The Right to Appeal and Workable Systems of Justice

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This article explores the practicalities of a right to appeal. Appeals and appeal systems are usually conceived of in terms of a top-down hierarchy, with appeals functioning as an instrument for superior bodies to correct the decisions of and otherwise to control inferior ones. A fuller appreciation of systems of appeal places at least equal weight on the need for appeal bodies to establish stable, workable relationships with the bodies which they supervise. The need for any appeal system to sustain a workable system of justice refocuses attention from hierarchical control to problems of deference by the superior bodies towards the inferior ones. This way of looking at appeals has the potential to illuminate many recent developments, and can be illustrated by describing recent reforms and reform proposals to both civil and criminal justice

The aim of this article is to explore the practicalities of a right to appeal. In so doing it tries to discern how the nature, functions and limitations of the functions of appeals circumscribe such a right.

Appeals and appeal systems are usually understood in terms of the supervision of inferior decision-makers by superior ones, with a view to providing the values of accuracy, fairness, consistency, and a mechanism for the generation of rules. And they are usually conceived of in terms of a top-down hierarchy, with appeals functioning as an instrument for superior bodies to correct the decisions of and otherwise to control inferior ones.[1] While these values and mechanisms apply to some degree within any appeal system, a fuller appreciation of systems of appeal places at least equal weight on the need for superior bodies to establish stable, workable relationships with the bodies which they supervise. The need for any appeal system to sustain a workable system of justice refocuses attention from hierarchical control to problems of deference by the superior bodies towards the inferior ones. From this perspective, rather different questions arise. How are the superior courts in the hierarchy to be restrained? How is the work delegated to inferior bodies able to remain delegated in the face of appeals? How are ideas of legitimate decision making, which point to the necessity of a right to appeal, resisted and countered? This way of looking at appeals has the potential to illuminate many recent developments, and can be illustrated by describing recent reforms and reform proposals to both civil and criminal justice.

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1 Conventional textbooks on the English Legal System describe the formal structure of the courts, correctly, in terms of hierarchy, but then proceed to attribute functions to appeal courts expressed solely by reference to their formal superiority. See, as examples, J.R. Spencer (ed), *Jackson's Machinery of Justice* (Cambridge: Cambridge University Press, 8th ed, 1989) chs 10 and 21; R. Ward (ed), *Walker & Walker's English Legal System* (London: Butterworths, 8th ed, 1998) chs 20 and 24; R. White, *The English Legal System in Action* (Oxford: Oxford University Press, 3rd ed, 1999) chs 9 and 16; M. Zander, *Cases and Materials on the English Legal System* (London: Butterworths, 8th ed, 1999) ch 7.

The nature of appeals

While the focus of this article is on appeals within the legal system, appeals play an important role throughout society, and are ubiquitous in modern societies. When any decision taken becomes available to be considered by a second person or body, or becomes available to be reconsidered by the original person or body that made the original decision, the conditions normally described as an appeal arise.[2] Modern societies, as they have grown more complex, have larger numbers of persons or groups with limited powers of decision making, or decision making for which they can be held accountable to other persons or bodies. However, being accountable and being subject to appeal are not necessarily the same thing. An appeal body within a given institutional structure is a body with authority to overturn a prior decision or to compel the original decision-maker to reconsider their decision.[3] This feature of appeals, 'going upwards' to have a decision changed, points to the hierarchical aspects of the process. But it also points 'downwards' to the problems of delegation. How can decisions that are delegated remain so, in the face of rights to appeal? On what basis will those who have power to overturn earlier decisions nevertheless defer to the decisions of their inferiors?

Rights to appeal create difficulties for delegation. The mere existence of a right to appeal has the potential to threaten the delegate's ability to deliver a final decision. This problem is minimised when the decision has standard or routine elements and where there is a consensus between the delegate and the superior body on how the decision should be reached, and what the substantive outcome should be. The reply on asking for a superior to countermand an inferior's decision is often: 'It will not make any difference, the superior body will decide it the same way'. To the extent that this reply is true, or at least believed to be true, there will be little point in appealing, and the number of appeals can be expected to remain small. Delegating routine decisions depends on those subject to the decision understanding their routine nature and why appeals are unlikely to be successful. In the absence of these conditions, decisions made by subordinates can only remain unchallenged if there are hurdles placed in front of those who might otherwise appeal. These can take many forms, both formal and informal, such as time limits, costs,[4] delay, procedural technicalities, etc.

Greater problems arise if the task to be delegated is not standard or routine: if there is more than one way to perform it and more than one possible outcome. Here, if the superior is prepared to make the decision afresh, appealing can clearly make a difference. Delegated decision making is not limited to slot machine

2 Normally described because, as Blom-Cooper and Drewry illustrate 'Appeal ... covers a multitude of jurisprudential ideas. It means different things to different men, in different places at different times.' L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972) 45. Chapter III of this book 'The Nature of the Appellate Process' is a particularly useful background to the analysis presented in this article.

3 This does not mean that the word appeal cannot be used in other contexts. Take the example of a game of cricket. When the fielding side believe that a batsman is out, they will appeal to the umpire. Here the word appeal represents deference to the authority of a decision-maker to make a decision. It can be distinguished from the use of the word to represent asking a higher authority for reconsideration of an original decision, although these two uses of the word appeal have similar roots.

4 If the right to appeal is restricted by the resources required, or one's status, then one has turned appeal into a privilege, and the first instance proceedings into something which a privileged litigant can win, but not lose. This point is of substantial practical significance. It might be that, under certain conditions, what might have been thought of as the crucial question of whether there is equal access to courts might in practice be the equivalent of the question of whether there is equal access to the appeal courts.

situations where a standard set of criteria produces an obvious outcome. What is delegated to decision-makers usually involves discretion: there are a number of ways to assemble the evidence required for a decision, and the decision itself is a matter for judgement. In this situation, successful delegation depends on the appeal body not interfering whenever it would, in the same situation, have come to a different conclusion. To adopt such a basis for appeals is potentially to undo what has been delegated.

This is not to suggest that rights to appeal run directly contrary to the ability to delegate decisions. Indeed, as a practical matter, the presence of rights to appeal often facilitates delegating decisions to those with lesser competence. In cases where a wrong decision is felt to have serious consequences (capital punishment, imprisonment, or the return of refugees to countries where they may possibly face torture) the presence of a right to appeal increases the legitimacy of whatever body is entrusted with those decisions. And conversely, even an excellent body cannot escape criticism arising from the inescapable fact that mistakes must sometimes occur. If there were no right to appeal then the decision, for this reason alone, could be thought of as lacking legitimacy.[5] Thus, not only is delegation efficient, it is for most forms of modern decision-making indispensable. The choice for those constructing decision making institutions is often whether to have a cheap inferior body with a superior appeal body, or a superior decision making body with an even more superior appeal body above it. The establishment of rights to appeal is a condition that assumes delegation, and cannot therefore be seen as running contrary to it.

The functions of appeals

Although formal appeal systems may be ubiquitous in modern societies, and the existence of a right to appeal implicit in many, if not all, institutional arrangements for decision-making and dispute resolution, what appeal systems do, how they function or what their functions are is less easy to generalise. This is because the functions of appeals, beyond the suggestion that they can call into question the decision of some other body, are simply not given for having appeal bodies. Appeal bodies hear appeals. But what is involved in appeals can vary along a spectrum from a complete rehearing to a review to see if a decision was taken in accordance with the mandate (however broad) of the first instance body. At best one can attempt to rationalise the practices, processes and outcomes of appeal bodies, and thereby try to produce generalised statements of their functions.

Let us start with one common function universally attributed to appeals, but perhaps the narrowest function of appeals: to allow the parties to an earlier decision to have the matter decided anew. This function of appeals is of the greatest interest to the previously dissatisfied party. Indeed, when lay persons think about appealing, what they want is for their claim or version of events to be upheld or accepted. They are dissatisfied with the verdict or decision of the first body, and want another body to decide the matter correctly meaning both, in their favour, and

5 Hence the attempt within some international human rights documents to establish a 'right to appeal' as a precondition to or a characteristic of a right to a fair trial. Here the idea is that the ability to appeal from any decision itself legitimates that decision. We have argued elsewhere how appeal mechanisms are used to legitimate inevitably flawed aspects of decision making within the criminal justice system ('The Never Ending Story: Disguising Tragic Choices in Criminal Justice' (1997) 60 MLR 293).

upholding their version of events.[6] This layman's call for another body to re-decide an issue points to the feature that is common to all systems of appeal: hierarchy. However, the factor that principally distinguishes different systems of appeal is not hierarchy as such, but the way and extent to which the hierarchical role is restrained. What deference is shown to the first instance body? To put this another way, what is the status of the first instance proceedings in any particular system of appeal? By exploring what role is left to first instance bodies in different systems of appeal, one is better able to consider the range of functions or effects of appeals.

Many of the functions of an appeal body can only be fully understood in terms of its relationship to the body whose decisions are appealed to it. The restrictions which are placed upon an appeal body, or which it places upon itself, identify the respective functions of the appeal body and, to some extent, the first instance body. In the context of this relationship one can talk about appeals having particular functions, and thereby focus on the practical meaning of a right to appeal. To illustrate this, let us return to our narrowest function of appeals: to allow the parties to an earlier decision to have the matter decided anew. If superior bodies re-decide cases when disputants are dissatisfied, issues of legitimacy arise when we consider whether or how access to these superior bodies should be limited. Or, in other words, to what extent the right to appeal can be restrained. If all dissatisfied persons have unlimited access to such appeals, then the right to appeal threatens to turn the first decision maker's role into at best a preliminary stage, and at worst a nullity. The need to ensure that first order bodies make decisions which, at least on some occasions, dispose of the matters before them, points to the need to restrict appeals in some manner. The crucial question, the answers to which give rise to discussions about the functions of appeals (an idea that presupposes a distinction between first order decisions and decisions made on appeal) is how appeals are to be restrained.

From de novo appeals to enforcing rules

If an appeal body goes so far as to receive all the evidence afresh, this threatens to turn the first instance decision into a preliminary hearing. Little, if any deference is being shown to it. However, one should be careful not to leap to the conclusion that such first instance proceedings thereby have no function. As preliminary hearings they provide parties with a preview of the case that they will have to make, or meet, on appeal. And as decision-making bodies, whose decisions are binding in the absence of an appeal, the first instance decision may operate as an important staging post; steering disputes into the appeal system that might otherwise not enter that system at all. Thus, for example, in situations of colonisation, colonial appeal courts which operated on this basis may have served to reinforce the authority of an imperialist legal system in a manner more efficient than by simply substituting their own first instance procedures for those of an indigenous people.[7] However,

6 Such a wish will often remain unfulfilled. Blom-Cooper and Drewry (n 2 above, 45) make this point succinctly. 'The layperson's expectation of an appeal is very often quite different from that of the lawyer and many an aggrieved plaintiff denied his 'just' remedy by judge or jury has come upon the disturbing reality that in England a disputed finding of fact can seldom, if ever, form the basis of an appeal'.

7 See M. Schapiro, 'Appeal' (1980) 14 *Law & Society Review* 629, 638–41. Such a relationship is also compatible with the systems of patronage practised alongside the courts in many countries in the past. Take the example of the ability of the English ruling class in the 18th century to secure pardons for such of their tenants as showed suitable deference to their authority. This ability undermined the

first instance decision-makers are more commonly treated with greater deference than this, and play a more significant role. Even where matters are decided *de novo*, appeal courts usually rely on the reports of evidence submitted to the first instance body, rather than hearing all the evidence anew. Appeals are commonly based on the record provided by the first instance body. In this situation, the first instance body has a preferred fact-gathering role.

As soon as an appeal system defers to or leaves some part of the original proceedings in place the relationship between the appeal court and the first instance body involves elements of supervision and interdependence. While the appeal body can reject what it is offered, call into question not only the decision reached upon the facts, but the manner in which those facts have been elicited, it will often not do so. At the same time, a supervisory relationship points to a need for consistency. Where first instance bodies have conducted themselves in the manner required by the appeal body, the record of evidence generated by them should not normally be rejected on appeal. To do this, to show no deference even where the inferior body has acted in the manner required, threatens to undermine the supervisory relationship. This same dynamic operates where the inferior body has, as is usual, a more significant role: not only conducting proceedings for the presentation of evidence, but making findings as to the meaning of the evidence presented. If the appeal body wishes this responsibility to be left to the inferior body, it has to show deference when those findings have been made in an appropriate manner.

Legally articulated rights to appeal include restrictions imposed through time limits, size of sentence or damages, etc, and represent clear statements about when appeal bodies must defer to first instance bodies. Such formal restrictions to the right to appeal are sometimes justified in terms of the consequences to the parties of allowing appeals. For example, that an appeal lodged after a certain period may create too great a cost in view of the reliance placed on the original decision by the winning party, which should not then be disturbed. But in many cases the reason for such a bar is not the consequences to the parties of allowing the individual appeal, but the aggregate cost to the decision making process as a whole if appeals are not rationed.[8] In these circumstances, when looked at from the perspective of an individual case, limits on the ability or right to appeal can appear arbitrary.

Alongside formal restrictions like time limits and informal ones like cost and delay one finds situations in which the appeal court needs to find justifications for not retaking decisions. In other words, it has to find reasons why, despite being the superior tribunal, it is less able to carry out the task delegated to the inferior body. The most typical example of this in the courts is the fact/law distinction. An inferior tribunal is often given sole power to elicit and/or decide questions of fact. The distinction between fact and law is easy to locate when the task delegated to the inferior tribunal is the hearing of witnesses. This allows a superior tribunal to make sense of its unwillingness to undo the delegation of this task by asserting its

finality of death sentences, but served to legitimate both the system of trial at first instance, and the general social hierarchy. See D. Hay, 'Property, Authority and the Criminal Law' in D. Hay et al, *Albion's fatal tree: crime and society in eighteenth-century England* (London: Allen Lane, 1976) ch 1.

8 Schapiro and Posner take this analysis even further. Schapiro demonstrates how this rationing impacts to a different extent on different groups, thereby operating as a form of 'distributive politics' (Schapiro, n 7 above, 637–638). Posner's approach to appeals suggests that the respective ability of different groups to overcome the rationing of appeals (by cost) promotes efficiency (*Economic Analysis of Law* (Boston: Little Brown, 5th ed, 1998).

own inferiority: it has not seen the witnesses. Deference to the inferior tribunal is justified by the fig leaf of a widely held but scientifically questionable view that seeing witnesses giving evidence provides a reliable basis for assessing the veracity of their evidence. Greater problems arise when the task of deciding facts is delegated to an inferior tribunal where there are no witnesses or where, as with expert witnesses, listening to their evidence has little to do with forming an opinion as to its credibility.[9] Here, where it seems obvious that the appeal body is as qualified (or given its superior qualifications perhaps more qualified) to decide the matter for itself, refusing to decide the matter anew, or referring the matter back to the first body for decision, may seem arbitrary and unjustified in the individual case. The fact/law distinction in such cases does not simply go to the gathering of evidence, but the exercise of judgement. Delegating to such a body the authority to decide facts relieves the appeal courts from the task of exercising particular kinds of judgement. While the manner in which such judgements have been reached, the reasoning used to justify them, and the substantive decision in the case can all, if the appeal court wishes, be described as points of law or mixed law and fact, a willingness to do this has the potential to encourage appeals.[10] This can easily undermine the delegation of decision making to the inferior tribunal. At its most basic, this formula merely points to the practice that appeal bodies who wish to rely on the record of evidence established by first instance deciders cannot reject everything which they found or did. Some responsibility for fact gathering must remain with them. But having responsibility for finding facts, by itself, places no restriction on the directions that may be given by an appeal body as to the manner in which that fact gathering exercise should be carried out (procedures, presumptions, etc). All of these directions can be subsumed under the rubric of 'questions of law', or mixed questions of law and fact.

Given the elasticity of the distinction between questions of fact and of law (or of mixed questions of law and fact) one can argue that appeal bodies can have relationships with inferior tribunals which range from forms of cultural imperialism at one extreme, to ones involving significant delegation with high levels of deference and tightly circumscribed bases for appeal at the other. Where appeal courts have little respect for an inferior body then, even in the absence of formal rights of *de novo* appeal, they can readily identify points of law which allow them to reach different conclusions to the first instance body. As in the situation of colonisation, such successful appeals will tend to reinforce the legitimacy and

9 In rehearsing the arguments about the reliability of expert evidence, Redmayne points out: 'The jury will probably not gain as much from the cross-examination of an expert as it would from an ordinary witness, because ordinary credibility cues would be unlikely to tell the jury much about the reliability of the expert's evidence.' M. Redmayne, *Expert Evidence and Criminal Justice* (Oxford: OUP, 2001) 125.

10 An example of where this is not the case is an appeal to the Crown Court from a magistrates' court based on the claim of, simply, error of fact or mixed fact and law (Magistrates' Courts Act 1980, s 108). In such cases, rather than the other avenues open to a person convicted in a magistrates' court (to appeal to the High Court by way of case stated or judicial review), a complete rehearing is undertaken (Supreme Court Act 1981, s 79(3)), and no leave to appeal is required. However, such an appeal has to be lodged within 21 days of the decision (Crown Court Rules (S I 1982 No 1109, r 7), or leave is required. The judicial statistics suggest that on average some 14,000+ appeals to the Crown Court against conviction and/or sentence occur each year. The only system of rationing operating is an informal one in which only a certain number of persons are willing to take the time and suffer the expense (normally an unsuccessful appellant will be liable for the prosecution's costs in resisting the appeal) of undertaking such an appeal. See our later discussion of current reform proposals to reformulate the division of responsibilities between the magistrates' court, Crown Court and Court of Appeal.

superiority of the appeal body.[11] But the ability of appeal bodies to deny deference to first order decision makers depends upon the reaction of such bodies, and the parties before them, and the adequacy of the appeal courts in turn to handle those reactions. So, for example, an unwillingness to defer to the functions formally delegated to a tribunal may have little consequence, to the extent that this is not known to other similar tribunals or to the parties before them, or if it is viewed as exceptional or aberrant. But if it is viewed as a precedent, as indicating a significant willingness to interfere on a similar basis in future, then the appeal body will face the prospect of an increasing number of appeals.[12] The appeal will have signalled to parties that the matters formally delegated to the first instance body are only provisionally so delegated. In the last instance, and subject to the willingness and ability of parties to appeal, these matters are really a function of the appeal body. Such changes in behaviour may not be limited to the parties. Without deference to the tribunal or lower court's formal role, the tribunal is no longer fully *responsible* for that function. In cases where the parties will clearly have the ability and willingness to appeal against any adverse decision, the first instance body is no longer deciding a matter, but only indicating a manner in which it ought to be decided.

Even where an appeal body wishes to show maximum deference to an inferior tribunal the minimum basis for review is the need to ensure that the inferior body has, in practice, a limited jurisdiction. If there were no mechanism for review, the rules that identified the task delegated to the inferior bodies would be left to those bodies to interpret for themselves. At this level of deference, the hierarchy dissolves. Within literature on the courts, this minimum role is articulated in terms of the monopoly of appeal courts to decide on the meaning of substantive rules of law.[13] While the boundaries of what constitutes a question of law is always open to dispute, the minimum content of such questions coincides with this residual supervisory role. It represents a level of supervision in which appeal rights correspond to judicial review. Ideas of the rule of law, the need for limited jurisdictions to be maintained via some mechanism of enforcement, justify the role played by appeal courts in reviewing inferior tribunals and that played by courts in reviewing government officials. At this point, legal rights to appeal become synonymous with ideas of legality.[14] But once this right of intervention is conceded, ideas of legality do not provide a stable and practical basis for successful

11 See note 7 above. While such a lack of deference may not lead to a process of patronage (where appeal is to, say a government official, rather than a superior court) it does favour certain classes of litigant. The lesser degree of deference shown by more expensive appeal bodes to their cheaper subordinates, the more a system of appeal favours those who have the resources to appeal over those who do not.

12 A good illustration that can be given is of when the standard for allowing appeals in criminal cases was changed in 1966 to 'unsafe or unsatisfactory'. This statutory change, and the example of high profile cases succeeding which had earlier failed, created a perception that more appeals would be allowed. The annual numbers of applications for leave to appeal rose from around 2,000 annually to 12,000 annually (see Zander n 1 above, 557). A Practice Direction issued by the Lord Chief Justice, Lord Parker in 1970, giving discretion to judges to order that time served would not count if the appeal were judged to be 'frivolous' had an immediate effect. 'The numbers of applications for leave went down by about half and remained at the lower figure of 6,000 a year for several years.' (Zander, *ibid*).

13 Of course this operates via the 'brooding omnipresence' of *stare decisis*, 'the very essence of the English common law system'. (Blom-Cooper and Drewry, n 2 above, 65).

14 We are not saying that all judicial review is about legality, or that all appeals on questions of law are reducible to judicial review, only that this minimum residual role is about legality. The requirements of legality are often used by judges as a rhetorical starting point from which to assert degrees of supervision that go beyond this.

delegation of decision-making. At its most extreme, the ideology of the rule of law points to a common interpretation of statutory provisions, and a common set of normative standards, enforced by appeal courts on all bodies within their jurisdiction. But such a level of supervision is not sustainable. Specialist tribunals are expected to reach interpretations of provisions that would not occur to an appeal court, and to bring to bear normative standards, based on their experience, that are not open to the reviewing body. Linguistic oppositions such as that between fact and law, or intra vires (legal) and ultra vires (illegal) cannot capture the different willingness of the various appeal courts in different areas to delegate authority to decide the appropriate basis for resolving disputes.

In seeking to construct relations of deference that restrict what can be appealed (which in turn generate functional understandings of the role played by appeals) law faces distinct problems arising from its own rhetoric. The rhetoric of law is particularly favourable to appeals. The innocent should not be convicted. Claimants have a right to justice according to the law. If mistakes and errors cannot be corrected because inferior bodies are insulated from appeals, what are the implications for ideas of parliamentary sovereignty, or the rule of law? This rhetoric makes it difficult for law to shut out the possibility of appeal, or to restrict the possibilities of review in terms of other values such as cost, or efficiency, which have no simple translation into its own rhetoric. Law needs management (to control costs, ensure value for money, etc) just as much as any other bureaucratic basis for making decisions. But to articulate restrictions on the right to appeal in terms of efficiency or cost runs contrary to the values by reference to which law, and lawyers, articulate legal practices. There is no claim which is so small that it could not raise important questions of legality and justice: the rhetoric of law provides a particularly powerful steer towards appeals that has a considerable potential to undermine or undo delegation.

Finality

The need for deference is not limited to the relationship between superior and inferior bodies. It also has a horizontal aspect. Where there is a right to appeal the question that also arises is, how often? Appeal bodies need to defer to their own earlier decisions, to resist claims that new arguments or evidence, or the simple fact of reconsideration, will produce a different result.[15] Where appeals are a slot machine exercise, in which only one answer can be reached by any appeal body, the need to curb appeals duplicates the problems of appeals from similar kinds of first instance decisions. Even here, parties who do not understand the inevitability of the outcome or who enjoy collateral benefits from appealing will still launch appeals. But, again, the problem becomes more acute where the appeal body exercises judgement, and where a different membership, or the same membership on a different occasion, might reach a different answer. Unless the appeal body can justify the claim that there is only one outcome open to it (the slot machine situation) a refusal to hear an appeal can, from the perspective of the losing party, appear arbitrary.

15 For example, formally, in the context of criminal appeals from the Crown Court to the Court of Appeal (Criminal Division), there is only the possibility of one appeal, or one application for leave to appeal (*R* v *Pinfold* [1988] QB 462). Thereafter a new appeal is only available following a reference from the Criminal Cases Review Commission (Criminal Appeal Act 1995, s 9).

In the literature on appeals, the need to defend earlier decisions is analysed in terms of finality: the need to have a final decision at some point in the system.[16] While this concern is present at all levels in any system, to concentrate on finality (the need to have any process of decision making end somewhere) says little about the relationship between appeal bodies and inferior tribunals. Finality is achieved so long as appeal bodies, at some point and at some level in the system, defer to their own earlier decisions. But maintaining a workable appeal system involves more than this. Usually deference goes not only to earlier decisions by an appeal body, but to ensuring that the decisions of the inferior body are not appealed against. This aspect of the appeals relationship can be illustrated through analysing recent developments in both civil and criminal justice.

Reforming civil and criminal justice from the perspective of appeals

Civil Justice

Recent reforms of civil justice point to changing functions for different courts, and correspondingly new relationships between the appeal courts and the bodies whose decisions and procedures they supervise.

It is not easy to talk about the functions of appeal bodies, or the system of deference this implies, on the civil side. This is because of the great array of first instance bodies. However, there are general themes and issues (which themes echo those of criminal justice). First, there is rhetoric about justice that puts pressure on the system to provide appeals. At an abstract level this implies a right to the correct decision, and as a consequence a mechanism for remedying error. Nevertheless, public commitment to provide correct decisions and avoid 'miscarriages of justice' would appear to be far less in civil justice cases than in criminal ones.[17] That said, the right to appeal has formed an important element in the judiciary's understanding of their own role, and the role of law. Without appeals, inferior bodies could decide the meaning of their own jurisdiction and powers. Thus, even where no formal rights to appeal have been given, such as historically with tribunals, these bodies have found themselves subjected to a system of control via what, after 1977, has been termed judicial review.

A brief review of the nature of civil appeals should demonstrate their potential and considerable powers. The appeals that have been offered from lower courts have always been very wide. Prior to the recent reforms, appeals from the High Court on questions of fact or law normally required no leave. Until 1981, a similar situation arose with appeals from the County Court to the Court of Appeal. Since then, leave has been required, but only in cases involving monetary sums below a specified minimum level. Initial attempts to create tribunals without a right of

16 The structure of appeal systems is organised through hierarchy and finality. Thus, at the top of the appeal structure is a body known as the 'final' court of appeal. In practice, this designation does not necessarily end the possibility of appeals. The appeal might take other forms or be directed to other authorities. This is clearly illustrated by the comparison of 'Finality' in US and English appellate courts, in D. Karlen, *Appellate Courts in the United States and England* (New York: New York University Press, 1963) 158–159.

17 One way in which this point can be easily demonstrated is by looking at newspaper reporting of successful appeals. In criminal cases, no matter who the appellant is, such reporting can often achieve the status of first page news, or first item on television news, but this is rarely if ever the case with civil appeals unless they involve glamorous persons or government ministers.

appeal to the courts were defeated by the courts' insistence that tribunals were subject to judicial review. Though judicial review is never supposed to question the merits of decisions, but only their legality, the scope for courts to interfere in particular decisions if they should so wish (by reference to criticisms of the manner in which that decision has been reached, etc) is not closed off by this opposition. Indeed, Lord Woolf has admitted that there is little difference between judicial review and an appeal on questions of law,[18] and in turn, the distinction between fact and law has been described in the following terms. 'Appellate courts have worked so hard at eroding the boundary between facts and law that today almost any issue can be characterised as a question of law or a mixed question of law and fact, and in either case appropriate for appellate consideration'.[19]

Changes to the procedures of inferior bodies have increased the practical possibilities for appeals. Historically, the civil courts shared the use of the jury, and resulting lack of ability to appeal. The distinction between fact and law was established not logically, but in the separate roles of judge and jury. Appeals were on the record, and the record was limited. Appeals on questions of law grew, as the judges' conduct of the proceedings was increasingly part of that record. With the decline of civil juries, we have an increase in the ability of appeal courts to review civil proceedings. Civil judges record the manner in which they have come to their decisions, and the right to such reasons in civil courts has become part of the standard of civil justice, with the Tribunals and Inquiries Act 1957 making this a requirement of nearly all tribunal decisions as well. Not only are tribunals supposed to give reasons, but a failure to give adequate reasons is itself an independent basis for appeal. Increased use of documentary evidence, and the creation of tribunals who reach decisions entirely on the basis of evidence supplied through correspondence, often leaves no reason, other than self-imposed restraint, for the appeal court to defer to the decision making ability of the first instance body.

Recent reforms of civil justice have taken place against the background of a concern with access to justice. Justice in this context is an empirical matter: more cases need to be processed at lower cost. This approach to justice shares the characteristics of many earlier developments in the mechanisms available to process civil claims: the growth of the system of tribunals after the second world war, the introduction and growth of Ombudsmen schemes, the developing use of mediation and other forms of alternative dispute resolution (ADR). The ability of first instance mechanisms to conduct large numbers of cases at low cost depends, quite crucially, on the relationship between those first instance mechanisms and their appeal bodies, in particular, their relationship with the appellate courts. One cannot achieve low cost, high volume processing of civil claims, in the face of large numbers of appeals, especially if the appeal bodies are the Rolls Royce institutions of the civil justice system. This fact has implications for the debate on access to justice. Wide rights of appeal on questions of fact, or liberal interpretations of what can be dealt with on an appeal limited to points of law, threaten to turn first instance decisions into preliminary rulings. Those who have the resources to take the matter to a higher level can delay the processing of a case, increase the costs of processing it, and give themselves a second chance (denied to more indigent parties) when decisions go against them.

18 '... the concept of what amounts to an error of law has been extended so that it virtually covers the same ground as is covered by a *Wednesbury* review.' H. Woolf, 'A Hotchpotch of Appeals – the Need for a Blender' (1988) 7 Civil Justice Quarterly 44, 48.

19 Shapiro, n 7 above, 648.

At one level all this is obvious. However, those who discuss the justice of trial and appeal procedures in terms of qualitative outcomes, tend to downplay the extent to which appeal mechanisms, which offer the prospect of superior decisions and thereby increased justice, threaten to reduce the quantity of justice, as viewed in access to justice terms. Until now most discussion of the relationship between access to justice and the function of appeal courts has focussed on a particular relationship, that between tribunals and appeal courts. The Franks Committee, which provided the recommendations that led to the Tribunals and Inquiries Act 1958, was more concerned with the quality of decisions, than the increased costs which might follow from widespread rights to appeal.[20] Thus it recommended that every tribunal should be supervised by an appeal tribunal which could consider questions of fact, law and the merits of the case; and that there should also be an appeal to the courts on points of law, and a right to judicial review. The recommendation that every tribunal should have an appeal tribunal (ie that there should be little deference to the decisions of tribunals at first instance) was not enacted. Appeals as of right were limited to points of law, and then only applied to specific tribunals, although all tribunals were to be subject to judicial review.

In more recent times, the Woolf Report's reform proposals[21] show perceptive awareness of the ability of liberal rights to appeal to undermine attempts to increase access to justice in the court system, just as they have on other occasions with respect to other decision makers. This is a perception that Lord Woolf shares with Michael Zander, one of his strongest critics. Zander has claimed that any savings in costs made by standard time limits for the processing of litigation (in cases assigned to the new fast track category), and by discretionary orders made by judges (in managed cases) would be undermined by the costs of processing enormous numbers of appeals made against these time limits and orders.[22] He felt that such appeals would be further fuelled by inconsistencies between decisions at the first instance (which would encourage litigants to appeal to seek a clear ruling) and by inconsistent decisions at the appeal level (when courts faced with matters of discretion would feel unable to give clear rulings). Lord Woolf anticipated this reaction. In his Final Report 'Access to Justice' he sought to close down the rights to appeal. Under rules made in accordance with the Bowman Committee's Report 1997 (on which Lord Woolf served)[23] rights to appeal on questions of law and fact (which includes the new case management orders and fast track timetable) are to be limited by the need to obtain leave.[24] And in deciding whether to grant leave, or allow appeals, those responsible are specifically pointed towards the discretionary

20 On Administrative Tribunals and Inquiries, Cmnd 218 (1957). The committee was criticised for this priority at the time, see B. Abel-Smith and R. Stevens, *In Search of Justice* (London: Penguin, 1968) ch 7, esp 227.

21 Final Report 1996 <www.lcd.gov.uk/civil/finalfr.htm>, as enacted in the Access to Justice Act 1999 and the new Civil Procedure Rules, particularly Part 52. The new civil justice reforms centre on the ability of the Courts to identify cases that are appropriate for a new fast track system. Such cases are processed at a standard rate by reference to prescribed time limits for each stage. Above this level, cases will move at a more flexible rate, but no longer at the rate determined by the action (or inaction) of the parties themselves. Instead judges, via orders setting out the steps to be taken, will actively manage cases and the time allowed for this. The reforms are premised on the assumption that a greater number of cases can thereby be processed, at lesser cost, resulting in an increased access to justice.

22 M. Zander, 'The Government's Plans on Civil Justice' (1998) 61 MLR 382.

23 Review of the Court of Appeal (Civil Division), <www.lcd.gov.uk/civil/bowman>.

24 In the USA, moves to restrict the right to appeal by introducing requirements for leave prompted a wide debate in academic circles on the differences between these two forms of appeal rights. For a sense of this debate see H. Dalton, 'Taking the Right to Appeal (More or less) Seriously' (1985) 95 *Yale Law Journal* 62.

(i.e. potentially inconsistent) nature of the decisions which will be made, and the danger to the reforms if deference to those decisions (a willingness to accept inconsistency) is not shown. This is clarified in the judgment of Brooke LJ in *Tanfern Ltd* v *Cameron-MacDonald* quoting from the new Civil Procedure Rules.

> As a general rule, every appeal will be limited to a review of the decision of the lower court. ... The appeal court will only allow an appeal where the decision of the lower court was wrong, or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court: CPR, r 52.11(3). This marks a significant change in practice, in relation to what used to be called 'interlocutory appeals' from district judges or masters. Under the old practice, the appeal to a judge was a rehearing in the fullest sense of the word, and the judge exercised his/her discretion afresh, while giving appropriate weight to the way the lower court had exercised its discretion in the matter. Under the new practice, the decision of the lower court will attract much greater significance. The appeal court's duty is now limited to a review of that decision, and it may only interfere in the quite limited circumstances set out in CPR, r 52.11(3).[25]

In stating his general approach towards appeals, Lord Woolf pays lip service to the idea that appeals are an important right, whilst simultaneously seeking to dilute the right to appeal to a higher court into a right to have someone consider whether undertaking an appeal should be allowed:

> An effective system for appeals is an essential part of a well-functioning system of civil justice. ... Save in exceptional cases, an individual who has grounds for dissatisfaction with the outcome of a case should in my view have at least the right to have his case looked at by a higher court, if only to consider whether to allow an appeal to proceed any further.[26]

This dilution of the right to appeal is used to introduce widespread new restrictions (most important of which is an increase in the need for leave). These restrictions on the right to appeal are not only a function of the need to avoid undermining the reforms designed to increase the number and lower the cost of first instance decisions. There was also a concern that lower court decisions were generating more appeals than the appeal courts could manage. This is made clear in the Bowman report, when a previous Master of the Rolls is quoted from his 1994/5 report on the Court of Appeal:

> The delay in hearing certain categories of appeal in the Civil Division of the Court of Appeal has reached a level which is inconsistent with the due administration of justice. On current projections there is every reason to think that over the next few years the situation will (if nothing effective is done) get worse and not better.[27]

One remedy for this would be to increase the numbers of Lords Justices, and thus the output of the Court of Appeal. Although, if an increased number of courts and judges resulted in more inconsistent outcomes, such a reform could further fuel the number of appeals. The alternative solution, as adopted in Woolf's Final Report, is to discourage appeals by increasing the deference to (and tolerance of inconsistency within) the trial courts.

The main features of the new regime, as instigated by the Access to Justice Act 1999 and new Civil Procedure Rules, are that every appeal is to be limited to a review of the decision under appeal unless the appeal court considers that a rehearing should be held in the interests of justice. This review will take place on the basis of the evidence presented at the original hearing, with fresh evidence to be permitted only for good reason. All appeals will require leave, and there will be

25 [2000] 1 WLR 1311, 1317.
26 n 21 above, ch 4.1.
27 n 23 above, ch 1.3.

no right to appeal against a refusal to grant leave to appeal. Second appeals are to be even more constrained, with leave being granted only where the case involves an important point of principle or practice. Alongside these restrictions, there has been a reallocation of work between different courts. The High Court is to take over much of the work from the Court of Appeal as an appeal court from the County Court, with the Court of Appeal operating as a second appeal court in such cases.

It is claimed that the new requirements for leave will reduce the number and the type of cases that are appealed to the Court of Appeal. It is unclear whether this will also lead to a reduction in the workload of its judges, as the reduction in numbers is intended to allow for an increase in quality, in particular by allowing Court of Appeal judges more time to work through appeal papers prior to hearings (which may in turn shorten the time required to hear each case). Not only will its caseload be reduced by its power to deny leave in cases where it is the appeal court, but by making leave decisions final it has been insulated from appeals against refusals to grant leave to appeal to the High Court from the County Court.[28] Other reforms are intended to bring matters before the Court that might otherwise escape its review. The Court of Appeal is expected to select some appeals which it considers raise issues which require its rulings, to by-pass the High Court instead of waiting for the parties to choose to bring a second appeal.[29] Such selections will potentially enable the Court to carry out its law-making role better: identifying principles appropriate to an area of law.[30] If the Court of Appeal can give greater attention to this law-making role, it may in turn increase the House of Lord's ability to carry out the constitutional role which has been thrust upon the courts by the Human Rights Act 1998. To put this in more day-to-day management terms, the House of Lords will be under pressure to reserve its limited docket to give guidelines as to the meanings of the various rights incorporated into English law by the Act. This leaves less room for indeterminate areas of conventional common and statute law to be certified as matters of 'general public importance'.

The requirement of leave will not simply save judicial time in the Court of Appeal by excluding unarguable cases. The standard for leave in cases appealed from the High Court to the Court of Appeal is principally that there is 'a real prospect of success'.[31] The standard involved from appeal decisions by the County Court or High Court to the Court of Appeal is even tougher. Such second appeals are only available where '(a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it'. Only the Court of Appeal can give leave.[32] Of course, what a Court of Appeal judge sees as likely to succeed at the Court of Appeal depends upon that Court's relationship to the courts that it supervises. If the Court of Appeal is to establish itself as more of a law-making body, then it has to exercise greater self-restraint and be less willing to interfere with the decisions of the High Court. If it

28 'Where – after hearing an application for permission – the appeal court refuses permission to appeal, there is no right to appeal against that decision'. D. di Mambro (ed), *Manual of Civil Appeals* (London: Butterworths, 2000) 4.

29 Access to Justice Act 1999, s 57(1).

30 Jacob sees this as part of wider changes to the culture of the Court of Appeal whereby it will 'manage' the production of law using bureaucratic techniques, see 'The Bowman Review of the Court of Appeal' (1998) 61 MLR 390.

31 Civil Procedure Rules 2000, 52.3(6). The phrase 'real prospect of success' does not, apparently, require 'any amplification': see the judgment of Lord Woolf MR in *Swain* v *Hillman* [2001] All ER 91.

32 Access to Justice Act 1999, s 55.

manages to establish self-restraint, and show greater deference, then leave will operate as an effective filter. The requirement of leave in cases tried in the County Court point even more explicitly to the Court of Appeal's new functions. First appeals, on questions of fact or law, will no longer be to the Court of Appeal, but to the High Court. Second appeals to the Court of Appeal will be allowed but, as has already been noted, leave for them will only be given 'where the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it'.[33]

The knock on effect of these changes on the High Court remains to be seen. The work of High Court judges is going to increase. As well as an increased role in giving leave (where appeals are from the County Court on interlocutory matters and from deputy judges dealing with final and interlocutory matters), they must also take over appeals from County Court judgements for all fast track cases dealt with by circuit judges on matters of fact and law.[34] The relative willingness of the High Court and Court of Appeal judges to substitute their own judgment in place of County Court decisions will depend on a number of factors, but crucial to this will be the need to establish a workable supervisory relationship with the County Court. If the High Court shows little deference to the decisions of the County Court, it will encourage appeals. If the work of supervising the County Court represents a major increase in the work of the High Court, its ability to supervise other tribunals will decrease. There is a potential in all this for the High Court to end up in a situation similar to that faced by the Court of Appeal prior to these reforms, where rationing occurs through a process of delay engendered by impossible workloads. Some amelioration should be achieved through the stricter time limits being imposed on appeals and the more restrictive rules permitting the extension of those limits 'in accordance with the overriding objective'.[35] However, without new formal restrictions on the right to appeal being put in place (for example, leave requirements for appeals from the County Court or inferior tribunals) the only means for the High Court to reduce its workload is to increase its deference towards the bodies that it supervises.

Criminal Justice

Recent developments in the criminal justice system also demonstrate the difficulties faced by appeal bodies in maintaining a relationship of deference to first order decision-makers. The system of criminal appeals is formally unbounded. Convictions must be quashed if they are 'unsafe'.[36] While the statutory formula for the Court of Appeal, Criminal Division's authority has changed periodically since the creation of the Court of Criminal Appeal in 1907, it has always had the practical authority to quash any conviction which it regarded as 'unsafe', whether that term is interpreted to refer to a factually incorrect verdict, or one involving a procedural irregularity. And in forming a view of the features of such unsafe verdicts, it has a formal power to regard any practice within the system of

33 *ibid.* The restrictive policy underlying this statutory formula appears so far to have been embraced by the Court of Appeal: 'Parliament ... has now made it clear that it is only in an exceptional case that a second appeal may be sanctioned'. *Tanfern Ltd* v *Cameron-Macdonald*, n 25 above, 1319.

34 The Access to Justice Act 1999 (Designation of Appeals) Order 2000, art 3(1).

35 See the Civil Procedure Rules 2000, 52.4 and the relevant parts of the Civil Procedure Rules, Practice Direction 52 as set out in n 28 above, 69–71.

36 Criminal Appeal Act 1995, s 2.

investigation and trial as suspect. Its pedigree as a hierarchical body, with responsibility for supervising (through its ability to declare what constitutes a miscarriage of justice) every aspect of the criminal justice system is, when considered solely by reference to its statutory powers, beyond question. But alongside this formally unlimited authority, the Court of Appeal has, since its inception, constructed a relationship of deference to the system that it must supervise.

For the most important criminal cases, a system of deference requires the Court of Appeal to construct mechanisms that enable it to uphold the jury's verdict. The history of the Court of Appeal demonstrates the difficulties that it has faced in maintaining this relationship of deference. The rhetoric of the Court of Appeal has, since its inception, stressed that the task of deciding whether a defendant is factually guilty or not, is not a task given to itself, but to the jury.[37] Sometimes this claim forms part of a constitutional argument: parliament (or the common law) has given this task to the jury. Sometimes it is a claim that the jury has a superior ability to get at the truth, having seen the witnesses, being formed of persons who have a broader experience of social life, etc.[38] The constitutional argument suffers from parliament's willingness to enact legislation which places no formal limits on the ability of the Court of Appeal to re-hear evidence.[39] While claims that the jury is a superior decision making body suffer from the handicap that, even if this is credible as a general claim, and even if true in most cases if one was deciding which body should have responsibility for trials, it has obvious weaknesses in the circumstances of appeals. Appeals, if based on the claim that the defendant was factually innocent, are likely to take the form of a forensic dissection of the prosecution's case. If, for example, scientific evidence is challenged, Court of Appeal judges are expected to receive evidence at a level of technicality that will rarely have been presented to the jury. And, given the invariable process of selection that occurs during any investigation and trial, an appeal can raise evidence and arguments that were simply never put to the jury. It is difficult then to claim that the jury has a superior ability to assess what they never saw or heard.

Alongside this rhetorical commitment to the superiority of the jury as decider of fact, there are more formal limits to the right to appeal. Originally, once the Court of Criminal Appeal had been established, appeals were only available as of right on questions of law,[40] provided that notice of the appeal was given within 10 days after conviction.[41] Now the right to appeal against convictions in serious cases is made subject to a requirement of leave or certification of the judge at trial in all cases, with application for leave assigned to a single Court of Appeal judge[42] or the

37 'The jury are the judges of fact. The Act was never meant to substitute another form of trial for trial by jury'. *R* v *Simpson* (1909) 2 Cr App R 128, 130.

38 On the constitutional and rational arguments in favour of deference to the jury, see R. Pattenden, *English Criminal Appeals 1844–1994* (Oxford: OUP, 1996) 75–77; R. Nobles and D. Schiff, *Understanding Miscarriages of Justice* (Oxford: OUP, 2000) 182–187.

39 Thus the Criminal Appeal Act 1968 s 23 contains no formal restrictions on the Court of Appeal's powers to view evidence, but rather gives it discretion to do so where 'necessary or expedient in the interests of justice'.

40 Criminal Appeal Act 1907, s 3(a). Leave was required, or a certificate from the judge involved in the trial, for an appeal involving fact, or mixed fact and law (Criminal Appeal Act 1907, s 3(2).

41 This requirement applied to all appeals to the Court of Criminal Appeal (Criminal Appeal Act 1907, s 7) but the time limit 'may be extended at any time by the Court of Criminal Appeal'.

42 Criminal Appeal Act 1968, s 31, which may include a judge of the High Court. Then in 1970, in order to restrain the number of applications for leave, the Lord Chief Justice issued a practice direction making it clear that what might be considered frivolous appeals would result in potential loss of remission of sentence (see n 12 above).

Court of Appeal itself, to be made within 28 days of the conviction.[43] This right to appeal is only available to a living appellant.[44] If the appeal is on questions of fact, leave will ordinarily not be granted in the absence of new evidence;[45] the extent of this restriction can be illustrated by the high percentage of leave applications that are rejected,[46] and the small number of successful fresh evidence appeals.[47] The requirement of leave also serves to insulate existing convictions from changes in standards and procedures. Leave to appeal out of time would ordinarily not be granted, if the appeal was based on a claim that changes in the substantive law or the law on procedure meant that the conviction, while safe according to the standards at the time, would not be considered safe now.[48]

A lay understanding of the idea of 'reasonable doubt' (the standard of proof necessary for a criminal conviction) places the Court of Appeal under pressure to increase its willingness to quash convictions, and threatens to undermine both formal restrictions on the right to appeal, and more general concepts of deference. At its widest, this lay understanding of reasonable guilt implies that a conviction is only safe if no reasonable adjudicative body, hearing the prosecution's case today, as well as any arguments or evidence previously not advanced favourable to the accused, could fail to convict. This approach, which informs much investigative journalism,[49] shows no deference to the decision of the jury who decided the case in question. And in showing such a lack of deference, it places pressure on the Court of Appeal to alter its usual relationship to the Crown Court, which is, as we have argued, a necessary part of its appeal function.

We have written elsewhere a history showing how the Court of Appeal has had to deal with these pressures since its inception, and the role which such pressures have played both in the Court's original creation, and its subsequent reforms.[50] In the confines of this article, we intend to show how the need of an appeal court to show deference to the bodies that it supervises, and the difficulties of constructing and maintaining such relationships, serves to illuminate current developments in criminal appeals and criminal justice reforms in general. The current developments, which provide the most important challenges to this relationship, are fourfold. First, the introduction of the new referral body, the Criminal Cases Review Commission; second, the increasing importance of the European Convention on Human Rights as now enacted in the Human Rights Act 1998; third, the proposals to reformulate the division of responsibilities between the magistrates' court, Crown Court and Court of Appeal and fourth, reducing the number of jury trials.

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43 Criminal Appeal Act 1968, s 18.

44 *R* v *Kearley (No 2)* [1994] AC 414. However, a reference from the Criminal Cases Review Commission, or as previously from the Home Secretary, can be made on behalf of a person who is dead (*R* v *Maguire* [1992] QB 936).

45 See the judgment of Lord Bingham CJ in *R* v *Criminal Cases Review Commission Ex p Pearson* (1999) 3 All ER 498.

46 Although the figures vary from year to year, it would be fair to say that on average one third of leave applications for conviction appeals are granted, thus 2 out of 3 are rejected (*Judicial Statistics 2000*, Table 1.7, page 12).

47 See K. Malleson, *Review of the Appeal Process*, Research Study 17 for the Royal Commission on Criminal Justice (HMSO: London, 1993).

48 This has been confirmed as a statement of Court of Appeal practice recently in *R* v *Kansal* [2001] 2 Cr App R 601 (CA). However, the successful high profile *Bentley* appeal (*R* v *Bentley (Derek)* [2001] 1 Cr App R 21) and *Kansal* demonstrate that the Court of Appeal are finding it difficult to retain this position in the light of referrals from the Criminal Cases Review Commission and the implications of the coming into force of the Human Rights Act 1998 (see discussion below, and the House of Lords judgment in *Kansal* [2001] 3 WLR 1562).

49 See Nobles and Schiff, n 38 above, ch 4.

50 n 38 above

The Criminal Cases Review Commission

The Criminal Cases Review Commission (CCRC) was introduced following the report of the Royal Commission on Criminal Justice, whose appointment was announced the day the Birmingham 6's appeal was finally successful. The CCRC is supposed to rectify a widespread belief that the Court of Appeal is too reluctant to quash convictions, and the Home Secretary too reluctant to refer cases to the Court of Appeal. The Royal Commission's view was that the Home Secretary's reticence was the result of a constitutional conflict between the executive and the courts, with the executive reluctant to reach different conclusions from the Court on questions that were legal rather than political. Whatever the merits of this diagnosis,[51] what the Royal Commission failed to recognise or consider, was the need for any appeal body which wishes to maintain a stable system of delegated decision making, to show deference to the ordinary practices and procedures of the first instance body. They proposed the creation of a new body for referring cases to the Court of Appeal, which was enacted. The apparent intention is that this body should refer more cases than had the Home Secretary, in the belief that this process would help to overcome the perceived reluctance of the Court of Appeal to quash convictions.

Concealed within this new institutional arrangement, and as yet unanswered, is the question of which body has responsibility for maintaining a stable working relationship with the bodies supervised via the process of appeal. To put this in terms of the analysis in this article: how is the function of appeal to be constructed out of a relationship of deference? What is to be the basis of that deference, and how is it to be legitimated and preserved at a level which ensures a workable relationship between the appeal body and the trial courts? On the face of the statute, this responsibility remains firmly with the Court of Appeal. Section 13(1) of the Criminal Appeal Act 1995 requires the Commission to limit the cases that it refers, to those which have a 'real possibility' of succeeding before the Court.[52] In *Pearson*,[53] the applicant, seeking judicial review of the CCRC's refusal to refer her case, argued that the Commission should not seek to duplicate the standards of the Court when deciding whether to refer cases. If the Commission felt that there were grounds for a conviction being unsafe, they should refer the case, and let the Court of Appeal decide on the merits of the appeal. Had the applicant's arguments been accepted, the Commission might have developed a role of putting pressure on the Court of Appeal to abandon its deference to the trial court system. In deciding the question of whether a conviction was, in the Commission's view unsafe, the Commission would not have had to have regard to any of the devices whereby the Court insulates itself from interfering with the routine operations of the trial court. The Court usually insists that any new evidence or arguments were not available at trial (preventing prisoners from strategically withholding such matters at trial, and then using them on appeal). It will not usually grant leave to appeal out of time, after the law changes (thus preventing changes in procedures in trials leading to a review of all convictions obtained under the old procedures). It will not ordinarily allow an appeal without new evidence (thus ensuring that simple disagreement

51 See R. Nobles and D. Schiff 'The Criminal Cases Review Commission: Reporting Success?' (2001) 64 MLR 280.

52 The authorisation reads: 'that there is real possibility that the conviction, verdict, finding or sentence would not be upheld [by the Court of Appeal] were the reference to be made.' Criminal Appeal Act 1995, s 13(1)(a).

53 n 45 above.

with the verdict of a particular jury is not in itself grounds for appeal). None of these rules and practices is relevant if the Commission's job is simply to look at each conviction afresh and ask itself whether, in its opinion, the conviction is unsafe. But adopting this attitude would result in referrals that represented a serious challenge to the authority of the Court of Appeal and its relationship to the trial courts. Media reporting on criminal appeals (a major factor in creating the climate of opinion that led to the creation of the Commission) would inevitably report the wide divergence between the Commission's implicit verdict (that a conviction was unsafe) and the Court of Appeal's view that, in accordance with its own practices (which often has more to do with their ability to maintain a workable system of trial than their own opinion as to whether they would have convicted on the current case against the appellant) the conviction remains safe. Thus, it was no surprise that the Court in *Pearson* approved of the Commission's approach, which was not to decide on the safety of a conviction on a purely *de novo* basis, but to ask itself how the Court would react to a referral.

Criminal appeals and the Human Rights Act

Article 6 of Schedule 1 to the Human Rights Act 1998 (HRA) appears to offer challenges to the practice of criminal appeals. Applying the right to a fair trial has resulted in rulings in Strasbourg, now supplemented by decisions in the UK courts, on what constitute fundamental aspects of procedure whose breach threatens that right. Under section 2 of the HRA, these decisions have retrospective effect. This creates a difficult situation for the Court of Appeal: the prospect of having to review every decision involving a breach of Article 6 to see if the conviction can no longer be upheld. This is not an entirely new problem. The declaratory theory of the common law leads to circumstances in which every ruling on procedural irregularity by the Court of Appeal or House of Lords has implications for all previous cases that were decided on a different basis. Will this lead to a situation in which the Court of Appeal will be forced to abandon its deference to a large number of trials which, according to the standards of the time, were quite satisfactory, and declare the convictions unsafe.

The first point to make about this threat to the current system of appeals is that it represents a potential influx of cases to the Court of Appeal, but not one in which the Court will be forced to overturn the convictions in question. The Court of Appeal in *R* v *Davis, Rowe and Johnson*[54] has already made it clear that the fact that an appellant has experienced a breach of some procedure which forms part of his right to a fair trial does not, automatically, make his conviction either unfair, or unsafe. So the threat facing the court is not the automatic quashing of large numbers of convictions, but the need to review a large number of convictions to see if the particular breach was so serious as to warrant the conviction being quashed. The second point is that this burden represents a serious challenge to the ability of the Court of Appeal to function. While it may be able to maintain a relationship of deference to jury verdicts, the potential work involved could be enormous.

Prior to the Human Rights Act and the creation of the Criminal Cases Review Commission the Court of Appeal ordinarily dealt with this problem, as it arose as a result of changes in the common law, through its practice on granting leave. It would not ordinarily grant leave to appeal out of time in cases where the appeal was

54 [2001] 1 Cr App R 8.

based on a change in the law applicable since the time of the case. The only formal exception to this was in cases where what had been considered criminal at the time, was found to be no longer a crime.[55] This solution was not available to the Court with cases that were referred to it by the Home Secretary, as both time limits and the need for leave did not apply. However, such cases were few, and in the light of their small numbers, would not have severely threatened the Court's relationship of deference to the jury if they had decided them not by reference to the standards applicable at the time of trial, but by reference to current standards. That said, when the Court of Appeal considered this issue in the referral of *R* v *Ward*, it nevertheless ruled quite unequivocally that it would apply 'the standards of what was considered to be proper and regular at that time'.[56] However, the main change dealt with in *Ward* was to rules about disclosure of evidence by the police and prosecution following the introduction of the Police and Criminal Evidence Act 1984, a statutory provision that, like most statutes, had only prospective effects.

As recognised by the Court of Appeal in *Kansal*,[57] the combined effect of the creation of the Commission and the retrospective effect of the Human Rights Act and changes in the common law, may have created a situation in which the Court of Appeal is unable to restrict the number of appeals which it is required to hear to a manageable level.[58] If the Commission, like the Home Secretary, is not required to consider the Court's approach to the question of leave when referring cases to it, then the Commission could in theory refer every case, no matter how old, which involved breaches of Article 6 or the common law. The Vice-President, Rose LJ went so far as to invite the Commission to appear before it, so that the Commission could set out what it regarded as the 'proper ambit of their discretion' in referring cases to the Court following a change in the common law or a decision on the meaning of Article 6.[59] As the retrospective application of the Human Rights Act makes it very difficult for the Court of Appeal to refuse to apply retrospective changes to the meaning of what constitutes a fair trial, it will be difficult for the 'real possibility' test to work, as discussed in *Pearson*, to protect the Court from having to deal with an overwhelming number of appeals. In effect, the Court is asking the Commission, as (in this area of the law) a de facto appeal body from the Court of Appeal, to show deference to the Court's own practices to ensure that it can continue to carry out its tasks. While the hierarchy lay with the Court of Appeal, as in *Pearson*, this was not necessary. In this area the Commission is being asked to set out what should be its functions as an appeal body, with the Court of Appeal 'appealing' to it to show deference to the Court's own function and responsibility for maintaining a workable system of appeals.

Reformulating the division of responsibilities between the magistrates' court, the Crown Court and the Court of Appeal

The basis for appeals from the magistrates' court formed a substantial section of the recent Auld report on the Criminal Courts.[60] Appeals can currently occur by

55 *R* v *Ayres* [1984] AC 447; *R* v *Graham* [1997] 1 Cr App R 302.
56 (1993) 96 Cr App R 1, 23.
57 n 48 above.
58 '... the consequential prospective work-load for the CCRC and for this Court is alarming.' Or, as submitted by the Crown: 'If references are made solely because of a change in the law they will be numberless.' (*Kansal*, n 48 above, 611 and 609)
59 n 48 above, 610.
60 <www.criminal-courts-review.org.uk>. For analysis of the Auld Report, see the April 2002 edition of the Criminal Law Review.

way of a re-hearing in the Crown Court, and thence to the Divisional Court of the Queens Bench Division on matters of law, or direct to the Divisional Court by way of case stated or through judicial review. Auld was particularly anxious to remove the right to a re-hearing before the Crown Court. In percentage terms, the right of re-hearing had not resulted in a substantial number of appeals: overall less than 1% of magistrates' court decisions (on conviction and sentence) are appealed against. But the high rate of successful appeal (3,090 of 14,355 allowed in 2000, with a further 3,268 varied)[61] is arguably evidence of a level of error that needs to be corrected through generous rights to appeal.[62] But Auld did not feel that the burden of conducting annually about 14,000 appeals against conviction and/or sentence was justified. He argued for the removal of this automatic right to appeal by way of rehearing by claiming that the lack of deference represented by such full rights of appeal was no longer justified. 'The right of appeal from magistrates' courts by way of rehearing must have its origins in a general lack of confidence in the impartiality and competence of the old 'police courts', mostly manned by local worthies with little knowledge of the law, little or no training and not obliged, unless required to state a case, to explain their decisions'.[63] He recommended that appeal to the Crown Court should require leave from that court, and that it should no longer take the form of a rehearing, but should be limited to an appeal on the same basis as appeals from the Crown Court to the Court of Appeal: appeals on questions of law or other matters that make a conviction unsafe, or against sentence on the grounds that it was unlawful, wrong in principle or manifestly excessive. Auld considered maintaining the present system of appeals against sentence (as opposed to conviction) on the basis that the experience of magistrates in sentencing might assist a Crown Court judge (the appeal is held in front of a mixed bench of judge and magistrates) in deciding what sentence was appropriate. But he concluded that, when the issue was not whether the sentence was correct, but wrong in law or manifestly excessive, there was no need for the appeal body to duplicate the membership of the court appealed from.

In keeping with reforms recently introduced in civil appeals (as described earlier), Auld also wanted the Court of Appeal to take over responsibility from the Divisional Court as the body formally responsible for overseeing the law and procedure applied by magistrates' courts. This is to occur via a second right to appeal from the Crown Court to the Court of Appeal on matters of law, and the abolition of the right to ask for a case stated to be sent by the magistrates' court to the Divisional Court, or to appeal to the Divisional Court by way of judicial review. Thus, routine supervision of magistrates' courts would henceforth occur via appeals to the Crown Court, and general supervision (through appeals, which might be expected to operate as precedents) would occur through the second right to appeal to the Court of Appeal. In order to restrict second appeals to matters having implications for the system as a whole, the appellant should ordinarily be required to obtain leave from the Court of Appeal, which would not be given unless the appellant could show that their appeal raised 'an important point of principle or practice, or that there was some other compelling reason for the Court of Appeal to hear it'. Auld acknowledged that the catch-all 'compelling reason' category would, in the criminal justice system, allow an appeal to the Court of

61 *Judicial Statistics 2000*, Table 6.14, page 69.
62 See, for analysis of this 'high rate of success', K. Malleson and S. Roberts, 'Streamlining and Clarifying the Appellate Process' [2002] *Crim LR* 272, 274–5.
63 Auld Review, n 60 above, 617.

Appeal in those rare cases where the appellant could not point to any mistake in the conduct of his trial, but could nevertheless persuade those giving leave to appeal that there is a 'lurking doubt' as to the safety of the conviction.[64]

Auld believes that an increase in the responsibility of the Court of Appeal for general supervision requires it to resist the temptation to interfere too readily in the decisions of the courts that it supervises. In order to have the time required to prepare good quality judgments, it needs to reduce the number of appeals it is required to consider, which necessitates in turn that it shows greater deference to the courts that it has to supervise. In conviction appeals, the Court should support trial court judges' robust case management and control of the trial, so long as this has not prejudiced the fairness of the trial overall, and thereby put the safety of the conviction at risk. Auld also singled out appeals against sentence (which far exceed the number of appeals against conviction) as an area where much greater deference needs to be shown, if the Court of Appeal is to be able to carry out the supervisory role he envisaged for it. He urged the Court of Appeal to draw back from its present tendency in appeals against sentence from the Crown Court to 'tinker' with those sentences. He blamed the lack of deference in part on the temptation, after having gone through the process of reviewing a sentence, to substitute 'the 'right' sentence',[65] rather than restrict itself to asking whether the sentence passed below was notoriously wrong. He also criticised excessive attempts to impose consistency, and the reporting of sentencing decisions which further encouraged such attempts at consistency, for the way in which this encouraged appeals based on fine distinctions. In an attempt to justify this increased deference in terms of the lower courts' greater abilities (rather than the Court of Appeal's need for more time to do other work) he urged that 'more credit should be given than is sometimes done at present to the experience and judgment of first instance judges and magistrates, and also to the greater time and thoroughness they give to their sentencing decisions than is often possible in the Court of Appeal'.[66] And in a remark which has particular significance for the ideas set out in this article, he admitted that the deference required could not be constructed through a statutory formula which sought to identify exactly when the Court of Appeal should interfere: 'To stop tinkering is probably more a matter of judicial appellate culture that needs firm general guidance and regular reminder from the Lord Chief Justice and/or the Vice-President'.[67]

Reducing the number of jury trials

One of the most controversial aspects of Auld's Report is the reduced role that he envisages for the jury. In what are presently indictable offences, he proposes that defendants should have an option of trial by judge alone, along the lines of the Diplock courts in Northern Ireland. Either way offences should in future be allocated to the Crown Court or to the magistrates' court (or to his proposed new District Court division comprising a judge sitting with two lay magistrates) at the discretion of judges rather than by the exercise of a defendant's choice of trial. Auld also envisages cases in which the jury's ability to deliver verdicts without reasons would be curtailed by requiring juries to give specific answers to particular

64 *ibid* 624.
65 *ibid* 649.
66 *ibid* 649.
67 *ibid* 650.

questions. As the Government has announced their intention not to implement his proposals for a reduction in the right to elect trial by jury, the discussion that follows (of the relationship between his proposals and rights to appeal) may seem otiose. However, given the frequency with which proposals of this kind are made (Auld's own proposals came only months after the defeat of two earlier Government attempts to restrict the role of juries), it is worthwhile to consider briefly what the knock on effects of such proposals are for appeals.

In the Northern Ireland context, in terrorism cases an unrestricted right to appeal, against conviction or sentence without leave, compensated for the loss of a right to trial by jury.[68] If the right to elect jury trial were abolished in the UK, it would be difficult to insist on only a right of leave to appeal as a precondition to appeals from the magistrates' court. Thus the reduction of the right to jury trial, if it had been enacted, may have been difficult to implement alongside other of Auld's proposals. Auld wanted to reduce the number of appeals from magistrates, by introducing a requirement of leave. While it may be acceptable to impose a requirement of leave if the magistrates keep their present responsibilities, it may have proved more difficult to introduce this change (especially given the Northern Ireland precedent) if the defendant's right to choose whether to be tried by jury were substantially curtailed. And regardless of the relationship between these changes and Auld's desire to extend the requirement for leave in appeals from magistrates, the removal of the jury will (as it did in Northern Ireland) alter the nature of appeals. The Delphic quality of jury verdicts has made deference to its decisions a matter of necessity as well as a useful method of ensuring the finality of Crown Court verdicts. Reasoned judgements by judges and magistrates, and special verdicts by juries, provide greater potential for appeals. To quote one of the Diplock court judges: 'You can see exactly with a judge where he has made mistakes – perhaps in recording what the witness has said, in missing a point and so on. In a jury case, you can't tell whether a jury missed a point or was muddled over the facts or whatever'.[69]

Whether moving from juries to bodies who can give reasons for their decisions alters the opportunities and likely success of appeals depends, to a large extent, on what is required by way of reasons. Again, the example of Northern Ireland illustrates some of the issues. When dealing with practices which are regarded by the appeal courts with distaste, such as the use of supergrasses, the processes by which trial judges have reasoned from evidence to convictions have needed to be detailed, and have been subjected in turn to close examination on appeal. Outside of such areas, more traditional forms of deference, requiring less fully reasoned judgments, are likely to prove the norm. In an extensive study of the Diplock courts, it was found that obvious mistakes by judges on such fundamental matters as the burden of proof were overlooked on appeal on the basis that the judges could not possibly have meant what they said, when even a first year law student would know better. The appeal courts also refused to require judges to set out every logical step in the process by which they might have reached their decision, preferring to accept that a judge who prefers one explanation for an event must necessarily have considered and excluded others which are incompatible with it. The study also found appeal judges adopting the rhetoric and practices of civil procedure to justify their reluctance to question Diplock court verdicts: '1. The

68 Originally enacted in the Northern Ireland (Emergency Provisions) Act 1973.
69 Quoted in S. Doran and J. Jackson, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon Press, 1995) 278.

judge's finding on primary facts can rarely be disturbed if there is evidence to support it. 2. The appellate court is in as good a position as the judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusions'.[70]

While the Northern Ireland example suggests that moving from the use of juries to trial by judge (whether sitting alone or with lay magistrates) will cause little by way of strain on the system of appeals, an increased use of magistrates sitting alone might be expected to create greater difficulties in maintaining the necessary level of deference. While appeal judges may be reluctant to assess the credibility of witnesses in appeals from any tribunal, the fact remains that in the absence of a jury the appeal court *can* review such matters. This can be done either directly, by calling witnesses, or indirectly, by requiring the trial court to provide reasons for believing or disbelieving witnesses rather than allowing it to hide behind the bald statement that a particular witness lacked credibility. With the Diplock courts, it appears that the increased opportunities to intervene have been cancelled out by the forensic skill of trial judges, who have been able to construct reasons that have to some extent made their judgments appeal proof. Such levels of reasoning are unlikely to be forthcoming from magistrates' courts.

The above analysis should not lead to the conclusion that removing the defendant's right to choose jury trial will not lead to a saving in resources. It is simply to point out that this change will have consequences and costs that Auld has not considered. In particular, it increases the strain placed on the system of appeals. Summary judgment by lay judges is more easily justified, even in cases resulting in a term of imprisonment, when the defendant has chosen this mode of trial. In the absence of that choice, there will be more pressure to conduct a vigorous review of convictions. In turn, this may go some way to remove the savings, which Auld expected to be made by the introduction of leave for appeal from magistrates' courts, and the introduction of appeals by way of review rather than rehearing.

The right to appeal as a human right

The Human Rights Act 1998 can be expected to increase the number of appeals, and place strain on the relationship between appeal courts and inferior bodies, at least until such time as a stable body of jurisprudence develops as to the meaning in domestic law of the various rights specified in the Act. While it has been said that the Human Rights Act gives rise to no free-standing rights, the duty of domestic courts to exercise their law making powers so as to give effect to convention rights offers the possibility of major shifts in substantive and procedural law. And regardless of the size of changes that eventually result, the existence of such possibilities makes it harder for appeals to be restricted in the meantime. We have already commented on the clearing of the decks which has taken place in the civil justice system of appeals, in the dockets of the Court of Appeal and the House of Lords, that may help those courts to cope with the number of appeals based on human rights arguments that can be expected. Aside from the general impetus to appeals created by the prospect of a period of unsettled law, what other effects may the Human Rights Act have on the general system of appeals?

70 *ibid* 282.

The right to appeal is not found explicitly in the Human Rights Act or the European Convention on Human Rights. Additionally, there is no right to an appeal in a civil matter (although there is in relation to criminal matters[71]) in any of the Protocols to the European Convention on Human Rights or other general international Human Rights instruments.[72] However, as already noted, indirectly the interpretation of fair trial rights (Article 6) might promote interests associated with civil as well as criminal justice that might otherwise be unprotected. Indeed, a large jurisprudence has been developed by the European Court and, formerly, the European Commission of Human Rights about the requirement to exercise control over administrative decision-making, including tribunals, in order to satisfy the requirements of Article 6. However, that jurisprudence appears to be rather pragmatic rather than principled, and reflects the focus of this article, that of the need to show deference to the inferior decision-maker, especially with regard to their fact-gathering responsibilities.

> The state of the Strasbourg jurisprudence means that it is not possible to say with precision when less than complete determination of factual issues will suffice. But it is possible to identify certain pointers in the existing Strasbourg case law which indicate the extent to which the Article 6 'independent and impartial' tribunal may accord to the primary fact finding administrative body the deference that an appellate court would accord to a court of first instance.[73]

The jurisprudence, despite its somewhat arbitrary character, nevertheless demonstrates that there are clear limitations on the application of Article 6.[74] Restrictions on rights to appeal, such as time limits, have been upheld as long as they are reasonable and have been made known; but there remains some scope for questioning whether time limits are reasonable. Even though any right to appeal may be satisfied by a hearing considering whether leave to appeal should be granted, and such hearings do not have to comply with all fair trial rights, such as those of a public hearing or oral argument, this depends on the nature of the questions that the appeal court is deciding.[75] Thus, for example, in *Helmers* v *Sweden*[76] the refusal of the applicant's request for an oral hearing before the relevant Court of Appeal in relation to his defamation case, was deemed to be a violation of Article 6(1).

71 Art 2 of Protocol 7 to the European Convention (to which Britain is not a signatory) states: 'Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal'.

72 There is a right to appeal in criminal cases in Art 14(5) of the International Covenant on Civil and Political Rights 1966. 'Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law'. On the limitation of this right to criminal matters, see the Human Rights Committee decision in *IP* v *Finland* (450/91, Official Records of the Human Rights Committee 1992/93, Vol II, 584).

73 S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell, 2000) 127–28. Apart from this particular example, it could be argued that the significant doctrine of 'margin of appreciation' in the European Court's decisions is itself one of deference – an attempt by the Court to allow it to operate as a workable system of appeals from the decisions of domestic courts.

74 Even on the criminal side the interpretations already given to fair trial rights by the European Court of Human Rights suggests that applicability of such rights to a right to appeal is necessarily limited. For example, the possibility of a penalty for a frivolous appeal, in the form of loss of remission time (see n 11 above) does not in itself contradict the right to a fair trial (*Monnell and Morris* v *UK* (1988) 10 EHRR 205). However there is some possibility that fair trial rights might require legal aid or assistance for an appeal, but only where the penalty is severe (serious cases) and the entirety of the proceedings makes this paramount (perhaps where an appeal court can substitute a conviction for a different offence).

75 See *Ekbatani* v *Sweden* (1991) 13 EHRR 504.

76 (1993) 15 EHRR 285.

Despite the limitations of the 'right to appeal' as a human right, particularly in relation to civil matters, Article 6, the right to a fair trial, is likely to have its greatest impact on the general relationship between the appeal courts and the bodies whom they must supervise. As such the Human Rights Act 1998 has some potential to undermine the current reforms to both civil and criminal justice. For example, rigid time limits for appeal may fall foul of article 6. The case of *Perez de Rada Cavanilles* v *Spain* 1998[77] demonstrates that time limits applied rigorously might restrict or reduce a person's right to a fair trial. And generally, once an appeal system has been set up rights to a fair trial apply to it.[78] Thus, for example, where the possibility of an appeal is dependent on a written judgment of a lower court, it will be breached where an appellant is deprived of the opportunity because the lower court failed to give a written judgment. Such a failure might be both a breach of the right to a fair trial and, in addition, a breach of the right to appeal 'according to law'.[79]

Conclusion

In view of the fact that human rights documents fail to acknowledge a right to appeal in civil matters, and give it only a limited meaning in criminal ones, why should one speak of a right to appeal? We would argue that such rights arise, indirectly, out of the functions served by appeal processes within domestic legal practice. The notion of an inferior tribunal points to the need for review by a superior one: there will be a right to appeal. But while the existence of such a right is difficult to resist without abandoning the inferior/superior opposition, the content of that right requires one to consider the opportunities given to persons aggrieved by legal decisions (civil and criminal) to have those decisions annulled or amended within domestic jurisdiction. These opportunities are determined, in workable systems of appeal, through the construction of stable relationships of deference towards inferior decision-makers by appellate bodies who have hierarchical authority over them. The content of these relationships gives substance to what it means to have a right to appeal. Formal constraints such as time limits, law-fact distinctions and requirements for leave point to, but do not fully capture these relationships, relationships that cannot be wholly expressed through verbal formulae. There is almost always some discretion to allow appeals out of time, facts can become questions of law, leave can be granted. Moreover, the legal rules that set out these opportunities are underscored by a rhetoric that cannot directly address the need for appeal bodies to have a stable and workable relationship with the bodies they supervise. For example, while the need for a leave requirement to appeal may be prompted by the number of cases that an appeal court can expect to deal with in any year, the conditions for granting leave are not articulated by reference to a numerical quota. Deference, as a practice, cannot be reduced to rules. Within the legal system, its rules and standards cannot directly address the need for restrictions to the right to appeal that result in workable relationships

77 As noted in [1999] EHRLR 208.

78 *Monnell and Morris*, n 74 above.

79 In relation to a criminal case, this broad challenge to the jurisdiction and legitimacy of an appeal court has been set out by the United Nations Human Rights Committee in interpreting Art 14(5) of the International Covenant of Civil and Political Rights 1966 (n 72 above) in a number of cases, for example, *Henry* v *Jamaica* (230/87, Official Records of the Human Rights Committee 1991/92, vol II, 375).

between appeal and inferior bodies. An appeal court's judgements can only be made by reference to standards such as legality and justice, which then result in sustainable levels of appeal. But this relationship between legality and justice on the one hand, and deference and sustainable levels of appeals on the other, is a difficult relationship to maintain.

Indeed recent reforms and reform proposals in the UK point to the difficulties of maintaining these relationships. In criminal justice, in dealing with serious crimes, there is pressure to offer appeals that amount to a rehearing of issues without showing deference to the trial court. This pressure has implications for the future of recent reforms of the institutions for appeal, as well as the regularly proposed, but as yet not enacted, suggestion to reduce the number of offences that can be tried by jury. While public perceptions of justice make it difficult to construct stable relationships of deference in criminal justice, civil justice does not share this feature. There is no similar public pressure for substantive rights to appeal to remedy incorrect decisions ('miscarriages of justice'). In civil justice, internal concerns with access to justice and the ability of the Court of Appeal to carry out its law making functions have led to a restructuring of the rights to appeal. Appeals as of right from the County Court to the Court of Appeal have been replaced with appeals to the High Court. The increased status of the High Court, and the Court of Appeal's willingness to defer to it on questions of law, is signalled in the new grounds of leave for second appeals. This dubbing down of formal rights to appeal, with appeals to the High Court being substituted for appeals to the Court of Appeal, and new requirements of leave being introduced, has passed largely without public comment, or interest. Whether these reforms work will depend on whether the reduction in formal rights is accompanied by changes in attitudes to the supervised bodies or, in terms of the quality highlighted throughout this article, to the presence of increased deference.

The need for hierarchical bodies to supervise inferior ones, and at the same time to routinely show deference to them points to one of the sources of the instability of modern legal systems. The need to limit the right to appeal, a need that varies with particular institutions' configurations of cost, personnel, culture etc, cannot be directly articulated within law. If unworkable relationships are to be addressed, the right to appeal (what counts as a remedial error and what procedures exist to correct it) has to be regularly amended to take account of current circumstances. Achieving co-ordination by reference to rules, standards and practices that do not directly address the need for this is not an easy task.[80]

80 Nor, of course, one limited to the law. Consider the difficulties of co-ordinating health care to the requirements of budgets.