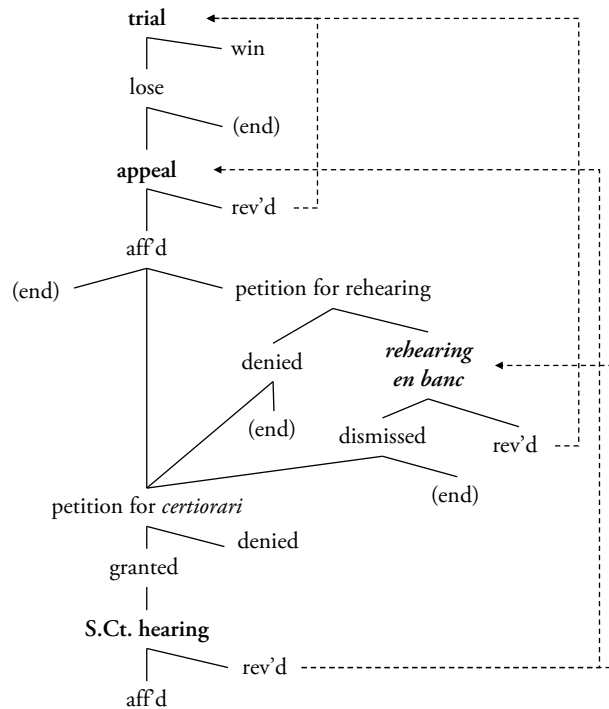
⁷⁸ 28 U.S.C. § 1257.

⁷⁹ See, in general, STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 72–77 (10th ed. 2013).

⁸⁰ *Youakim v. Miller*, 425 U.S. 231, 234 (1976). But see STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 466 (10th ed. 2013): “Although the Court generally declines to review *issues* not pressed or passed upon by the lower courts, it has allowed petitioners to make new *arguments* in support of claims properly presented below.”

emphatically adorned itself with the faculty of constitutional review.⁸¹

34. Seen from the viewpoint of the original plaintiff, the process will be the following:⁸²



B. The French Model

I. General description

35. The French judicial system consists of (mainly) *tribunaux de grande instance* (TGI) at the basic level, *cours d'appels* at the appellate level and the *cour de cassation* acting as supreme court.⁸³

⁸¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁸² Of course, the decisional process for the original defendant will be reverse; he would not appeal a judgment where the plaintiff loses...

⁸³ On the basic level, there are 173 TGIs, 210 labor courts (*Conseil des prud'hommes*) and 134 commercial courts (*tribunaux de commerce*). Above that, there are 36 courts of appeals (*cours d'appel*). On top, we have the *Cour de cassation*, of which there is only one. On the administrative side, to which we will pay no further attention, we have there are 42 administrative tribunals (*tribunaux administratifs*), 8 administrative courts of appeals (*cours d'appel administratives*), and the *Conseil d'Etat*.

One salient feature about the French legal system is the dichotomy between the ordinary and the administrative jurisdictions. Both have their own, entirely separate ‘pyramid’ (on the administrative side the *tribunaux administratifs*, the *cours d’appels administratives* and the *Conseil d’Etat*).

36. It should also be noted that France has a separate Constitutional Court (*Conseil constitutionnel*), which falls outside of the judiciary (the ‘Kelsen’ model). Its main relevance is to answer *questions préalables de constitutionnalité* (QPC), or preliminary questions as to the constitutionality (of a legal norm). This rather recent feature can be equated to the certification questions in American judicial technique. Both the ordinary as well as the administrative jurisdictions can refer those questions.

37. Besides, two international courts play a significant role. First, the Court of Justice of the European Union (C.J.E.U.), based in Luxemburg, is an important factor in the uniform interpretation of E.U. law through the same mechanism of referral of questions for preliminary ruling. Second, the European Court of Human Rights (E.Ct.H.R.), based in Strasbourg, which is not an institution of the E.U. but of the Council of Europe, of which it is the main visible feature, can almost act as a genuine fourth level of jurisdiction: parties can allege violations of the European Convention on Human Rights (E.C.H.R.) — Europe’s Bill of Rights — by the national legislature, once all internal means of jurisdiction have been exhausted.⁸⁴

II. The basic level

38. The first aspect that should be borne in mind, is that the Continental judicial system has no juries (except in some countries, for some criminal trials, usually reserved for the most serious cases).

39. The French judicial system is not uniform all over the territory.⁸⁵ The main system, however, consists of the *tribunal de grande instance* (TGI), which encompasses the civil and criminal courts, the *conseil des prud’hommes* (labor courts) and the *tribunaux de commerce* (commercial courts). Those two have the particularity to have only lay judges, i.e. people with another professional activity (mainly in business), who are elected by their peers to act as judges.⁸⁶

⁸⁴ This means, in practice, that only rulings of the national supreme courts can be ‘appealed’ to the E.Ct.H.R. It is, however, not a regular appeal, as the Court cannot overrule these rulings, but only decide if the national law applied by the national supreme court violates the E.C.H.R., and if this is the case, award monetary compensation to be paid by the state.

⁸⁵ As the Alsace and Lorraine regions went back and forth between France and Germany until WWI, they were allowed to grandfather features of the German system. We also will not discuss the particularities of the courts in French overseas departments and territories.

⁸⁶ Belgium has inherited this system but overhauled it in 1970: since then the labor and commercial courts sit

We merely mention the small claims courts (*juridiction de proximité* and *tribunaux d'instance*), for completeness' sake.

40. Parties that have been adversely affected by a ruling of a first instance court have the possibility to bring the case back to this court to have their interest taken into account by way of 'third party opposition'.⁸⁷ They do not appeal the case to a higher court.

III. The appellate level

41. The *cours d'appel* are the appellate jurisdiction in France. Whenever an appeal is possible⁸⁸, it is brought before this court.

At first, the revolutionary system (1790) had abolished the courts of appeals and had installed a so-called 'circular appeal': appeals were brought before any other one of seven most adjacent tribunals.⁸⁹ This experiment did not last, as the *tribunaux d'appel* were created in 1800 — and were renamed *cours d'appel* in 1804.⁹⁰

The *cours administratives d'appel* are fairly recent addition, having been created in 1989: before that, there was no appellate level and the only way the rulings of the *tribunaux administratifs* could be challenged, was straight to the *Conseil d'Etat*.

42. An appeal can be lodged when the petitioner had *interest* and *capacity* to do that. The capacity requirement entails that the petitioner should have been a party during the initial proceedings or have been represented there⁹¹. The petitioner will have an interest when the lower court has



in panels of three, presided by one professional judge joined by two lay judges. Unlike in the French system, this means that Belgian lay judges sit in oral arguments and decide cases, but do not write any opinions: this is the professional judge's duty.

⁸⁷ 'Tierce opposition'. CODE DE PROCÉDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] article 583 (Fr.). Note that this is also possible before the appellate court if the third party has only been affected by this court's ruling.

⁸⁸ Rulings of *juridiction de proximité* cannot be appealed. The rulings by the *TI* can be appealed to the *Cour d'appel*, if the monetary value of the case exceeds € 4 000. However, a challenge on legal grounds to the *Cour de cassation* is always possible.

⁸⁹ JACQUES KRYNEN, L'ETAT DE JUSTICE; FRANCE, XIII^E-XX^E SIECLE II — L'EMPRISE CONTEMPORAINE DES JUGES (2012) 49; JEAN-PIERRE ROYER ET AL., HISTOIRE DE LA JUSTICE EN FRANCE (4th ed., 2010) 271.

⁹⁰ GERARD JUGNOT, HISTOIRE DE LA JUSTICE FRANÇAISE DE L'EPOQUE FRANQUE A NOS JOURS (2011) 94 – 95.

⁹¹ For instance, a minor child, who cannot act as a party, is represented by his parent(s) before the lower court but reaches majority by the time the judgment is appealed.

ruled against him, at least in part. Finally, the petitioner must not have voluntarily forfeited the right to appeal.

As a rule, an appeal can be lodged against any judgment.⁹² A relatively recent exception is that a judgment containing provisory measures must have been executed for the appeal to be admissible.⁹³

On a substantive level, the door to the court of appeals is wide open: no requirements are made. “The appeal aims, by the criticism of the opinion rendered by a court of the first tier, to have the latter reversed or annulled by the court of appeals.”⁹⁴ Formally, the law states that only those point that have explicitly or implicitly raised, can form the basis of the appeal.⁹⁵ However, the very next sentence of the Civil Procedure Code renders this rule basically moot: by stating that the appellate judge is faced with the entire case if the petitioner does not limit his appeal, this eventuality becomes the rule in practice.⁹⁶ Parties will be reluctant to limit their appeals, so that the court of appeals will not only have to do over everything from scratch, but also decide on facts or issues that have occurred in the case after the ruling of the first court.

The court of appeals will therefore hear the case *de novo*, provided the case was brought properly, and provided the parties did not choose to limit the appeal to specific points. This makes for significant differences with the American standards of review.

This is also why the distinction between an ‘annulment’ appeal and a ‘reversing’ appeal is as good as moot: the appellate court will start over from scratch in either hypothesis, so that the practical relevance for the parties is only theoretical.

⁹² CODE DE PROCÉDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] article 543 (Fr.).

⁹³ C.P.C. article 526. See SERGE GUINCHARD, FRÉDÉRIQUE FERRAND & CÉCILE CHAINAIS, PROCÉDURE CIVILE, 846–850, nr 1234 (2016).

⁹⁴ C.P.C. article 542: “*L’appel tend, par la critique du jugement rendu par une juridiction du premier degré, à sa réformation ou à son annulation par la cour d’appel.*”. The translation provided by the French government is incomplete: “An appeal aims at reversing or annulling by the court of appeal of a judgment rendered by a court of first instance.” («<https://www.legifrance.gouv.fr/content/location/1745>»): the necessary criticism of the first opinion is not mentioned.

⁹⁵ C.P.C. article 562, § 1, according to the same translation: “An appeal brings to the cognizance of the court only those points of the judgment that it impugns expressly or tacitly and those subordinate to them.”. See JEAN-LOUIS GALLET, LA PROCÉDURE CIVILE DEVANT LA COUR D’APPEL 128–29 (2nd ed., 2010).

⁹⁶ C.P.C. article 562, § 2: “The devolution will take place for the whole (matter) where the appeal is not limited to certain points, where it is directed to nullify the judgment or if the object of the dispute is indivisible.”.

IV. The *Cour de cassation*

a. Particularities

43. The *Cour de cassation* and its very particular procedural approach — the so-called *technique de cassation* — is a major characteristic of the French judiciary. It provides for a very stringent framework within which the appealing party should present its questions to the Court, as well as within which the Court should answer those questions. As we shall see, this subtle mechanism allows for extremely short opinions, written in a kind of code, which are nonetheless perfectly understandable when one knows how to decipher the code.

This approach was inherited in Belgium and slightly adapted, which makes for interesting comparisons. In the Netherlands or in Italy, for instance, the respective supreme courts — the *Hoge Raad der Nederlanden* and the *Corte suprema di cassazione* — were molded after the French model (as were those of Spain, Portugal and Greece), but the *technique de cassation* was not taken over as stringently.⁹⁷

44. The primary characteristic of the *Cour de cassation* is that it cannot decide on the facts, but only on the law.⁹⁸ This means a party can't argue that the lower court wrongly decided that fact X has occurred. Of course, the party can argue that the lower court misapplied the rules of evidence in deciding that fact X had occurred or that it gave these facts a wrong legal qualification: these are legal, not factual questions. When facts are to be taken into account, the Court is bound by the facts contained in the record.⁹⁹

b. The procedural filters

45. First, only decisions rendered in last resort can be appealed to the *cour de cassation*.¹⁰⁰ Of course this is somewhat of a tautology, but not entirely: cases that cannot be appealed to another

⁹⁷ See, in general, BART GROEN & EVERHARD KORTHALS ALTES, *CASSATION IN BURGERLIJKE ZAKEN* § 9 (5th ed., 2015) and Vittorio Sgroi, *Cour de cassation d'Italie*, in PIERRE BELLET & ANDRÉ TUNC (EDS), *LA COUR JUDICIAIRE SUPRÊME — UNE ÉTUDE COMPARATIVE* 293 (1978) and in 30 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.T.D.C.], no. 1, 1978 at 293.

⁹⁸ CODE DE L'ORGANISATION JUDICIAIRE [C. ORG JUD.] [CODE OF THE JUDICIAL ORGANIZATION] article L411-2, § 2 (Fr.). In Belgium this is even a constitutional provision (1831 CONST. article 95, § 2, nowadays 1994 CONST. article 147, § 2). This rule was already present in Article 3 of the (French Revolutionary) Decree of 27 November / 1 December 1790 creating the *Tribunal de cassation*: “*Sous aucun prétexte et en aucun cas, le Tribunal ne pourra connaître du fond des affaires.*”

⁹⁹ Either the facts determined by the lower court, or those mentioned in a party's written pleadings (and not disputed by the other party).

¹⁰⁰ CODE DE PROCÉDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] article 605 (Fr.).

court are, by definition, rendered in last resort. Those cases — and only those cases — are the ones that can be brought farther up to the supreme court. Also, if a judgment could be appealed (to the court of appeals) but the party did not make use of this possibility within the allotted time frame, the decision will become definitive and no supreme court appeal will be possible.

There are two exceptions to this principle, which we just mention for completeness' sake. First, an appeal to the supreme court is possible if two judgments have been rendered by different courts in the same case and are not compatible with each other.¹⁰¹ Second, the *procureur general* has the possibility to bring cases before the supreme court when the law has been disregarded and parties themselves have not acted upon it.¹⁰² This is a matter of policy, and will be extremely rare.¹⁰³ It is noteworthy that if the Court ends up quashing the decision, this is merely for the books as the parties themselves are not allowed to derive any rights from it in order to elude the effects of the lower decision.¹⁰⁴ The same type of appeal, but which will have effects, can also be brought in case of abuse of power by the lower court.¹⁰⁵

46. Second, as a rule, an appeal to the supreme court is only possible against a judgment containing final decision. The Code defines this as a decision of the court either ruling on part of the claim, or imposing either a discovery measure or a temporary measure.¹⁰⁶ Furthermore, ruling on a defense, putting an end to the case, can also be appealed.¹⁰⁷

¹⁰¹ C.P.C articles 617 and 618.

¹⁰² Loi n° 67-523 du 3 juillet 1967 relative à la Cour de cassation [Statute 67-523 of July 3, 1967 regarding the Supreme Court], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [JORF] [OFFICIAL GAZETTE OF FRANCE], JULY 4, 1967N P. 6651, art. 17 (1).

¹⁰³ JACQUES BORÉ & LOUIS BORÉ, LA CASSATION EN MATIÈRE CIVILE 755 (4th ed., 2008).

¹⁰⁴ Loi n° 67-523 du 3 juillet 1967 relative à la Cour de cassation [Statute 67-523 of July 3, 1967 regarding the Supreme Court], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [JORF] [OFFICIAL GAZETTE OF FRANCE], JULY 4, 1967N P. 6651, art. 17 (2) and CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] article 639-2 (Fr.).

¹⁰⁵ COUR DE CASSATION [Fr.], DROIT ET PRATIQUE DE LA CASSATION EN MATIÈRE CIVILE 34 (3rd ed., 2006).

¹⁰⁶ CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] article 606 (Fr.): “*Les jugements en dernier ressort qui tranchent dans leur dispositif une partie du principal et ordonnent une mesure d’instruction ou une mesure provisoire peuvent être frappés de pourvoi en cassation comme les jugements qui tranchent en dernier ressort tout le principal.*”

¹⁰⁷ CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] article 607 (Fr.): “*Peuvent également être frappés de pourvoi en cassation les jugements en dernier ressort qui, statuant sur une exception de procédure, une fin de non-recevoir ou tout autre incident, mettent fin à l’instance.*”

c. The *technique de cassation*

i. In general

47. The salient feature about the French(-inspired) *Cour de cassation* is the so-called *technique de cassation*, which could be described as a highly refined method of structural reasoning used to determine the outcome of the cases.

This is true for both the ‘in’ and the ‘out’ part: parties will have to present their questions pigeon-holed into one specific category of criticism against the decision of the court of appeals, and the outcome of the case will result in one of several typical formulas.

All of this will be formulated in code language, which will make it possible to dispose of a case in an extremely short opinion, typically of not much more than a single typed page. The reasoning behind this method is the application of a legal syllogism.¹⁰⁸

The highly technical, almost mathematical buildup of such an opinion makes it possible to say a lot in few words. Besides, it allows for a high work volume: in France, the *Cour de cassation* issues about 30 000 opinions per year, for 208 justices; in Belgium, 3 000 opinions for 30 justices.¹⁰⁹ Compare this with the U.S. Supreme Court: around 75 opinions¹¹⁰ for 9 justices, who have four law clerks at hand, while the French (and Belgian) justices hardly have any assistance regarding the substance of their work.

Besides, the style is homogenous so that the authorship is close to interchangeable. Furthermore, no dissenting or concurring opinions are allowed, making the whole opinion writing process very ego-less.¹¹¹

48. At least in civil cases¹¹², the Court is generally bound by the question(s) raised by the parties.

¹⁰⁸ This method of reasoning is essentially very similar to the American *IRAC* structure.

¹⁰⁹ General figures from both courts’ annual reports, which can be found on «www.courdecassation.fr/publications26/rapportannuel36» and «justice.belgium.be/fr/ordrejudiciaire/coursettribunaux/courdecassation/documents/rapportsannuels».

¹¹⁰ The statistics about the U.S. Supreme Court since OT 1995 can be found on «www.scotusblog.com/reference/stat-pack».

¹¹¹ As Mitchell Lasser puts it: “In the end, the French civil judicial system ... emerges as a very shrewd and sensitive system, in which what we Americans have traditionally taken to be a dominant *formalism* ... is but a highly significant and intentionally limiting public *formality*.” (MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL DELIBERATIONS; A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY*, 202 (2004)).

¹¹² In criminal cases, the Court can raise questions on its own initiative. Of course, it will only do so when it thinks the question is pertinent and should lead to the quashing of the lower court decision.

This means that the Court cannot raise issues which might be pertinent, which could settle ongoing controversies, etc., if the parties themselves have not raised the issue. This procedural straight-jacket imposes a natural form of restraint on the court.¹¹³

ii. The input: the *ouvertures à cassation*

49. The statutory ground regulating the situations in which cases can be appealed to the French *Cour de cassation* is extremely broad: “The goal of the appeal in cassation is to have the judgment against which it is aimed quashed by the *Cour de cassation* for reason of non-compliance with the law.”¹¹⁴ No further details are given, except for some procedural rules laying out which judgments can be appealed.¹¹⁵ The effect of this generality is that the Court has some leeway in regulating its own input without, however, having the possibility to turn down appeals altogether like the U.S. Supreme Court has by denying *certiorari*. Over the years, the Court itself has developed a detailed framework clarifying what should be understood as “non-compliance with the law”.

This framework can be classified according to different typologies.¹¹⁶ Five major axes¹¹⁷ can be identified under which the appeals should be pigeonholed:

- the judge’s power (did the judge have jurisdiction over the matter? did he not rule on a point not submitted to him?)
- due process (formal aspects of the proceedings; fair trial)

¹¹³ Compare with the famous “cardinal principle of judicial restraint” quoted by Chief Justice John G. Roberts, Jr.: “[I]f it is not necessary to decide more, it is necessary not to decide more”, both in this opinions (*PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004) (Roberts, J., concurring in part and concurring in judgment)) and in non-judicial statements (Georgetown University address, May 21, 2006, *NY Times* May 22, 2006, ‘Chief Justice Says His Goal Is More Consensus on Court’).

¹¹⁴ CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] article 604 (Fr.). The semi-official translation provided by the French Government on «<https://www.legifrance.gouv.fr/content/location/1745>» is: “The appeal in cassation shall tend to ask the Court of Cassation to quash the nonconformity of the judgment to the rules of law.”.

¹¹⁵ CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] articles 605 – 618 (Fr.).

¹¹⁶ See e.g. JACQUES BORÉ & LOUIS BORÉ, *LA CASSATION EN MATIÈRE CIVILE* (4th ed., 2008) 357; François Boucard, *Pourvoi en cassation*, in *JURISCLASSEUR PROCÉDURE CIVILE*, fasc. 755 (2015).

¹¹⁷ This is certainly not the only possible typology. E.g., MARIE-NOËLLE JOBARD-BACHELIER & XAVIER BACHELIER, *LA TECHNIQUE DE CASSATION* (7th ed., 2010) distinguish between five ‘marginal’ and five ‘main’ types. The Court itself (COUR DE CASSATION [Fr.], *DROIT ET PRATIQUE DE LA CASSATION EN MATIÈRE CIVILE* (3rd ed., 2006) gives four ‘usual’ and four ‘exceptional’ instances. These two classifications, however, start from an analytical, procedural point of view instead of the synthetic approach we will use.

- the duty to lay out the reasoning (does the opinion give a reasoning, is this reasoning precise? have all the parties' arguments been answered?)
- is the reasoning pertinent?
- is the decision compatible with the legal framework? (is it compatible with other judgments between parties? is it not grounded on dispositions that might have been declared unconstitutional subsequently?)

iii. The output side

50. The result of an appeal to the *Cour de cassation* is equally formulaic.

One possibility is that the appeal is successful. This will result in the quashing of the lower court decision. The quashing can be partial if the error only affects part of the decision.¹¹⁸

If the Court decide the appeal is meritless, it has a number of options to formulate the rejection:

- either the question presented fails on legal grounds: the Court rejects the legal argument presented on its merits ('*non fondé*'¹¹⁹); these will be the cases where the opinion will have a (quasi-)precedential value.
- either the argument is rejected on logical grounds, as the claim made by the argument does not have any factual basis ('*manque en fait*'); this will occur, for instance, when the Court thinks the petitioner misread the judgment and bases his argument on premises that the judgment does not contain. It is not, however, an assessment of the facts of the case.
- either the argument is legally sound, but contrary to what the petitioner affirms, the lower court has made a correct application of these principles, in which case the argument will be said not to be acceptable ('*ne peut être accueilli*').¹²⁰

¹¹⁸ Consider, e.g., the decision to award damages. If the lower-court decision to award damages is correct, but the part of the opinion determining the amount of those damages is faulty, only this latter part will be quashed. The lower court to which the case is sent back will have to take it from that point, not from scratch.

¹¹⁹ The Belgian *technique de cassation* variant uses the term '*manque en droit*' to denote legally meritless questions: this shows even better that the question is rejected on its *legal* basis; see CLAUDE PARMENTIER, *COMPRENDRE LA TECHNIQUE DE CASSATION* 167–68 (2011).

¹²⁰ See COUR DE CASSATION [Fr.], *DROIT ET PRATIQUE DE LA CASSATION EN MATIÈRE CIVILE* 488 (3rd ed., 2006).

51. An opinion resulting in the quashing of the lower court decision will have the following structure:

- A brief recapitulation of the facts and the previous proceedings (usually in just a couple of sentences), and only as far as they are necessary to understanding the reasoning, and as they have been found by the lower court.¹²¹
- The identification of the statutory disposition or the legal principle in play (the so-called *visa*; “*Having regard to article ...*”).
- A statement of the legal principles the Court will apply to reach its decision. The Court can interpret or clarify the meaning of the statute (*chapeau*; this is the holding that will, at least in practice, be quoted as precedent).
- A rendering of the decision of the lower court being criticized (“*Whereas the criticized opinion decides that ...*”).
- The solution given by the Court (“*By deciding this way, whereas ...*”).
- The result (“*On those grounds, quashes and annuls ...*”).

As an illustration, we transcribe two recent U.S. Supreme Court opinions into what the French *Cour de cassation* could have made of it. First an example of the supreme court reversing the opinion of the court of appeals¹²²:

Whereas, according to the appealed opinion, petitioners are 14 same-sex couples and two men whose same-sex partners are deceased; they filed suits in Federal District Courts in their home States, claiming that respondents violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition;

Having regard to the Fourteenth Amendment;

The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State;

Whereas the appealed opinion declines to find a legal ground for marriage equality;

By deciding this way, the court misapplied the mentioned rule;

¹²¹ See *id.*, at 500 (3rd ed., 2006); JACQUES BORÉ & LOUIS BORÉ, *LA CASSATION EN MATIÈRE CIVILE* 763 (4th ed., 2008).

¹²² See *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). JUSTICE KENNEDY’s majority opinion encompasses 28 pages of the slip opinion (not counting the appendixes).

FOR THESE REASONS, and without it being necessary to examine the other questions presented:

QUASHES AND ANNULS the opinion rendered between parties by the Court of Appeals of the 6th Circuit on November 6, 2014 and remands the case to the Court of Appeals of the 8th Circuit.

We see that the court will start by summarizing the factual background, by referring to the opinion below, as it itself cannot rule on (and hence determine) facts. Next, it will point out the legal disposition at play, following this by a statement on how this rule should be understood. This is the crux of the opinion, and can be equated to the actual holding of the case that will be quoted with quasi-precedential value. The court will then check the opinion below against this holding, and determine if the lower court has applied this rule correctly. If the court find this is not the case, it will dispose of the case by quashing the judgment and remanding the case to *another* court of the same level as the one that rendered the quashed opinion.

52. An opinion rejecting the appeal will be similar but not identical:

- There will be no *visa* but the Court will go straight to the facts (“*Whereas it appears from the mentions of the criticized opinion that ...*”).
- The essence of the criticism (“*Whereas offence is being taken to the opinion ...*”).
- The solution given by the Court, refuting this criticism (“*But whereas ...*”).
- The disposition of the case (“*Rejects the appeal*”).

We repeat the same exercise with a case rejecting the appeal¹²³:

Whereas, according to the appealed opinion, respondents have more than 200 copyright registrations for two-dimensional designs — consisting of various lines, chevrons, and colorful shapes — appearing on the surface of the cheerleading uniforms that they design, make, and sell; they sued petitioner, who also markets cheerleading uniforms, for copyright infringement;

Whereas the opinion is appealed on the ground that the it misapplied the requirement of separate identification and independent existence;

But whereas, in application of 17 U.S.C. § 101, a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own

¹²³ See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. ___, 137 S. Ct. 1002 (2017). JUSTICE THOMAS’ majority opinion is 17 pages long.

or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated;

It follows that the appeal fails;

FOR THESE REASONS:

REJECTS the appeal.

53. As Lasser has shown, this brevity does not mean that little thought is given to the result of the opinion.¹²⁴ Various documents will precede this text: a report by the justice entrusted with the case¹²⁵ and the opinion of the advocate-general¹²⁶, in what he calls the ‘unofficial discourse’, which he sees as extremely open-ended¹²⁷. In that sense, Nietzsche is proven right when he stated: “A brief dictum may be the fruit and harvest of long reflection.”¹²⁸

¹²⁴ MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL DELIBERATIONS; A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 49–60 (2004). However, in her Ph.D., F. Malhière argues that this brevity is on its way out, although it is unclear when and how the actual change will occur (FANNY MALHIÈRE, LA BRIÈVETÉ DES DÉCISIONS DE JUSTICE 572 (2013)).

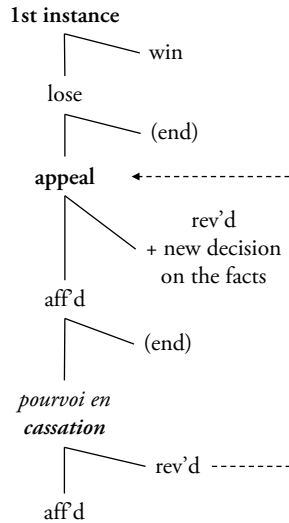
¹²⁵ See COUR DE CASSATION [Fr.], DROIT ET PRATIQUE DE LA CASSATION EN MATIÈRE CIVILE 419–422 (3rd ed., 2006); JACQUES BORÉ & LOUIS BORÉ, LA CASSATION EN MATIÈRE CIVILE 550–552 (4th ed., 2008); DELPHINE LANZARA, LE POUVOIR NORMATIF DE LA COUR DE CASSATION À L’HEURE ACTUELLE 165–67 (2017).

¹²⁶ The *procureur général*, assisted by advocates-general, is technically the highest organ of the national prosecutorial system. Functionally, however, it has little to do with actual criminal prosecution, and can be compared to an in-house version of the Solicitor General’s office giving its views in every case. See COUR DE CASSATION [Fr.], DROIT ET PRATIQUE DE LA CASSATION EN MATIÈRE CIVILE 435–437 (3rd ed., 2006); JACQUES BORÉ & LOUIS BORÉ, LA CASSATION EN MATIÈRE CIVILE 552 (4th ed., 2008); DELPHINE LANZARA, LE POUVOIR NORMATIF DE LA COUR DE CASSATION À L’HEURE ACTUELLE 167–68 (2017).

¹²⁷ LASSER, JUDICIAL DELIBERATIONS 252–55.

¹²⁸ FRIEDRICH NIETZSCHE, HUMAN, ALL-TOO-HUMAN, PART II, No 127, 69 (Paul V. Cohn, transl., MacMillan 1913) (1878) (MENSCHLICHES, ALLZUMENSCHLICHES, in WERKE IN DREI BÄNDEN, 1, No 127, 786 (1954): “*Etwas Kurz-Gesagtes kann die Frucht und Ernte von vielem Lang-Gedachten sein*”).

54. The decisional process for the French system will be:



C. Germany

I. General description

55. Whereas the French court system has two parallel judicial systems, the German has five, with three levels of jurisdiction in each: besides the ordinary courts, there is a separate system of administrative (*Verwaltungsgerichte*), tax (*Finanzgerichte*), labor (*Arbeitsgerichte*) and social courts (*Sozialgerichte*). Besides this, each state has its own constitutional court, and the Federal Constitutional Court (*Bundesverfassungsgericht*), a 'Kelsen court', falls outside of either system.

The ordinary system (*ordentliche Gerichtsbarkeit*), dealing with both civil and criminal cases, has four different types of courts. Cases where the value of the dispute does not exceed € 5 000 are brought before the local court, the *Amtsgericht*.¹²⁹ The regional courts the *Landgerichte*, deal with the other civil and commercial cases as well with criminal cases and parole matters.

56. It is important to note that Germany overhauled its appellate system in 2001. From January 1, 2002, the new system was put in place rationalizing the appellate system, both as far as the actual appeal to the the second level is concerned (*Berufung*) as what the appeal to the supreme

¹²⁹ GERICHTSVERFASSUNGSGESETZ [GVG] [JUDICIAL ORGANIZATION ACT], § 23(1) (Ger.). This court has minor criminal offences and a few other specific civil matters within its jurisdiction, which are not important in this context.

court is concerned (*Revision*).

57. There is a threshold for the appeal, which is only allowed against final judgments of the first instance court¹³⁰ if (1) the case is worth over € 600, or (2) the original court has allowed it¹³¹, which it should do when the case is important on the principles or the evolution or unity of the law requires it.¹³² Furthermore, appeals are only possible in case of misapplication of law or if the underlying facts would warrant another outcome.¹³³

Appeals from the *Amtgericht* is generally brought before the *Landgericht*¹³⁴, except in cases of family law¹³⁵, where the appeal goes straight to the *Oberlandesgericht*. This court will also hear all the appeals from the *Landgericht*.¹³⁶

58. The Code lays out very specific requirements for the appeals. The petition should

- declare the extent to which the judgment is being contested, and must set out the specific petition as to how the judgment is to be modified;
- designate the circumstances indicating a violation of the law and the significance they have for the ruling being contested;
- name the specific indications giving rise to doubts as to the court having correctly or completely established the facts in the ruling being contested, and therefore mandating a new fact-finding process;
- designate the new means by which the plaintiff in the appeal intends to challenge the opponent or defend his case, listing the facts and circumstances based on which these new means of challenge or defense are to be admitted.¹³⁷

The Code also specifies that the court of appeal is to base its hearing and decision on:

- the facts established by the court of first instance, unless specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision, and therefore mandate a new fact-finding process;

¹³⁰ ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 511(1) (Ger.).

¹³¹ ZPO, § 511(2).

¹³² ZPO, § 511(4).

¹³³ ZPO, § 513(1).

¹³⁴ GERICHTSVERFASSUNGSGESETZ [GVG] [JUDICIAL ORGANIZATION ACT], § 72(1) (Ger.).

¹³⁵ GVG, § 119(1)(1)(a).

¹³⁶ GVG, § 119(1)(2).

¹³⁷ ZPO, § 526(1), in the translation provided by the German Ministry of Justice, http://www.gesetze-im-internet.de/englisch_zpo/index.html.

- new facts and circumstances insofar as these may permissibly be considered.¹³⁸

The latter will only be the case if the newly raised issues

- concern an aspect that the court of first instance has recognizably failed to see or has held to be insignificant,
- have not been raised in the proceedings before the court of first instance due to a defect in the proceedings or
- have not been raised in the proceedings before the court of first instance, without this being due to the negligence of the party.¹³⁹

59. One of the major changes in the 2002 overhaul was the abrogation of § 525 ZPO, which used to provide that the appellate court would hear the case in its totality. This, combined with the limited possibility to bring up new facts, results in the impossibility for a party to amend a procedural strategy that has proven to be faulty during the initial proceedings.¹⁴⁰ This is a significant step forward in streamlining and rationalizing the appellate process.

II. The *Bundesgerichtshof*

60. The overhaul of the civil procedure law regarding the access to appellate review in 2001–02 also had influence on the appellate (*Revision*) to the *Bundesgerichtshof* (BGH).

A filter system for the *Revision* similar to that in ordinary appeals is in place: it will only be possible if the appellate court¹⁴¹ has allowed it, or if the BHG has overruled a decision not to allow it.¹⁴² The rule concerning the admissibility is that these appeals should be allowed if the case is important for the applicable legal principle, or if either the evolution or the unity of the law requires a decision from the BGH.¹⁴³ In 2016, of 4 545 appeals in civil cases, only 679 were filed

¹³⁸ ZPO, § 529(1), in the same translation.

¹³⁹ ZPO, § 531(2).

¹⁴⁰ See LARS BIRSCHENK, DIE ZWEITE INSTANZ IM DEUTSCHEN UND FRANZÖSISCHEN ZIVILVERFAHREN, 127–33 (2015); Stefan Huber, *L'effet de l'appel en droit allemand*, in LE DOUBLE DEGRÉ DE JURIDICTION; ÉTUDE DE DROIT COMPARÉ 325, 327 (Jacques van Compernelle & Achille Saletti, eds., 2010).

¹⁴¹ This will be either the *Oberlandesgericht* on appeal of the *Landgericht* or the *Landgericht* on appeal from the *Amtsgericht*.

¹⁴² ZPO, § 543(1)(2) and § 544. In this case, an appeal against a refusal of leave to appeal is limited to cases with a monetary value of € 20 000 or higher (GESETZ, BETREFFEND DIE EINFÜHRUNG DER ZIVILPROZESSORDNUNG [ZPOEG] [ACT CONCERNING THE INTRODUCTION OF THE CIVIL PROCEDURE CODE], § 26(8) (Ger.)). Then again, this limitation is not applicable when the appellate court has rejected the appeal.

¹⁴³ ZPO, § 543(2). See WOLFGANG KRAMER, DIE BERUFUNG IN ZIVILSACHEN, 225–229 (8th ed., 2015).

in cases in which the lower court had granted a leave for appeal. In addition, the BGH itself decided to accept 266 additional appeals in which a leave had initially not been granted¹⁴⁴.

61. The Code lists only one ground for *Revision*: it may only be based on the reason that the contested decision is based on a violation of the law.¹⁴⁵ It is noteworthy that the English translation of the Judicial Organisation Act and of the Code of Civil Procedure provided by the German Ministry of Justice translates *Berufung* as ‘appeal on fact and law’ and *Revision* as ‘appeal on law’.¹⁴⁶ The Code gives a list of instances wherein decision shall always be regarded to have been based on a violation of the law¹⁴⁷:

- an irregular composition of the court, including the presence of judges who did not have that capacity (any more) or had been recused
- a party had not been lawfully represented
- the decision has been given based on a hearing for oral argument in which the rules regarding the admission of the public to the proceedings were violated
- the decision does not set out the reasons for the judgment.

Contrary to the French *ouvertures à cassation*, this is not a closed but a minimal list: parties are free to argue that other irregularities have occurred.

62. A specific feature of the German *Revision*-procedure is the so called ‘leapfrog *Revision*’, which allows parties who agree upon it to bypass the appellate level and submit their case straight to the Supreme Court.¹⁴⁸ Of course, this only makes sense in cases with a clear, disputed legal challenge.

¹⁴⁴ <http://www.bundesgerichtshof.de/DE/Service/Statistik/Taetigkeitsberichte/Taetigkeit2016/Taetigkeit2016Anlagen/anlage1.html?nn=6004752>

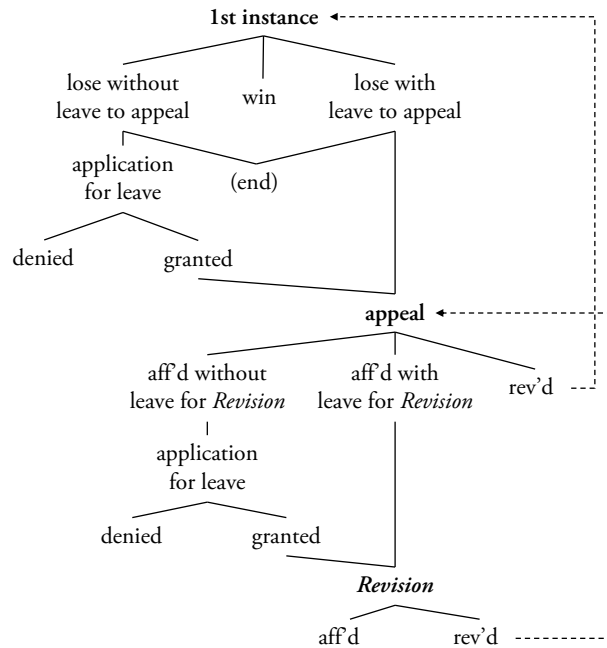
¹⁴⁵ ZPO, § 545(1). (2) adds that it may not be based on the fact that the court of first instance was wrong in assuming that it had or did not have jurisdiction.

¹⁴⁶ http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html and http://www.gesetze-im-internet.de/englisch_zpo/index.html.

¹⁴⁷ ZPO, § 547.

¹⁴⁸ § 566 ZPO. The translation renders *Sprungrevision* as “Immediate appeal on points of law in lieu of an appeal on facts and law”. This feature is also known in the Italian and Dutch civil procedure (CODICE DI PROCEDURA CIVILE [CODE OF CIVIL PROCEDURE], article 360, § 2 (It.) and WETBOEK VAN BURGERLIJKE RECHTSVORDERING [CODE OF CIVIL PROCEDURE], article 398 (Neth.)).

63. Abstraction being made of this last feature, the German system will present itself as follows:



V. EVALUATION OF THE DIFFERENT SYSTEMS

A. Substantive aspects

I. *Revision vs. cassation*

64. The ordinary appeals to courts of the second tier differ in France and in Germany: whereas the former system allows basically every appeal, the latter is conceived as a way of correcting material or legal errors in the initial proceedings.¹⁴⁹

However, the differences between the appeals to the respective supreme courts are less different.

Nominally, the German system of *Revision* is said to be different from the French *cassation* as

¹⁴⁹ LARS BIERSCHENK, DIE ZWEITE INSTANZ IM DEUTSCHEN UND FRANZÖSISCHEN ZIVILVERFAHREN, 117–18 (2015).

the former (1) suspends the effect of the lower court judgment, (2) allows the possibility to quash cases without remanding it back to a lower court, and (3) was mainly aimed at the parties interests, whereas the latter (1) had no suspending effect, (2) always required a remand and (3) had the general interest in mind.¹⁵⁰ In her 1990 Ph.D. thesis¹⁵¹, Frédérique Ferrand unravels a lot of this myth: she demonstrated that both aim at increasing the unity of the law, and that both supreme courts have a hard time resisting the “sirens’ song”¹⁵² of taking the facts into account. The fact that not all decisions can be appealed to the Federal Court of Justice would make it more difficult to realize than in France where there is no liminary screening at the supreme court.¹⁵³

One main difference is the ability for the German court to limit the amount of cases through the system of leave to appeal by the lower courts, or by rejecting appeals against refusals of these leaves. The French court does not have this kind of mechanism and needs to resort to procedural boundaries within each case in order to winnow out meritless appeals.

Since the number of cases dealt with by either court is divergent (about four times as many in France than in Germany)¹⁵⁴, Prof. Ferrand concludes that the unity in the law is pursued in Germany with a more explicit reasoning in fewer cases, rather than the repetition of the same principles over and over again in France. A closer look at the publication figures is enlightening.¹⁵⁵

¹⁵⁰ FRÉDÉRIQUE FERRAND, *CASSATION FRANÇAISE ET RÉVISION ALLEMANDE XXVII* (1993).

¹⁵¹ Published in a shortened and updated version in 1993.

¹⁵² FERRAND, 188.

¹⁵³ FERRAND, 337. Although this book predates the 2002 reform, this criticism keeps its theoretical validity. Her criticism of the illogic nature of the system at the time, which required a leave to appeal to the supreme court from the appellate judges when the case had less than DM 60 000 in play has been addressed by this reform.

¹⁵⁴ The differences are less pronounced nowadays: in 2016 the *Cour de cassation* had an input of (20 398 civil + 7 649 criminal =) 28 047 cases (COUR DE CASSATION, *RAPPORT ANNUEL 2016*, 323 (2017)) and the BGH of (6 531 civil + 3 526 criminal =) 10 057 cases (*Tätigkeitsbericht des Bundesgerichtshofs für das Jahr 2016*, http://www.bundesgerichtshof.de/DE/Service/Statistik/Taetigkeitsberichte/Taetigkeit2016/taetigkeit2016_node.html).

¹⁵⁵ For 2016, the official database yields 10 324 *Cour de cassation* opinions (of which 1 527 were officially published and thus deemed interesting by the Court itself) and 3 285 BGH opinions (<https://www.legifrance.gouv.fr/initRechJuriJudi.do> and <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=2016>).

<i>Cour de cassation</i>					
(2016)	Input	Output	(merits) ¹⁵⁶	Published	of total
Civil	20 398	21 777	11 194		
Criminal	7 649	7 828	2 403		
Total	28 047	29 605	13 597	10 324	34.85 %

<i>Bundesgerichtshof</i>					
(2016)	Input	Output	(merits) ¹⁵⁷	Published	of total
Civil	6 531	6 328	648		
Criminal	3 526	2 941	178		
Total	10 057	9 269	826	3 285	35.44 %

It appears that, while there is a significant difference between the volume of cases dealt with either court, both will publish (almost exactly) the same proportion of cases. However, the same calculation limited to the cases that on the one hand the *Cour de cassation* itself earmarks for publication in the official *Bulletin des arrêts de la Cour de cassation* (1 527 in 2016) and on the other hand the merit cases (*Urteile*) from the BGH, yields proportions of 11.2 % in France and 25.14 % in Germany.

This buttresses Prof. Ferrand's conclusions that the French court tends to wield influence through repetition of its decisions (of which a relatively small portion is 'interesting'), whereas the German court will issue fewer decisions, which contain a more extensive reasoning.

II. The French *ouvertures à cassation* compared to the various American standards of review

a. Principles: the importance of the fact vs. law–distinction

65. As we have seen before, the outcome of the American appellate procedure will greatly depend on the standard of review that the appellate court decides to apply. The access to review by the French *Cour de cassation* depends on the possibility to fit the criticism against the lower court opinion in one of the instances of *ouvertures à cassation*. In both cases, the qualification of the 'angle of attack' by the petitioner will be of vital importance. This warrants the question whether

¹⁵⁶ Rejections (*rejets*) with given reasoning, quashing decisions (*cassations*), with or without remanding the case (*sans renvoi*).

¹⁵⁷ Appeals for *Revision* which lead to a judgment (*Urteil*); not the cases that were rejected by order (*Beschluss*), whether or not this order contained a reasoning.

the two methodologies can be compared.

66. There is no escaping the fact /law distinction, in all its vagueness and intricacies. Judges on both sides of the Atlantic have this problem in common. In both systems, the distinction between law and fact is paramount: on the one hand the question whether a legal or factual argument is being brought forward will determine the standard of review to be used, while the *Cour de cassation* only takes legal challenges.

The distinction is notoriously fraught. Although it is seen as “the legal system’s fundamental and critical distinction”¹⁵⁸, it is yet “ill-defined”¹⁵⁹. In the U.S., “[t]he controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”¹⁶⁰

It should be borne in mind that continental Europe has no civilian juries, so that every decision, regarding either the facts or the law, will be made by the (lower) court. The question of the better allocation of decision making doesn’t come into play. One aspect is straightforward: the French courts of appeals can reexamine both facts and law. On the other hand, the *Cour de cassation* can only check the law, at least in principle. In practice, this will result in the following distinction. The court can

- always check the law
- never establish facts
- sometimes check the qualification of facts.

We will now examine how this is done in practice.

b. Application

67. The first of the *ouvertures à cassation* can be brought under the denominator of a check of the judge’s powers. This could encompass three categories: (1a) abuse of power and (1b) ‘denial of justice’, (2) competence and (3) violation of the boundaries of the case. The first instance will be that where a court orders a measure the law does not allow it to order, or when it rules in a case where it does not have jurisdiction (for instance because the case should have been brought before an administrative court, an arbiter, etc.). The second case is that where a court refrains from ruling on all the points of the petition. The third one will occur when the court did not have inter-

¹⁵⁸ Ronald J. Allen and Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003).

¹⁵⁹ Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. L. REV. 57, 57 (2005).

¹⁶⁰ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). See also HARRY T. EDWARDS, LINDA A. ELLIOTT & MARIN K. LEVY, *FEDERAL STANDARDS OF REVIEW*, 7 (2nd ed., 2013).

nal jurisdiction to rule on the case (for instance if a general court would rule on some matter that should be brought before the labor court). Finally, a lower court judgment can be criticized before the supreme court if the court did respect the boundaries of the case. This will occur when the court goes farther than what was asked, and grants aspects that were not requested (for instance, if a court would award damages as well as interests when only the actual damages were asked).

All these points would be reviewed without any deference towards the lower court: it is indeed the very functioning of the latter that is under review, and it had no leeway here: the statutory duties of the courts are not optional.

In the U.S. all these instances would fall within the *clearly erroneous* standard, as these are occurrences where in case of error the “decision ... cannot be located within the range of permissible decisions.”¹⁶¹.

68. The next category of *ouvertures à cassation* are those where due process is under review, either concerning formal aspects of the procedure or, generally speaking, the fairness of the trial. This is of particular importance in France as no jury trials are held and all¹⁶² argumentation is submitted in writing (notwithstanding oral argument), so that parties should have the possibility of discovering each other’s argumentation in due time in order to answer them in their reply brief.

Here, the supreme court will have some maneuvering space in checking the decision. As guaranteed by the European Convention on Human Rights¹⁶³, the right of fair trial must be assessed having regard to the proceedings as a whole.¹⁶⁴ For instance, the requirement of “equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”¹⁶⁵. The Court emphasizes that “[i]t is left to the national authorities to ensure in each individual case that the requirements of a ‘fair hearing’ are met.”¹⁶⁶. As a plaintiff to the E.Ct.H.R. must first exhaust all domestic remedies¹⁶⁷, it is evident that the national courts,

¹⁶¹ *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

¹⁶² At least in civil cases. There is a jury sitting in the serious criminal trials.

¹⁶³ Convention for the Protection of Human Rights and Fundamental Freedoms [E.C.H.R.] art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁶⁴ *Ankerl v. Switzerland*, ECLI:CE:ECHR:1996:1023JUD001774891, <http://hudoc.echr.coe.int/eng?i=001-58067>, § 38 (1996).

¹⁶⁵ *Dombo Beheer BV v. The Netherlands*, ECLI:CE:ECHR:1993:1027JUD001444888, <http://hudoc.echr.coe.int/eng?i=001-57850>, § 33 (1993).

¹⁶⁶ *Id.*

¹⁶⁷ E.C.H.R. art. 35(1).

and ultimately the supreme court, will have to assess the fairness of the proceedings according to this standard. While considering the proceedings as a whole, the court will have the faculty to determine if a violation of due process or of the fair trial principle has consequences for the party in question at all, or is the error in fact harmless.

69. The next category of *ouvertures à cassation* is the duty of the courts to lay out the reasoning of their judgment. This is a feature that is fundamental in the system of French tradition¹⁶⁸, and is seen to have a threefold reason of existence¹⁶⁹:

- it forces the court to develop a reasoning, by applying a legal rule (or principle) to a set of facts
- it guarantees the parties that their arguments have been carefully examined
- it allows the supreme court to exercise its duty of legality control.

The importance of this principle leads to a very high level of scrutiny from the supreme court. Any problem on this level will be met with a quashing of the opinion. In practice, the Supreme Court will examine whether the opinion gives a reasoning (at all) for a given decision. Of course, this will rarely be a problem, except for minor points where the lower court might have forgotten to be explicit about the reasons for its decision on that point. This will also be a problem when the judgment gives contradictory reasons, or reasons by way of reference. As there is no formal system of precedents, the courts have to rule on the merits of each individual case without being bound by precedents.¹⁷⁰ Next, the Court will verify if the reasoning is precise. This will involve a check whether the reasoning is not a general one, and if it's not hypothetical nor dubitative. Indeed, the given reasoning must instead be specific to the facts of the case. Next, the court will quash a judgment that does not answer all the specific arguments brought forward by the parties before the lower court. Finally, the Court will also quash judgments in which the reasoning does not make it possible to either identify the legal rule it is based upon, or where the reasoning does not contain all necessary elements to ascertain that this rule is being applied correctly.

¹⁶⁸ The requirement under the fair trial provision of the E.C.H.R. is less stringent, as it only “obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument” (Van de Hurk v. The Netherlands, ECLI:CE:ECHR:1994:0419JUD001603490, <http://hudoc.echr.coe.int/eng?i=001-57878>, § 61 (1994)).

¹⁶⁹ COUR DE CASSATION, RAPPORT ANNUEL 2010, https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2010_3866/etude_droit_3872/e_droit_3873/obligation_se_justifier_expliquer_3875/obligation_motivation_19404.html.

¹⁷⁰ Of course, rulings of a higher court on the same issue will be influential, although not binding. What the court must avoid doing, is giving the impression of considering itself bound by the ‘precedent’. There is, of course, no harm in applying the same reasoning to the facts at hand, with or without citing the earlier case.

70. The main substantive *ouverture à cassation* is of course to check if the given reasoning is pertinent. This will occur in two forms. First of all, the Court will examine if the judgment makes a correct application of the law. This is of course the core function of a higher court, and no deference at all is warranted here. In the U.S. this would also be scrutinized under a *de novo* standard.

Second, the Court will examine if the judgment does not give any document another meaning than what it evidently is. This instance is basically the only real exception to the rule that the *Cour de cassation* does not find facts, and is therefore conceptually important even though it is rarely successfully argued. Of course, the Court will not establish facts, but it has to take a real look at the factual background to see if the judgment has not erred in establishing them. This is a fairly recent addition to the *technique de cassation*, as it is only in 1872 that the Court added this eventuality to its arsenal. The court stated that, when the terms of a contract are clear and precise, the courts are not allowed to denature the resulting obligations, and to modify the provisions they contain.¹⁷¹ This hypothesis does not concern a wrong interpretation of the text, but a patent error in its reading.

Under U.S. procedure, this reasoning would fall under the clearly erroneous standard.¹⁷² But since “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed”¹⁷³, the French standard is even more deferential: no mere conviction, however firm, but a certainty is needed.

We have already mentioned Posner’s criticism of the standards of review, which appear to be commensurate with his *sui generis* approach of judging in appeals.¹⁷⁴ He is certainly correct on one specific point, though: the disparate interpretation of these standards, which is clear in the large number of them that courts have applied over time and in their oftentimes uncertain appli-

¹⁷¹ Cour de cassation [Cass.] [supreme court for judicial matters] civ., April 15, 1872, Bull. civ., No. 72 (Fr.) “*il n’est pas permis aux juges, lorsque les termes de ces conventions sont clairs et précis, de dénaturer les obligations qui en résultent, et de modifier les stipulations qu’elles renferment*”.

¹⁷² See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969): “In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.”. See also *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622–23 (1993), requiring “a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof”.

¹⁷³ *Concrete Pipe*, 508 U.S. at 622, citing *United States v. United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

¹⁷⁴ RICHARD A. POSNER, *THE FEDERAL JUDICIARY; STRENGTHS AND WEAKNESSES* 239–78 (2017).

cation.¹⁷⁵ After having stated that it is the courts of appeals' business to reverse fact-findings by the trial court that it finds to be clearly erroneous, he wonders:

“But what is the force of ‘clearly’ in this formula? Posing that question makes the entire body of law governing standards of review unravel. For what is an error that is not clear? A murky error? A maybe error? Is it enough that the appellate court thinks there’s a 51 percent probability that a trial judge’s, or a jury’s, ruling was incorrect? But it is unrealistic to think an appellate court could make such a precise estimate. Why not just say: if the appellate court thinks the district judge or the jury erred on a point material to the outcome of the case, it should reverse.”¹⁷⁶

The answer is, of course, because the trial court, having reviewed all the evidence firsthand, is better placed to assess it, certainly better than an appellate court reviewing the record. But the point remains valid regarding the relevant threshold. Here, input from Europe might prove enlightening.

Under the influence of Dutch doctrine¹⁷⁷, Continental European jurisprudence and case law developed the notion of ‘marginal scrutiny’, as opposed to full scrutiny. This concept signifies that a party, whose behavior or actions are to be checked against norms such as reasonableness, fairness or comity will be given the benefit of the doubt, as long as there is no manifest unreasonableness, unfairness or conduct unbecoming.¹⁷⁸ This means that the checking process will have to consider that the outcome is not a fixed one as the person in question had a certain leeway. It is not the outcome that is under scrutiny, but the way this was reached, and the question is: is this behavior not manifestly unreasonable?

Graphically represented, it does not matter if the behavior falls squarely within the ‘normal’ or accepted outcome, or on the contrary would seek the edges of it, as long as it does not fall squarely outside of it. Even if the boundaries are fuzzy, the question is whether the behavior at hand *clearly* falls outside of them. This is not the place for fine tuning.¹⁷⁹

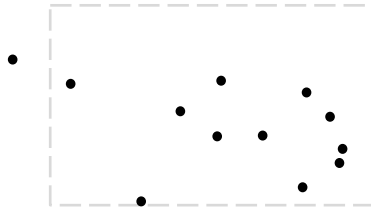
¹⁷⁵ See also Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643 (2015), who demonstrate the problems with the incorrect application of standards of deference.

¹⁷⁶ *Id.*, at 262.

¹⁷⁷ See Jan Ronse, *Marginale toetsing in het privaatrecht*, 1977 TIJDSCHRIFT VOOR PRIVAATRECHT [TPR] 207, 208, fn. 1.

¹⁷⁸ G.J. WIARDA, *DRIE TYPEN VAN RECHTSVINDING*, 128 (3rd ed. 1988).

¹⁷⁹ A tennis umpire has to be certain of his calls, will pay a great deal of attention and might even be assisted by a system like *Hawk-Eye*. This is clearly a ‘full’ scrutiny. Marginal scrutiny applied to this example would be only to call a ball ‘out’ if every reasonable person present would have seen so. (And of course, “[u]mpires don’t make the rules, they apply them”, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005)



This is a widely used reasoning in law, which the Dutch had the merit to describe. Many examples of this type of reasoning could be given from earlier times or different legal systems. Remember Justice Stewart’s famous characterization of ‘hard-core pornography’¹⁸⁰. When turned into a favorite laughingstock, this quote is usually stripped of its operative part: “and the motion picture involved in this case is not that”. Without this clause, it is easy to mock this ‘test’ into a tautology (“Why? Because I say so!”). But considered in full, it is clear that Justice Stewart applied what amounts to marginal scrutiny: in his opinion, the footage in question *manifestly* did *not* meet the definition of obscenity — whatever that may be — and no reasonable person could doubt that.

71. The last category of *ouvertures à cassation* is that of the compatibility of the decision with its framework (is it compatible with other judgments between parties? is it not grounded on dispositions that might have been declared unconstitutional subsequently? is it not moot?).

These are of course legal-technical questions which, would also fall under the *de novo* standard in the U.S.

c. Correctives

72. Of course, the system of the *technique de cassation* has built in some corrective mechanisms. We will discuss two major ones. First, an appeal before the supreme court can be considered moot if the petitioner has no interest in raising that argument. This will for instance be the case when the lower court judgment would still be valid even stripped of the argument in question. If the lower court has grounded its reasoning on two separate arguments, the petitioner will have to attack both of them (successfully) in order to have the judgment quashed.

This is in fact an application of the same principle that lies behind the ‘harmless error’



(statement of John G. Roberts, Jr., nominee)).

¹⁸⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring): “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”

doctrine in the U.S. The district court's decision may be affirmed on any ground supported by the record, even if not relied upon by the district court.¹⁸¹ Accordingly, the decision may be affirmed, "even if the district court relied on the wrong grounds or wrong reasoning."¹⁸² This technique, designated as *substitution de motifs* (substitution of legal grounds)¹⁸³, requires the Court to request additional briefings from the parties, otherwise it would infringe on their right to a fair trial.

73. Second, the 'new argument' rule: a party can only raise arguments before the *Cour de cassation* if it has raised them earlier before the lower court. Also, and this is an aspect of the same principle: a party cannot raise an argument that is contrary to what it has stated earlier before the lower court.

d. *Sua sponte* arguments

74. This brings us to the last comparative aspect: the question whether the court can raise arguments *sua sponte*. In France, the Code explicitly allows the *Cour de cassation* to do so¹⁸⁴, although procedural safeguards for the parties right to a fair trial will have to be considered.¹⁸⁵ This is an innovation of the 1992 Civil Procedure Code.¹⁸⁶

Both American doctrine¹⁸⁷ and courts¹⁸⁸ have waxed lyrical on how *sua sponte* decisions by appellate courts are contrary to the adversary system. And on the substance, this is of course correct: putting parties in front of surprises, with them not having been able to take position, is fundamentally unfair, which is contrary to the essence of any modern judicial process.¹⁸⁹

¹⁸¹ Campbell v. Washington Dep't of Soc. & Health Servs., 671 F.3d 837, 842 n.4 (9th Cir. 2011); Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003).

¹⁸² Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 418 (9th Cir. 1998) (cleaned up).

¹⁸³ CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] article 620(1) (Fr.).

¹⁸⁴ C.P.C. article 620(2).

¹⁸⁵ C.P.C. article 1015(1).

¹⁸⁶ JACQUES BORÉ & LOUIS BORÉ, LA CASSATION EN MATIÈRE CIVILE 502 (4th ed., 2008).

¹⁸⁷ Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 247 (2002).

¹⁸⁸ "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." (United States v. Burke, 504 U.S. 229, 246 (1992) Scalia, J., concurring).

¹⁸⁹ See e.g. George C. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1329 (1969): "[T]he primary social purpose of the judicial process is deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated."

But there is little doubt that the Circuit courts of appeal can raise issues *sua sponte*. The refusal to consider arguments not raised by the parties is a mere “sound practice” rather than a “statutory or constitutional mandate”¹⁹⁰. Robert Martineau coined the term ‘gorilla rule’ for this phenomenon, as “appellate courts, like gorillas, are subject to few restraints except those that are self-imposed”¹⁹¹. Of course, the supreme courts, and especially the U.S. Supreme Court takes this even one step further, as Justice Jackson famously observed: “We are not final because we are infallible, but we are infallible only because we are final.”¹⁹². Yet, when this feature is accepted, Milani & Smith correctly argue that procedural safeguards should be built in, like the obligation for the court to ask for supplemental briefing¹⁹³ and rehearings as a matter of right in those cases¹⁹⁴.

As far as the facts are concerned, the theory is that appellate courts should limit themselves to the fact-finding enclosed in the lower court’s record.¹⁹⁵ In practice however, this does not seem to be as firm a rule as one would imagine, as there are many exceptions like judicial notice, legislative facts and the material contained in amicus briefs.¹⁹⁶

75. It is highly ironic that the ‘adversary system’ allows appellate judges to decide issues on which the parties did not have the opportunity to lay out their views¹⁹⁷, whereas this would be an out-

¹⁹⁰ Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring).

¹⁹¹ Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1061 (1987). The author builds on the joke “Where does an eight-hundred-pound gorilla sleep? — Anywhere it wants.”

¹⁹² Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). In the same logic, we could call the Supreme Court deciding on its own working — including the *certiorari* process — the ‘Godzilla rule’.

¹⁹³ Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 294 (2002); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1297 (2002) and Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 1005–12 (1989).

¹⁹⁴ Milani & Smith, *Playing God...*, at 304.

¹⁹⁵ Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2020 (2012).

¹⁹⁶ *But see* the exceptions to this principle discussed *id.* at 2032–60. *See also* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 3 (2011), flagging the problem of appellate courts deciding on the basis of facts that have not been vetted through the adversarial process.

¹⁹⁷ Compare the frustration expressed by Larry Lessig on how the Supreme Court ended up deciding *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which he had argued for the petitioner (Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS (March / April 2004), www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp).

right heresy in what is still dubbed as the ‘inquisitorial system’ — which does not exist anymore in civil cases in Europe¹⁹⁸. Any argument raised *sua sponte* by a court would necessarily involve additional briefing by the parties, otherwise this would be a flagrant violation of the right to a fair trial guaranteed by Article 6 E.C.H.R. Yet, this does not prevent even the U.S. Supreme Court from raising the specter of the evil and medieval inquisitorial system, even in civil matters¹⁹⁹. This cannot but be flagged as sloppy comparatism.²⁰⁰

B. Aspects of court organization

I. The functions of the appeal

76. We have seen earlier that the French and German appellate functions show clear differences: whereas the French system sees the appeal as a second trial, the German one limits the possibility of the parties to raise new facts and issues. However, a recent policy document ordered by the French Justice Minister²⁰¹ questions this system. The fact that the appeal is seen as way of completing the case (“*voie d’achèvement du litige*”) has two consequences: the first instance court will lose authority as the result will be seen as basically moot, and the appellate proceeding will lose authority as well since it will often concern only pedestrian matters and questions. The authors of this report, which is not limited to the question of appeals but looks at the entire judicial system, advocate abandoning both the principle of the ‘general appeals’ as well as the *de novo* review of facts by the appellate courts²⁰², and in practice a move towards the German conception of the appeal as it is known since 2002.

¹⁹⁸ See, e.g., Ruiz-Mateos v. Spain, ECLI:CE:ECHR:1993:0623JUD001295287, <http://hudoc.echr.coe.int/eng?i=001-57838>, § 63 (1993): “the principle of equality of arms is ... one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial”.

¹⁹⁹ The earlier quote by Justice Scalia (*supra*, n. 188) is from a tax case.

²⁰⁰ See, for criticism of the use of the distinction ‘adversarial’ vs. ‘inquisitorial’ to evaluate present-day systems, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS, 3 – 6 (rev. ed., 1991) and JOHN ANTHONY JOLOWICZ, ON CIVIL PROCEDURE, 175 and 219 (2000).

²⁰¹ INSTITUT DES HAUTES ÉTUDES SUR LA JUSTICE, LA PRUDENCE ET L’AUTORITÉ — L’OFFICE DU JUGE AU XXIÈ SIÈCLE, 142–143 (2013).

²⁰² *Id.* 145–146. The current Belgian Justice Minister has laid out plans that go in the same direction (SERVICE PUBLIQUE FÉDÉRAL JUSTICE / FEDERALE OVERHEIDSDIENST JUSTITIE [Belg.], THE COURT OF THE FUTURE, 30–31 (2017)).

Richman and Reynolds have demonstrated that the U.S. Circuit Courts of Appeals function in a two-tiered system: about one-sixth of the cases are dealt with according to what they call the ‘Learned Hand model’ — with a panel of three circuit judges hearing oral argument and deciding through a reasoned opinion — whereas the remainder is being disposed of by orders or unpublished opinions drafted by staff attorneys and not receiving the same level of attention by the judges.²⁰³ This model can be said to build on a ‘romantic’ view of the appellate judge in the Holmes–Brandeis–Cardozo–Hand–Friendly–Posner tradition.²⁰⁴ This model has been shown not to be mainstream nowadays, as most Circuit judges would let their clerks write initial drafts of their opinions.²⁰⁵

These two examples — in addition to the German overhaul of 2001–02 — clearly show that the state of the appellate procedure is never a static phenomenon. There is always an evolution if not in the concept, then certainly in the fine-tuning of the practical realization thereof.

77. The following tables show the proportions of appeals in the U.S. Federal System, in France and in Germany, both to the appellate courts and the supreme courts in 2016. The different ways of keeping and presenting the statistics in the different countries make the comparison somewhat shaky, but we can discern the broad strokes.²⁰⁶

<i>Decisions on appeal</i>						
2016	1st	Appeals	(merits)	(summ.)	Affirmed	Reversed
U.S. Fed.	278 779	58 039	37 172	18 247	23 727	5 587
		100 %	64.05 %	31.44 %	40.88 %	8.78 %
France	1 566 886	240 673	138 271		107 517	30 754
		100 %	57.45 %		44.67 %	12.78 %
Germany	1 343 337	100 324	27 787	85 768	12 033	14 214
		100 %	27.70 %	85.49 %	11.99 %	14.17 %

²⁰³ WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL; THE UNITED STATES COURTS OF APPEALS IN CRISIS 119 – 120 (2s013). See also the same vein of criticism by Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 428–29 (1987).

²⁰⁴ See e.g. DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA 92–95 (2012), on how Judge Friendly would write opinions in one sitting, on two legal pads (one for the text, the other one for the footnotes), in almost religious silence, etc.

²⁰⁵ Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 497.

²⁰⁶ It will be noted that the columns *merits / summary* do not add up to 100 %, due to small variations in the way cases are disposed of (for instance, withdrawals of cases by the parties themselves). The columns *Affirmed / Reversed* only take merits opinions into account, with the same remark concerning the totals.

<i>Supreme court appeals</i>					
2016	Appeals	(merits)	(summ.)	Affirmed	Reversed
U.S. Fed.	6 252	69	6 183	14	52
	100 %	1.10 %	98.90 %	0.22 %	0.83 %
France	21 777	11 194	10 155	5 487	5 707
	100 %	51.40 %	46.63 %	25.20 %	26.21 %
Germany	4 388	1 061	3 327	228	555
	100 %	24.18 %	75.82 %	5.20 %	12.65 %

These figures make it clear that the conception of the appellate systems is entirely different in the three countries. If we look at the cases reversed on appeal (*i.e.*, where the appellate court has given a different direction to the case), compared to the absolute volume, we see the following:

<i>Reversals</i>					
2016	Input	Appeals	reversed	S.Ct. app	reversed
U.S. Fed.	278 779	58 039	5 587	6 252	52
	100 %	20.82 %	2.00 %	2.24 %	0.019 %
<i>reversal rates</i>		100 %	9.63 %	10.78 %	0.090 %
				100 %	0.83 %
France	1 566 886	240 673	30 754	21 777	5 707
	100 %	15.36 %	1.96 %	1.39 %	0.36 %
<i>reversal rates</i>		100 %	12.78 %	9.05 %	2.37 %
				100 %	26.20 %
Germany	1 343 337	100 324	14 214	4 388	555
	100 %	7.49 %	1.06 %	0.37 %	0.041 %
<i>reversal rates</i>		100 %	3.55 %	4.37 %	0.55 %
				100 %	12.64 %

Both in France and in Germany, we see a reversal rate on appeal that is smaller than the reversal rate by the supreme court. This makes sense: frivolous appeals get rejected, but the supreme court gets to have a role in the unification of the law. The first instance court is generally the 'deciding' court: in 98.00 % of the cases in the U.S., in 98.04 % in France and in 98.94 % in Germany the first decision does *not* get reversed by the appellate court. The opposite can be seen in the U.S., where the reversal rate by the Supreme Court is negligible, both compared to the total appeals (in this case petitions for *certiorari*) and certainly to the total mass of Federal cases: only 0.83 % of the appeals cases get reversed by the Supreme Court, while this is 26.20 % and 12.64 % in France and Germany.

This shows that the U.S. Supreme Court's only vocation is to tweak the system through a small number of carefully chosen pinpricks rather than through a sustained influence on the totality of the case law.²⁰⁷

II. The size of the judiciary

78. The differences in philosophies regarding the court systems, and in particular the appellate system, has a demonstrable influence on their organization. This can be illustrated by comparing the personnel allotment of courts of either level in the U.S. State and Federal courts and in several European countries. We distinguish between three clusters of European countries: Western Europe²⁰⁸, where the French influence is at least indirect, the Scandinavian countries²⁰⁹ where this influence did not exist as such, and the former Communist countries of Eastern Europe²¹⁰.

<i>Judges per 100 000 inhabitants</i>					
	U.S. Fed.	U.S. States	Scand.	Western	Eastern
Trial /1st	0.52	7.26	8.49	15.10	18.33
Appellate	0.06	0.33	3.43	4.04	5.34
Supreme Ct.	0.003	0.17	0.40	0.56	1.00
All judges	0.59	7.80	12.38	19.18	27.01

Of course, the U.S. Federal system cannot be compared as such to the other system because of its very specific jurisdiction, but the count is indicative for the systemic design.

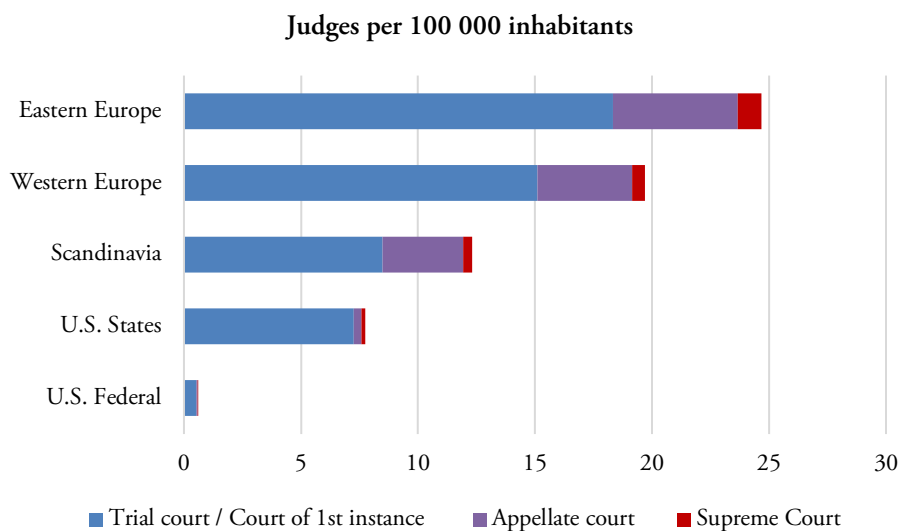
²⁰⁷ Cf. Frederick Schauer, *Is It Important To Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77 (2009) and Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV., *forthcoming*, Washington University in St. Louis Legal Studies Research Paper No. 17-03-05, available at <https://ssrn.com/abstract=2928275>.

²⁰⁸ Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Switzerland.

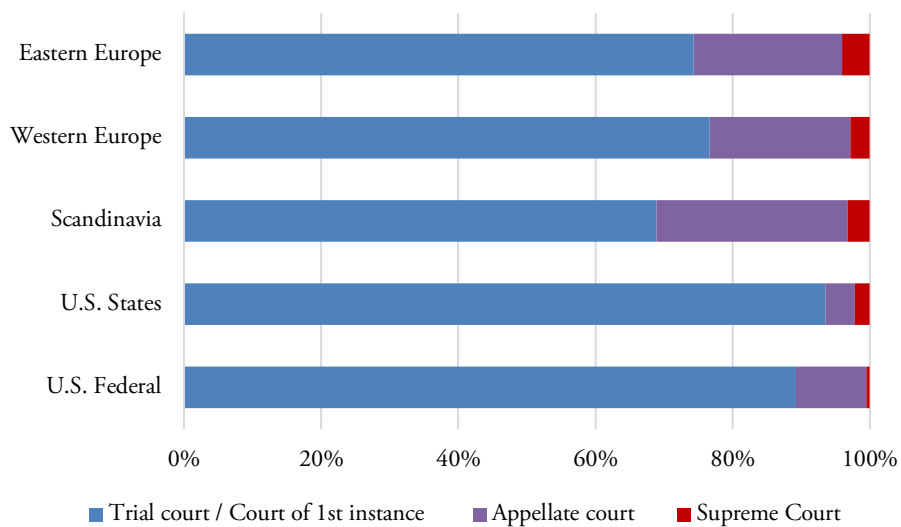
²⁰⁹ Denmark, Finland, Norway and Sweden.

²¹⁰ Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Montenegro, Poland, Moldova, Romania, Serbia, Slovakia, Slovenia, the FYROM and Ukraine.

The graphical rendering of these data highlights de differences.



The second graph shows the proportional repartition of judges over the three levels within each examined system.



It is clear that the American courts have a far greater proportion of trial court judges, whereas the European systems have more appellate and supreme court judges.

79. Specifically for the countries which we have examined in greater detail, France and Germany, the figures are as follows (we repeat the U.S. data for ease of comparison):

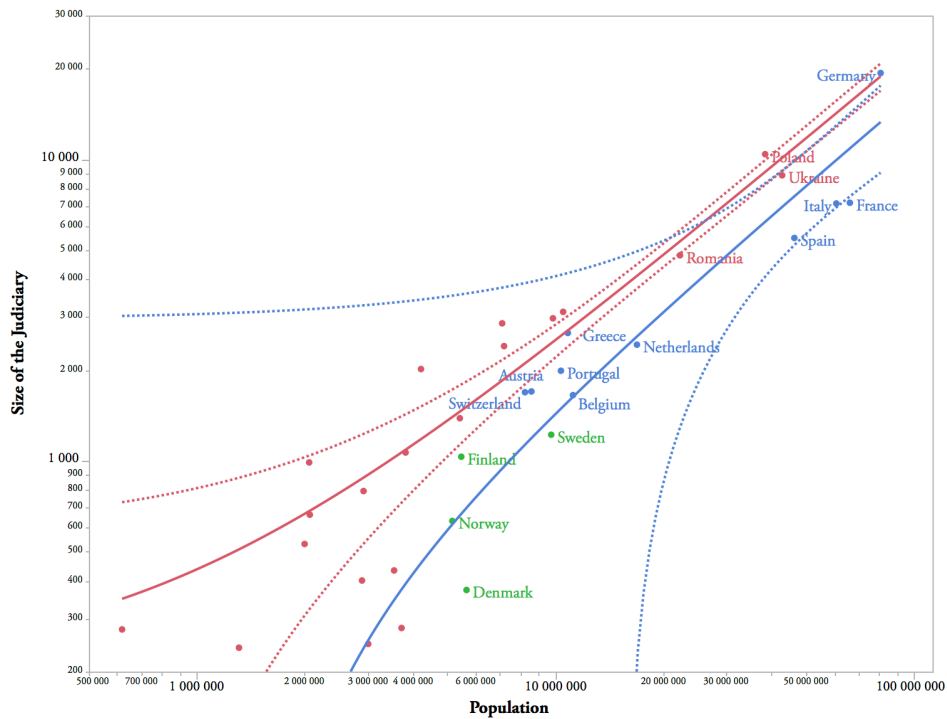
<i>Judges per 100 000 inhabitants</i>				
	France	Germany	U.S. States	U.S. Fed.
Trial /1st	17.62	18.40	7.26	0.52
Appellate	2.64	5.00	0.33	0.06
Supreme Ct.	0.54	0.57	0.17	0.003
All judges	10.83	23.94	7.80	0.59

80. If we examine the influence of one tier on the composition of the total cohort, we see a prominent correlation emanating from the lower level. This is hardly surprising as this is the largest part of the total. It is however interesting to see that the composition of both the appellate and supreme court cohort correlates in a statistically significant way²¹¹ in both Western and Eastern Europe. This indicates a fairly homogenous architecture of the court systems in these clusters.

<i>Correlation between size of one tier vs. of whole judiciary</i>				
	U.S. States	Western	Scand.	Eastern
Trial /1st	.998	.987	.990	.916
Appellate	.152	.912	*	.386
Supreme Ct.	*	.334	*	.168

81. The following graph shows the correlation between the population of European countries and the total size of the judiciary (both axes are logarithmical). Here again, it becomes clear that the Eastern European (in red) countries have a more uniform system, since the correlation between them is quite strong ($R^2 = .95$). The 95 % confidence interval (dotted) is narrow. The Western European countries (in blue) on the other hand are more diverse but still show a certain unity ($R^2 = .78$). The Scandinavian countries (green) do not have a significant correlation between the four of them.

²¹¹ The figures used are the relative densities (judges / 100 000 inhabitants). The correlations here were either extremely significant ($p < .0001$, in which case the R^2 values are given in the table) or not at all ($p > .05$, indicated by * in the table). Only the value for the U.S. State courts of appeals was significant to a level of $.0001 < p < .05$.



Considering only the (French-influenced) Western European countries, we see five noticeable aspects:

- Switzerland and Austria are extremely comparable in size of population and of judiciary, both having a relatively large judiciary
- three countries with about 11 million people show clear differences, with Belgium having fewer judges than Portugal, which in turn has a lesser amount than Greece, but all three have more than expected
- the Netherlands have slightly fewer judges than expected
- France, Italy and Spain, the three large ‘Latin’ countries, form a well-defined cluster with markedly *fewer* judges than expected, especially France
- Germany, besides being the most populous country, has *significantly more* judges than expected.

VI. ASSESSMENT

82. Having stated a theoretical model of the most desirable features of a three-tiered appellate system, and having described the features of the U.S. Federal, French and German systems, we shall now assess the merits of each system.

83. First, we mentioned that the appellate court should avoid performing a *de novo* review of the facts as this is a mere repetition of the work of the first court; the appellate court should be mainly concerned with the question whether the first court applied the law correctly. The system failing this criterion is clearly the French, as the court of appeals reviews both fact and law *de novo*. Both the U.S. Federal and the German systems score better on this aspect: the use of differentiated standards of reviews on the one hand, and the statutory limitation of factual appeals lead to a narrower scope of the appeal compared to the first instance.

84. We further stated that *errores in procedendo*, the ‘disciplinary appeals’, should be (exclusively) corrected at the appellate level, while *errores in iudicando*, mistakes on the substance of the applicable law, are the domain of both the appellate and supreme court. The system should also be designed so that the risk of (new) *errores in procedendo* at the appellate level are minimized; the appellate court should not have jurisdiction over any facts that have not been decided on by the initial court. The supreme court should not have to deal with any facts. Again, the French system, allowing a broad factual inquiry by the court of appeals, will lead to an unavoidable number of errors by this court in doing so. A misapplication of the law of evidence will lead to the supreme court having to correct what is mainly a factual problem (as it touches the determination of facts, not their qualification). The U.S. Federal and German systems have a much more constrained role for the court of appeals regarding the facts (either through the use of distinct standards of review or because of the statutory limitation of the appealable subject matter).

85. Finally, a balance should be struck between discouraging pointless appeals and the access to appellate review for the cases where it is warranted. Relatedly, the supreme court should not merely check whether the law has been correctly applied in the case at hand (as this is the main attribution of the appellate court), but also have the uniform application of the law in mind.

On the one hand, the American system of appeals is rather strict as the parties should indicate and the court is expected to follow the applicable standard of review. The appeals to the Supreme Court are far less formal — the main problem is take the *certiorari* hurdle and to ‘get in’. On the other hand, the French system has almost no boundaries as to the actual appeals, while the appeals to the *Cour de cassation* is very strictly defined, both for the parties as for the court itself. There are, however, few formal boundaries. The German system, certainly after the 2001–02 reforms, offers a better balance on either front: appeals are limited, mainly in a substantive rather than in a quantitative fashion, as is the way to the supreme court.

Too wide a door results in the same questions being addressed twice (or even three times) in

the same case (for which there might be good reasons, but this is not always so). But if the gate is set too narrowly, this might result in relevant issues not being able to be heard in appeal, and issues slipping between the cracks of appellate review and thus of unification of the law will ultimately backfire within society.²¹²

In the French system, the fact of having to deal with *errores in procedendo* in fairly large numbers takes a lot of the Court's bandwidth, so that it cannot give as much attention as would be ideal to its actual function of interpretation and unification of the law.

86. In sum, the French system has two problems. First, the quasi-unlimited access to the appellate courts, without it being necessary in reality to state grievances against the lower judgment, makes for a suction effect towards the appellate level: the main, if not only factor barring a losing party to appeal will be the attorneys' fees — and maybe the desire to get it over with. The possibility to raise new arguments and bring up new facts will result in the court of appeals judging certain aspects of the case for the first time, without possibility of appeals on these points. It is therefore hardly an exaggeration to state that France does not have actual courts of appeals, but 'Tribunals of Second Instance'. Also, by allowing parties to start over after having filed the appeal, the costs of bad lawyering get externalized from the parties — bearing their own loss — and the lawyers — as potential malpractice claims, which are however rather rare — to society as a whole, and thus to the taxpayers. Then, the very restrictive access to the *cour de cassation* will result in many desperate appeals that have no chance and get summarily rejected.

The French system could easily be tweaked at minimal cost by adding a formal requirement for parties willing to appeal a first instance judgment to (1) state their grounds for the appeal (a) in a limiting way, (b) form the onset, so that no grounds can be added along the way and (c) having the court of appeals be bound by these stated grounds, and (2) requiring that the court of appeals would apply marginal, not full scrutiny to the factual determinations and assessment by the first instance court. This would require no structural reform but would greatly benefit both the appellate level and, by consequence the Supreme Court. More far-reaching reforms could involve remanding reversed judgments back to the respective lower courts (nowadays only judg-

²¹² Cf. LARS BIRSCHENK, DIE ZWEITE INSTANZ IM DEUTSCHEN UND FRANZÖSISCHEN ZIVILVERFAHREN 200–15 (2015) discussing the problems with appeals regarding small claims in both Germany and France. See also Justice Thomas' recent line of 'dissentals' in Second Amendment cases — *post* *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742, 780 (2010) — in which *certiorari* was not granted (*Friedman v. Highland Park*, 577 U.S. ___, ___ (No. 15–133, December 7, 2015) (Thomas, J., dissenting from denial of *certiorari*) (slip op., at 1); *Jackson v. City and County of San Francisco*, 576 U.S. ___, ___ (No. 14–704, June 8, 2015) (Thomas, J., dissenting from denial of *certiorari*) (slip op., at 1); *Peruta v. California*, 582 U.S. ___, ___ (No. 16–894, June 26, 2017) (Thomas, J., dissenting from denial of *certiorari*) (slip op., at 7); *Silvester v. Becerra*, 583 U.S. ___, ___ (No. 17–342, Feb. 20, 2018) (Thomas, J., dissenting from denial of *certiorari*) (slip op., at 11–14)).

ments quashed by the supreme court are remanded to a lower court, but a different one than the one that issued the quashed opinion).

87. The U.S. Federal system also has a very broad access to the appellate level, but contrary to the French system, the application of standards of review will lead to a smaller reversal rate. We do not share the sentiment²¹³ that this is a problem in itself. First, a low reversal rate on appeal means that the lower courts work fine, which is of course the ultimate goal. Second, it has been demonstrated repeatedly that votes on *certiorari* petitions are inherently strategic.²¹⁴ The ability (1) of selecting one's own docket, combined with (2) 'aggressive grants' will unavoidably lead to a reversal rate by the Supreme Court that is of an entirely different magnitude than that of the Courts of Appeals. But the most important feature, is that this is the end of the road for most cases, as the access to the Supreme Court through the process of petition for *certiorari*, and hence the chance to have the appellate opinion reversed, is extremely tenuous — too small for parties to be able to calculate this reliably in their judicial strategy. The same can be said about rehearing *en banc* before the Circuit Courts. This means that the Circuit Courts of Appeals — sitting in its normal panels of three — are *de facto* the final adjudicators in the Federal system, with the Supreme Court only taking action in the exceptional cases in which it pleases to do so, mainly to resolve circuit splits. It is however unlikely that we would see any reforms any time soon in the way the U.S. Supreme Court handles its business. It is no coincidence that the Chief Justice favorably referred to the depiction of tortoises in and around the Supreme Court building as “symbolizing the judiciary's commitment to constant but deliberate progress in the cause of justice”²¹⁵.

²¹³ Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the 'Affirmance Effect' on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 358 (2005): “Reversals are a defining feature of the Supreme Court: over the last decade, the Supreme Court reversed 64% of the cases it heard. Affirmances are a defining feature of the courts of appeals: the courts of appeals affirmed 90% of the cases they decided during the same period.”)

²¹⁴ See Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828 (1989); Robert L. Boucher, Jr., and Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 80 and 118–25 (1998) and Aaron Walker, *Strategic Behavior at the Certiorari Stage of the Supreme Court of the United States*, Thesis, available at <https://www.ramapo.edu/law-journal/thesis/strategic-behavior-certiorari-stage-supreme-court-united-states> (June 15, 2017).

²¹⁵ See John G. Roberts, Jr., *2014 Year-End Report on the Federal Judiciary* 11–12, available at <https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf> (Dec. 31, 2014).

See, however, the recent and conceptually interesting proposal that the Supreme Court docket should not only consist of cases where the Court itself has granted *certiorari* but should be complemented with a number of cases in which petition was sought and that would be drawn by lottery. This would foster the familiarity of the Justices with problems they do not have cherry-picked themselves and would also be a remedy

VII. CONCLUSION

88. As a whole, the present German system seems to be the better balanced one. The ‘funnel’ of successive appeals seem to be more progressive than either in the U.S. Federal system or in France, so that every step in the process embiggens its added value to the final result: there is no repetition in the process, and the Supreme Court deals with a proportion of cases that is small in absolute numbers yet large enough to ensure a substantive influence in unifying the law. It would seem that public resources are better spent this way.

Countries looking to tweak their appellate systems would benefit from having a close look at the particulars of the German system.



against denials of *certiorari* in such cases as the ones flagged by Justice Thomas (*supra*, note 212).

SYNOPTIC TABLE

	U.S.A. (Federal)	France	Germany
APPEALS			
PARTIES ('in')			
who	any party (with standing)	any party with interest and capacity	(the parties, implied)
what	as of right: final judgments; some interlocutory judgments discretionary: controlling question of law, substantial ground for difference	every judgment > € 4 000	final judgment > € 60 or when allowed
when	after final judgment (or if immediate appeal may advance ultimate termination of the litigation)	after final judgment	after final judgment
substantial	fact and law	fact and law	law (new facts under strict conditions)
new arguments?	in theory not, in practice yes	yes	
COURT ('out')			
devolution	record of lower court proceedings	entire case	in general, only decisions based on facts established by the lower court
deference <i>sua sponte?</i>	depending on appealed decision yes	<i>de novo</i> yes, with respect of fair trial	<i>de novo</i>

SUPREME COURT

PARTIES ('in')

who	any party (with standing)	any party with interest and capacity	(the parties, implied)
what	judgments of appellate courts, three-judges district court and state supreme courts (or lower state courts if the state supreme court does not hear the case)	any final decision on the merits, unless exclude by statute	final judgments
when	after final or interlocutory judgment; before judgment, if imperative	after final judgment	(after final judgment, implied)
substantial	only law	only law (<i>ouvertures à cassation</i>)	only law
new arguments?	no new issues but sometimes new arguments	no, unless of public policy or emanating from the decision below	no

COURT ('out')

devolution	questions for which <i>certiorari</i> is granted	only the appealed points	only the appealed points
deference	<i>de novo</i>	<i>de novo</i>	<i>de novo</i>
<i>sua sponte?</i>	yes	yes, with respect of fair trial	

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