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Appellate Courts

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Appellate courts are a nearly ubiquitous part of the legal systems of the world. Though courts of appeal in many countries may lack the legal drama that makes trial courts a focus of popular attention, appellate judicial bodies have long been a fixture of scholarly attention for the way they embody and reflect the philosophies, cultures, and norms in society. Increasingly, too, scholars have recognized them as significant lawmaking institutions in the political systems of the world, including supranational organizations such as the European Union. Whether legislation places the appellate role in a single court or a full hierarchy of appellate bodies, the institutions and dynamics of appellate courts shape the law and society in remarkable and varied ways.

Function and Organization

At their simplest, appellate courts are those courts given the responsibility and authority to review the decisions of lower courts. Thereafter, the meaning of *review* and the distinction between a trial and an appeal are subject to wide variation across jurisdictions. In the United States, courts hearing cases on appeal generally do not conduct full fact-finding or make prima facie determinations. Rather, American courts focus on examining lower-court proceedings for errors of law. Where they find such errors, they must decide what corrective measures they should take.

In the European civil law tradition, by comparison, the varied procedures of appellate courts can allow a [p. 80 ↓] party to raise new evidence or fully retry a case in a first appeal. Continental supreme courts, often called courts of cassation, then sit to confirm or quash the lower appeals courts' judgment on questions of law. Yet across major legal systems, the nature and significance of appellate court decision making far exceeds a spare description of their position. The Supreme Court of the United States looms large as an example, par excellence, of the potential prominence of appellate courts, though the organization, roles, and status of appellate courts vary across jurisdictions.

Independence

Appellate courts, because of their potential to shape the development of policy, exist in political environments torn between the fundamental values of independence and accountability. On the one hand, appellate court judges generally have sought a position free of overt political control, allowing them to increase their institutional power. Support for the modern concept of judicial independence developed significantly in the seventeenth and eighteenth centuries in Europe, and the notion has flowered in concept, if not in practice, in both common law and civil law systems. On the other hand, in all systems there remain both theoretical and practical devices for producing responsiveness and accountability to political authority, especially to the enduring and shared opinions in society. The potential for clashes between these values affects the organization and operation of courts at many levels.

The selection of appellate judges and the conditions of their tenure are essential elements in setting their degree of independence. Appellate jurists may be elected to the bench (notably in most American states), but far more common around the world is some combination of political appointment or professional advancement. In Anglo-American systems, judges are often selected from leading lawyers (in England, typically barristers). In Continental systems, such as France and Germany, judging is a civil service vocation chosen by students at an early stage of their professional life. Once a judge is on the bench, rules enhance the independence of judicial decision making by setting long terms of service or providing life tenure.

The potential of independent judges depends on the status and jurisdiction of appellate courts in their respective systems. Lower-level appellate courts frequently specialize by subject matter, such as criminal or civil appeals. The twentieth century saw notable growth in specialization driven by the overall demand on judiciaries. Courts of last instance, often generalist courts, sit at the top of hierarchical systems of appellate courts, though some countries retain specialization within their highest appellate courts. Higher appellate courts entitled to exercise discretion over the appeals they entertain generally find themselves more able to select the ripest cases and display more creativity in their approach.

Even more fundamentally, appellate courts of the world differ on whether their power to interpret the law includes some notion of judicial review, the power to test legislative and executive decisions against a higher law standard such as a written constitution. In the United States, judicial review evolved from English precedent and blossomed in the twentieth century, while in practice, English judges have shown much greater deference to parliamentary sovereignty. Indeed, while many countries have moved toward a system of constitutional judicial review, institutionally and attitudinally the change has been measured. If judicial review is lodged in appellate courts at all, the creation of special constitutional courts in many countries has kept judicial review away from career jurists, while the absence of stare decisis has further restricted the practice.

Accountability

In the extreme, scholars commonly regard the removal of judges for their decisions in specific cases as a hallmark of oppressive governments. Yet, links between appellate courts and the rest of the political system are essential for producing accountability. Different societies have different tolerances. In the United States, decisions interpreting the national Constitution can be overturned only with extreme difficulty through a constitutional amendment process, [p. 81 ↓] leaving less-direct paths, such as appointment of new judges and noncompliance, as responses. The U.S. Supreme Court enjoys high levels of legitimacy in its decisions interpreting statutes, although Congress much more frequently modifies appellate court decisions by statutory revision. Judicial independence is rarely so pronounced, either formally or informally. Until recently, even, the historic office of the Lord Chancellor in England allowed that cabinet minister and member of the House of Lords to sit also as a judge on the Court of Appeal. In countries with career jurists, the government frequently influences promotion, which serves to limit judicial creativity.

Roles

Depending on the nature of the national context and its historically evolved setting, to varying degrees appellate courts around the world perform a number of roles.

First, and most simply, appellate courts correct errors made by trial courts. Even assuming that appellate court judges are motivated by political ideology, a significant number of decisions—many unanimous—work to reverse mistakes of fact and law that can be observed in the legal record. The notion of “error” presumes rules, and so a fundamental role for appellate courts is to develop and maintain a system of rules for lower courts. As a political system seeks to stamp uniformity over a wide area, the significance of appellate courts tends to increase. Thus, the European Court of Human Rights has risen in prominence in the past two decades as member states have articulated a set of rights and guarantees, particularly regarding criminal and bureaucratic due process. Islamic law, by comparison, has seen relatively little appeal, most easily explained by the nonhierarchical nature of the religion, in which there is no single, supreme, earthly authority.

The duty to oversee courts across wide geographic jurisdictions at a minimum produces a form of lawmaking by resolving the conflicts and filling the gaps that appear between the existing law and practice. One may debate the scope of such judicial policy making, but appellate courts in numerous legal systems implicitly exercise wider powers of policy making. When individuals and groups express political claims in constitutional terms, a court's legitimacy as an interpreter gives its judges authority to decide the limits of those claims. Many legislatures and executives have willingly sought to place questions of policy within court systems, sometimes because they see courts as politically expedient or because they represent an independent arbiter.

In common law systems such as the United States and countries of the British Commonwealth, the aggregate output of appellate courts constitutes an entire body of legal rules, doctrines, and precedents that serve as the law for future claims. The case-by-case evolution of the common law arguably provides a stable system by which the law adjusts to changing social and political circumstances.

Civil law systems, derived from Roman and canon law, emphasize the centrality of statutes and codes deriving their authority from legislative mandate. Continental judges, such as in France and Germany, arguably are limited because the basic substance of the law has this source, but in practice observers point to the similarities between common law and civil law appellate decision making. In both, judges have developed systems of argumentation and precedent that develop judicial policies on a given topic.

Judicial politics around the world reveals a variety of approaches for managing the apparent conflict between the formal limited role of the judiciary and the potential for substantive lawmaking through appellate court decision making. Over the objections of legal realists, enduring, cross-national strains of political rhetoric evince a belief that judicial actions cannot or should not run contrary to the nation's "will." In Great Britain, parliamentary supremacy can overcome judge-made law; in France, courts have not historically stood long against strong political leadership. Both countries have faced challenges from European courts insisting that constitutional and human rights principles must trump domestic political sympathies. Importantly, as in Europe's supranational governance, appellate courts often fill an important role within their respective constitutional orders, that of refereeing disputes that bring into question the very structure of political power. In the Western tradition of [p. 82 ↓] "separation of powers," people call on courts to resolve disputes between the legislative and executive or bureaucratic branches. In federal systems, too, national courts frequently share the responsibility for dividing the authority of the central and regional governments.

An additional function of appellate decision making found in many systems is the expectation that judges can articulate and enforce norms of justice. As the highest legal authority, invested with discretion and politically independent, appellate courts can be viewed as the final opportunity to render justice. The U.S. Supreme Court has developed a "cult" status in American culture as the last resort for individuals seeking vindication of legal wrongs, especially when people make those claims against a dominant, majority sentiment. A significant rise in the number and status of constitutional courts over the second half of the twentieth century was particularly associated with the political and social freedom of individuals.

Impact

Though appellate courts have risen in prominence over the past century and have converged on a set of roles that make them central to the development of national policies, the actual impact of appellate court policy making presents an enduring problem. Many courts, especially in the developing countries of Latin America and Africa, lack the independence to rival other branches of government. Nevertheless, independence alone is insufficient to conduct successful judicial policy making or enact

political or social change. Even with their significant political capital, in note-worthy cases state and federal appellate courts in the United States have been limited in their capacity to develop judicial solutions and implement them directly. Thus, a significant area of academic inquiry over the past two decades has addressed the conditions in which appellate courts are able to make legal development translate into political, social, and economic development. The problem is especially vexing when viewed comparatively. Courts are at their peak of strength when their decisions overlap with popular and political majorities and when the legal nature of the dispute supports courts' claim of authority. When judicial policy making runs contrary to these conditions, governments have reduced appellate court actions to negligible influences, at least in the short term.

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Further Readings

Cappelletti, Mauro. (1989). *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press.

Feeley, Malcolm M., and Edward L. Rubin. (1998). *Judicial Policy Making and the Modern State* . Cambridge: Cambridge University Press.

Hertogh, Marc, ed. , and Simon Halliday, eds. (2004). *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* . Cambridge: Cambridge University Press.

Johnson, Charles A., and Bradley C. Canon. (1984). *Judicial Policies: Implementation and Impact* . Washington, DC: CQ Press.

Koopmans, Tim. (2003). *Courts and Political Institutions: A Comparative View* . Cambridge: Cambridge University Press.

Shapiro, Martin. (1981). *Courts: A Comparative and Political Analysis* . Chicago: University of Chicago Press.

Stone-Sweet, Alec. (2000). *Governing with Judges: Constitutional Politics in Europe* . Oxford: Oxford University Press.