

Appeal Procedures: Evaluation and Reform

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I. Introduction

Many jurisdictions are currently streamlining their appeal procedures.² The reasons to consider changing appeal procedures are manifold. They include high costs, delay in dealing with disputes, or too high rates of appeal in certain areas. The impression may be that appeals are sometimes used as a stalling tactic, or for strengthening a position in negotiations with a weaker party. Last but not least, improving the quality of adjudication could be a goal.

In this paper, we will discuss the recent changes in appeal procedures and proposals for change that are being considered in four European jurisdictions. We will cover civil procedure, administrative procedure, and criminal procedure.³ These changes usually affect both the costs of the appeal system and the quality of justice that the appeal system provides. We will try to assess the effects of these changes systematically. What are the likely costs and benefits for the parties and for future users of the court system? How do they influence the costs of maintaining the appeal system?

The costs and benefits we will deal with are therefore those of the stakeholders in appeal proceedings. These stakeholders include both the parties to appeal proceedings, and future users of the civil, administrative, or criminal justice system who may benefit as a result. The state incurs the greater part of the costs of maintaining the appeal courts, which are only partly borne by the parties.

We will not consider the benefits of appeals for lawyers and judges. Their job satisfaction and their interests in earning a living will not be taken into consideration. We do this for practical reasons: it is difficult to assess these benefits. We also assume that decisions regarding the appeal system, taken by legislators, will not take these interests into account.

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² The need to restrict appeals is increasingly discussed. See, for example, J.A. Jolowicz, *On Civil Procedure* (2000), Cambridge: Cambridge University Press, Chapter 16, Managing Overload in Appellate Courts: 'Western' Countries, 328-351, who gives an overview of different western legal systems. For the English procedure rules, see The Bowman Report, Review of the Court of Appeal (Civil Division, 1997), The Lord Justice Auld, Review of the Criminal Courts of England and Wales, 2001 and many following evaluations, reports, and proposals for changes in civil, criminal, and administrative procedure rules, available at <<http://www.dca.gov.uk/procedurerules.htm>>. For changes in French civil law, see L. Cadiet, Civil Justice Reform: Access, Cost, and Delay, The French Perspective, in: A.A.S. Zuckerman (ed.), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999), Oxford: Oxford University Press, 291-346. An evaluation of the recent German reform on civil appeals is given by G. Debusmann and B. Hirtz, in: M. Huber (et. al.), *Die Reform der ZPO – eine Wirkungskontrolle, Berichte zum 65. Deutschen Juristentag* (2004), München: Beck Verlag.

³ We define 'appeal' as any procedure in a second instance, which means any procedure subsequent to the decision in first instance, which comes before a court higher than the court of first instance, and which is sometimes followed by a decision in third instance. For problems defining 'appeal' in a comparative study, see Jolowicz, *supra* note 2, at 329.

In Section II, we will start with an impression of the changes that are under way in the European appeal systems. The interaction between the appellate level and the other levels of the court system will also be discussed. What happens in an appeal may influence the pre-trial phase, in which the parties discuss and sometimes settle their dispute, and will certainly have an impact on the dealings before a court of first instance. “Above” the appeal courts, generally there are third level (supreme) courts.

Section III sets the stage for the evaluation of possible changes in appeal proceedings. First, we will identify the categories of the costs of appeal that are borne by the parties and the courts. We will also consider the possible side effects of mechanisms on other parts of the system: first-level courts, third-level courts, and out-of-court dispute resolution (III.A). Then we will discuss the different functions attributed to appeal proceedings in the legal and the law and economics literature. Each of these functions will be translated into concrete benefits to parties and future users of the court system (III.B). As an intermediate result, some preliminary conclusions will be drawn as to the most effective general strategies for cutting costs and increasing benefits (III.C).

Then we will proceed to the changes themselves (Section IV), categorized in several groups. First, there are mechanisms that limit the tasks of appeal courts, such as the introduction of a leave for appeal and restrictions on new issues (IV.A). A second mechanism is changing the incentives on using the right to appeal, e.g., by increasing court fees, increasing the possibility of worse outcomes, and changing the incentives on lawyers (IV.B). Then there are mechanisms that change the way courts deal with appeal procedures. Examples are fast track proceedings for certain appeals and appeals heard by one judge instead of three judges (IV.C). The fourth and last category is the one of alternatives to appeal: prevention, mediation, or correction procedures connected to the first-level courts (IV.D). Of course, these mechanisms can be used jointly (IV.E). In each category, we will assess the most common mechanisms under consideration. Are they likely to lead to the expected cost savings, or to the expected improvements? What do we know empirically about the effects of these mechanisms? We will report evaluation studies of these mechanisms, usually undertaken some years after their introduction.

Section V contains the conclusions. What are the most promising mechanisms? What general lessons can be learnt?

II. Tendencies in French, German, English, and Dutch law

Five general tendencies underlie most changes and proposals in civil, administrative and criminal appeals in the legal systems we studied. First, there is a widespread tendency to limit appeal to cases with a certain ‘value’. Less widespread but at least as important is the second tendency to change from rehearing to review proceedings. The increased finality of the judgment at the first level is the third tendency. The fourth is the notion to make fewer restrictions on appeals in criminal cases. Improving the interaction between first, second and third levels is the fifth general tendency discussed.

A. No Appeal If Stakes Are Low

The first main tendency is that appeal is limited to cases with important stakes for the parties.⁴ One way to limit the use of appeal procedures is to allow appeals only if the ‘value’ of the case reaches a certain level. This method of limitation will be discussed with the other mechanisms described in section IV.

How is it determined whether a case is of (too) little importance to allow an appeal procedure and who decides that it is? If the financial value of a case can easily be determined, it is an attractive option to make a financial threshold for appeal proceedings. Financial thresholds are very clear because the barriers for appeal proceedings can be defined. No extra judgment is necessary.

In civil cases, the financial value of the claim can determine the value of the case while in criminal law cases, the level of the penalty imposed is the easiest starting point. In public law, it is not as easy to assess the value of the case, because many disputes in this area, e.g., the ones involving a government permit, cannot easily be expressed in terms of financial value. This is probably the reason why we have found less use of putting up financial barriers as a streamlining measure in administrative law. If administrative decisions relate to fines, the level of the imposed penalty can be used.

The ‘low stake-cases’ are in some systems filtered by a statutory provision prohibiting appeals beneath a certain value. In other systems, these cases are filtered from appeal by a leave for appeal mechanism.⁵

B. From Rehearing to Review

One of the most prominent ways in which legislators have tried to make the appeal proceedings more efficient in the systems studied, is that appeals develop from procedures of rehearing into procedures of review. In a rehearing, the dispute is handled as if it were a case in first instance. The appeal court evaluates the case with a totally fresh look. In a review, the appeal court only checks the decision of the court of first instance. All restrictions that have been made in first instance are taken into account. In other words: the appeal procedure is not a second chance in which the parties can completely alter or renew their positions or views on the dispute. The character of review manifests itself in features such as the object of appeal

⁴ See also Jolowicz, *supra* note 2, at 334-335.

⁵ More on this in IV.A.6.

being the facts established at the first level and restrictions to bringing forward new facts, new issues, and/or new evidence.⁶

Roughly, we can classify the English and German civil appeals as procedures of review, as well as the English criminal appeal.⁷ The French and Dutch civil and criminal appeal are typical procedures of rehearing, and so is the German criminal appeal.⁸ In administrative law, we found that the appeal court mostly has a choice between focusing on the decision that the administrative authority has made, or the judgment of the court of first instance. If the decision is the object of appeal, this is a form of a rehearing; if the judgment of the court of first instance is the object, this is a review.

C. Finality of First Instance

Common law and civil law systems differ on the issue whether the decision at the first instance is final in principle.⁹ The finality of the decision of the first instance is an important feature of common law systems, while most civil law systems historically consider appeal as 'just another stage' in the proceedings. Though such a sharp distinction between common law and civil law systems cannot be made in these days, many features of both fundamentals are still visible in the legal systems. The exceptional nature of appeal is, for example, underlined by the need to ask for permission to appeal in English proceedings. An example of not underlining the finality of first instance judgments is allowing new evidence, facts and issues in appellate courts. The suspensive effect of appeal in relation to first instance judgments, which occurs in some civil law jurisdictions, is another one.

Most civil law systems tend to adopt instruments that underline the finality of the decisions in the first instance. The German civil appeal system, for example, is no longer intended as just another stage in the procedure. Instead, appellate courts focus on the judgment at the first level. Introducing new facts, issues and evidence is restricted in the reformation implemented in January 2002.¹⁰ Furthermore, the need to ask for permission to appeal is introduced in German civil and criminal proceedings as well, though restricted to specific cases and procedures.¹¹ In French civil procedures the suspensive effect of first instance judgments is being discussed.¹² Too many appeals seem to originate in the desire to stop the enforcement of the judgment in first instance.

⁶ Most features are being evaluated in section IV, see for example IV.A.4.

⁷ Of course it is only a very rough indication. All the systems mentioned have different standards of review and rehearing, for different type of decisions (for example decisions on points of law or points of fact) in different kind of courts. In literature, different standards of review are distinguished. See for example K. M. Clermont, *Principles of Civil Procedure* (2005), St. Paul: Thomson/West, 129-131. He refers to a plenary review, which is almost a rehearing, a middle-tier review, which is a clearly erroneous test and finally the highly restricted reviews. See also Zander, *Cases and Materials on the English Legal System* (9th ed. 2003), Cambridge: Cambridge University Press, 637 ff.

⁸ Though a full rehearing, appeals can be restricted significantly by ways of partial appeal, as is for example known in German criminal appeals.

⁹ See Jolowicz, *supra* note 2, at 333-334 and F.J.H. Hovens, *Civil Appeal, A Comparative Research into the Functions of Appeal in Civil Case* (2005), Deventer: Kluwer, 315-321 (English summary).

¹⁰ More on this in IV.A.4.

¹¹ More on this in IV.A.1.

¹² Décret n° 2005-1678, 28 décembre 2005.

D. Fewer Restrictions in Criminal Cases

In criminal procedure, the limitations on access to appeal are less pronounced. This fourth tendency may be explained by the interests of the accused and by the imbalance in comparison to the prosecution. Appeal in criminal procedure is seen as an extra safeguard against the abuse of power by police and prosecution.¹³

The special position of appeal in criminal cases is acknowledged by Art. 14.5 International Covenant on Civil and Political Rights and Art. 2 Seventh Protocol European Convention of Human Rights. However, both rules give states wide discretion on how to regulate access to appeal.¹⁴ The restrictions that are made in criminal appeals are mostly methods of partial appeal and filtering appeals in trivial cases.¹⁵

E. Improving the Interaction between First, Second and Third Levels

An appeal procedure is just one element of a system of dispute resolution, that is often pictured as a pyramid. At the broad basis of the pyramid, parties interact between themselves and with the help of lawyers, mediators, or others (level 0). Some disputes enter the level of proceedings in first instance (level 1). Some cases go to appeal (level 2), which may be followed by proceedings at the Supreme Court level (level 3). The four levels interact. A quick and simple procedure before a court of first instance may lead to a relatively high number of errors that need to be corrected in a more thorough second level. A thorough and extensive procedure at the first court level will be too expensive for many parties, so they will stay at the pre-trial level and try to settle their dispute there. This thoroughness may even raise the question of whether a rehearing in the appeal phase is necessary. Similarly, a sophisticated and high quality review on appeal (level 2) may reduce the need for review on supreme court proceedings (level 3).

The mere fact that there is more than just one level making decisions may have specific benefits. Many commentators believe, for instance, that citizens will have more confidence in their court system if the system consists of multiple levels.¹⁶ Sceptics may point out, however, that private dispute resolution systems (arbitration organisations) rarely offer a two-level system, and that private “supreme courts” are unknown.

The interdependency of levels, however, is not a fixed matter. It provides opportunities for intervention that are now well recognised by legislators. If the quality of the procedure in first instance is high, the pressure on the appeal courts will be lower. At level 2, there will then be more time for law making and setting precedents. The English system is an example of this, but it also shows that a sophisticated first instance may have a price. Access may become so costly that very high percentages of cases are settled before they reach the courts. In the US this even happens in criminal procedure, where plea-bargaining is a common way to resolve

¹³ See, for example, P.F. Smith, S.H. Bailey & M.J. Gunn, *On the Modern English Legal System* (4th ed. 2002), London: Sweet & Maxwell, 10-014 and 18-014.

¹⁴ See Smith, Bailey & Gunn, *supra* note 13 and Hovens, *supra* note 9, at 316. See also Andrews, who gives a clear and extensive overview of the impact of human rights on English civil appeals (N. Andrews, *English Civil Procedure, Fundamentals of the New Civil Justice System* (2003), Oxford: Oxford University Press, 7.01-7.144.

¹⁵ See for example the German and English criminal appeals, where partial appeal is common (at least possible) and a leave for appeal is required in trifle cases in some courts, see for English criminal appeals Zander, *supra* note 7, at 631 and for German criminal appeals § 313 and 322a StPO.

¹⁶ Several participants to the *expert meeting* expressed this view.

criminal cases. The ADR programmes set up in the US, with extensive mediation and non-binding arbitration opportunities within the court system, might even be seen as the introduction of a new level in the system (level 0.5). Sophisticated first-level proceedings also increase the demand for summary proceedings (the Dutch “kort geding”), for settlement conferences in which courts give some indication of the likely outcome, and for reconsideration of government decisions within the administration with some procedural protection. In systems with thorough first level proceedings, almost no cases need to reach level 3 for error correction, so the courts at that level can devote their time to setting precedents and settling controversial legal issues.

This type of system can be contrasted with the German system of civil procedure. In Germany, many more disputes are decided by the court of first instance, which is operating rather fast and at fixed, rather low costs.¹⁷ Such a first level attracts extra cases from level 0 and will also put more pressure on level 2. This may explain German attempts to reduce the access to level 2, and to increase the incentives to stay on level 0.¹⁸ We could think of such a system as more trial-and-error based. Level 1, or level 0.5, is used to obtain a quick ‘preliminary’ decision, whereas the second level is meant to provide the final decision if the decision at the first level is not acceptable.¹⁹ First-level decisions are rather fast and inexpensive and there is a fair chance that the outcome will be acceptable to both parties. If not, appeal comes to the rescue. The German civil court system even has a quite substantial third level that deals with thousands of cases per year, in a supreme court (*Bundesgerichtshof*) that consists of several chambers, assisted by specialised courts for some areas, such as employment matters.

Until now, few attempts have been made to improve the interaction and the division of labour between the levels. The legal systems we studied are far apart in this respect, and as yet there is no consensus on how to structure that interaction. A theory of the optimal division of labour between levels of the dispute resolution pyramid is lacking, as far as we know.

For now, we may conclude that analysing appeal proceedings as an isolated element of proceedings is difficult. We will, however, focus on appeal proceedings as the level that is placed between an “average” first level dealing with facts and issues of law and the third level, that exclusively deals with specific cases and issues of law. The influences of choices in organising this second level on the first and third levels, are taken into account as side effects. In the mean time, we will not close our eyes to the possibility to make a strategic choice in the way the interdependency of levels is organised.

¹⁷ A.A.S. Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999), Oxford: Oxford University Press, 3-53.

¹⁸ For instance, the fees lawyers can charge for settlements were increased to 1.5 times the rate (determined on the basis of the value of the case) compared to 2.5 times this rate for litigation in first instance. For settlements during proceedings the fee is 2.3. Also the difference between fees for appeal (2.8) and for proceedings in first instance (2.3) were lowered, see the *Rechtsanwaltsvergütungsgesetz* (RVG) and the accompanying *Vergütungsverzeichnis* under 1000, 3100, 3104, 3200 and 3202.

¹⁹ This type of procedure is typical for civil law systems; common law systems do not know such type of proceedings, see for instance The Bowman-rapport 1997, *supra* note 2, at 155: “An appeal should not be seen as an automatic further stage in a case”.

III. Framework for evaluation

What criteria exist for the evaluation of present appeal proceedings, or improvements thereof? In the following, we will use a framework that incorporates the costs of the procedure and the benefits. We build on earlier studies that developed frameworks to study appeal. Jolowicz identified the benefits of appeal systems, but did not break down the costs or the benefits in factors, which makes it possible to gauge the effects of measures to improve the appeals process in a systematic way.²⁰ Other studies focused on one or several benefits of appeal, such as supervision of lower courts,²¹ or error correction.²² The framework we developed is the first more encompassing framework for evaluating appeal systems with a break down of different costs and benefits that we know of.

A. Costs of Appeal for Parties and Courts

The costs of litigation for parties are usually high; appeal proceedings are no exception. However, surprisingly little effort has been done to measure the costs for the parties of concrete proceedings, let alone for appeal procedures. The following is an attempt to identify the most common types of costs of litigation for the parties.

There are four main types of costs:

- Out of pocket expenses (lawyers' fees, court fees, fees for experts and others involved, travel costs);
- Time spent by parties and their employees (instructing lawyers, collecting evidence, attending hearings, consulting and deciding on strategy);
- Costs of delay (loss of opportunities because of uncertainty, devaluation of assets);
- Emotional costs (stress, costs of risk aversion).

The out of pocket expenses are rather easy to calculate from bills. The other types of costs are notably more difficult to measure. However, we tried to identify the most important determinants of the level of costs

The costs of appeals for the parties		
<i>Type of costs</i>	<i>Most important categories</i>	<i>Remarks about factors determining costs and measurement</i>
<i>Out of pocket expenses</i>	Lawyers' fees	Depend on: <ul style="list-style-type: none">- the range of issues,- the amount of information needed for a decision on each issue,- the difficulty of (re)producing this
	Court fees	
	Fees for experts, witnesses, translation, bailiffs, court reporters, etc.	

²⁰ Jolowicz, *supra* note 2, at 328 ff.

²¹ S. Shavell, The Appeals Process And Adjudicator Incentives, 35 *The Journal of Legal Studies* 1, 1-29 (2006).

²² S. Shavell, The Appeals Process as a Means of Error Correction, 24 *The Journal of Legal Studies* 379, 379-462 (1995).

	Travel costs	information, - the structure of the proceedings, - the personal attitude of the judges, and - the interaction between the parties. Rather easy to calculate from bills, etc. Little information is available.
<i>Time spent by parties and their employees</i>	Instructing lawyers	Depend on: see above
	Collecting evidence	To be measured as opportunity costs of time.
	Attending hearings	- labour costs, - value of free time for non-professionals.
	Consulting and deciding on strategy	Little information is available. Likely to be substantial (hundreds of hours, fewer for the most simple proceedings, much more for corporate litigation)
	Informing stakeholders, press, etc.	
	Travel	
<i>Costs of delay</i>	Devaluation of assets in dispute because of uncertainty	These costs will increase over time, so the number of months that appeal proceedings take, which is rather easy to measure, will be an indicator of these costs. Another factor to take into account is the value in dispute. The last (and most difficult to measure) factor is the loss of value per month.
	Loss of opportunities because of uncertainty regarding future of relationships	
<i>Emotional costs</i>	Stress, etc.	Uncertainty leads to extra costs for persons who prefer a certain outcome over a range of possible outcomes with the same value. Surveys report high levels of stress for litigants. ²³
	Costs of risk aversion	

Table I: The Costs of Appeals for the Parties

We can assume that the most relevant factors that determine the costs are the number of issues, the value in dispute, the amount of information needed and the difficulty of (re)producing it, the structure of the proceedings, the personal attitude of parties and judges, and the interaction between the parties, the length of the procedure, and the amount of uncertainty on outcomes. The length of the procedure has a big influence on all types of costs, while the other factors seem to influence one or two types of costs in particular. *Table I* gives an overview of these types of costs, the most important categories of costs along with some remarks on the factors determining the amount of costs.

If we proceed to the costs for the judiciary, we can assume that appeal procedures are rather costly elements of procedural systems. Compared to courts at the first level, appeal courts generally employ judges that are paid better and can devote more time to each case. Appeal courts also sit more often with three judges rather than one, so appeals may be rather expensive elements of the judicial system. There are at least three types of costs for the judiciary:

- Costs of judges (screening of cases, dealing with issues of appeal proceedings, preparation of hearings, hearings, decision making, writing judgments/court opinions);

²³ Hazel Genn (et al.), *Paths to justice: what people do and think about going to law* (1999), London: Hart Publishing.

- Costs of other court personnel (preparation and organisation of appeal procedure, attending and reporting hearings);
- Extra costs of hearings (courthouses, costs of safety measures, bailiffs, service desks).

The total amount of costs arguably depends mostly on the first type of costs, the costs of judges. The amount of these costs will in their turn, depend much on some of the same factors determining the costs for the parties: the range of issues in dispute, the amount of information needed for a decision on each issue, the difficulty of (re)producing this information, the structure of the proceedings, the personal attitude of the judges and the interaction of the parties. Other factors are the number of judges per case, the number of cases, and the salary level of appeal judges. All types of costs are relatively easy to measure.²⁴ *Table II* gives an overview of the types of costs for the judiciary, the most important categories, and the factors determining the amount of costs.

The costs of appeals for the judiciary		
<i>Type of costs</i>	<i>Most important categories</i>	<i>Remarks about factors determining costs and measurement</i>
<i>Costs of judges</i>	Screening of cases	Depend on: <ul style="list-style-type: none"> - the range of issues, - the amount of information needed for a decision on each issue, - the difficulty of (re)producing this information, - the structure of the proceedings, - the personal attitude of the judges, - the interaction between the parties. Other factors: <ul style="list-style-type: none"> - the number of judges per case, - the number of cases, - the salary level of appeal judges. Rather easy to measure. Judges' salaries, offices, secretarial support, and other overhead. Little information is available.
	Dealing with issues of appeal procedure	
	Preparation of hearings	
	Hearings, including pre-trial settlement hearings	
	Decision making	
	Writing judgments/court opinions	
<i>Costs of other court personnel</i>	Preparation and organisation of appeal procedure;	Depend on the complexity of the appeal procedure and the length of the hearings. Likely to be a small part of the total costs of appeal.
	Attending and reporting hearings	
<i>Extra costs of hearings</i>	Courthouses, hearing rooms	Depending on the number and length of the hearings.
	Costs of safety measures, bailiffs, service desks	

Table II: The Costs of Appeals for the Judiciary

Moreover, appeal procedures, or changes therein, may affect other elements of the judicial system, such as superior courts or courts of first instance. More generally, changes in procedures may influence the streams of cases through the "Paths to Justice": from the first entry into the legal system when legal advice is sought, through the negotiation process between the parties, and the different levels of the court system.

²⁴ Important work on this field is published by CEPEJ in 2002. This report contains figures and numbers of the judicial systems of 40 member states, including the number of judges, the salary of judges and the average length procedures is specific types of cases, see European Judicial Systems, Facts and figures, CEPEJ 2002.

For example, supervision of a higher level may cause parties and courts becoming sloppy because they know there will be a second opportunity. Another side effect on the third level is that this level needs to deal with more complex procedural issues because of appeal. These side effects are difficult to measure. Little information is available and much depends on the structure of the proceedings. *Table III* shows some side effects of measures taken in appeal proceedings on the first and third instances.

Costs in other areas (side effects)		
Area	Types of Costs	Remarks about factors determining costs and measurement
<i>In negotiations</i>	Access to appeal will influence the effect of a threat of claiming in court, because the expected total costs for the parties of proceedings increase. Thus, settlements may become less balanced, in favour of stronger parties.	Depend on: - the costs for parties at the first level, - other mechanisms to correct imbalances of power.
<i>In first instance</i>	Parties become sloppy because they know there is a second chance.	Depend on: - possibilities to correct errors of judges and parties at the second level, - the quality of the supervision.
<i>In supreme court proceedings</i>	Dealing with procedural appeal issues.	Depend on: - structure of proceedings; the more complex the structure, the more procedural issues at the third level.

Table III: Costs in other areas (side effects)

One final remark about the costs: complex appeal proceedings are almost inevitably laid down in complex rules, by legislation, or in court decisions. The more complex the rules are, and the larger the number of cases in which these rules have to be applied, the higher the costs.

B. Functions: Benefits of Appeal for Parties and Future Users

The second part of our framework for evaluation relates to what the appeal procedure should achieve. Appeal proceedings have several functions. Most frequently mentioned is the one of correcting errors made at the first level. Law making and ensuring uniformity are other functions of appeal proceedings.²⁵

To distinguish the promising mechanisms from the less promising ones, it is necessary to get a clear picture of the effects of the mechanisms. Who is affected and in what way? The drawbacks can quite easily be described as the costs of a specific measure. But what about the benefits? How can a certain effect be tagged as a benefit? It can be said that a leave for appeal

²⁵ For different functions of appeal proceedings, see Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 *SMU Law Review* 469 (1998); Andrews, *supra* note 14, at 38; and Jolowicz, *supra* note 2, at 330-332. See for a comparative analysis of the functions of appeal proceedings also Hovens, *supra* note 9.

may benefit the parties because the chance that a party abuses appeal proceedings to buy time will be reduced. Others argue that such a system would not benefit the parties, because they lack a chance of re-evaluation of the case.

Some may see it as a political choice whether or not a certain consequence of a measure can be described as a benefit. However, we believe that it is possible to analyse the effects objectively in terms of the benefits for persons affected by appeal procedures.

The first element of this analysis is to determine these effects from the perspective of the different functions of appeal proceedings. Three functions of appeal proceedings were already mentioned: correcting errors, ensuring uniformity, and law making. Other functions mentioned in literature are: re-evaluation, supervision, and selection for the third level²⁶ Clear definitions of all these function do not seem to exist. More importantly, the meaning of these functions varies in common law and civil law systems.²⁷ However, we think that, in essence, these are the most important functions that should be distinguished, despite the differences in the law systems.²⁸

The second element is that, for each function, we will try to establish which persons actually benefit from it, and in what way. We will focus on the appellant, the appellee, and the future users of the legal system of which the appeal court forms a part.

1. *Correcting Errors*

Correcting clear errors made at the first level is probably the most important function of appeal procedures. In civil law systems, appeal is used to correct errors made by the parties as well as by the judges. In common law systems, however, the possibility to correct errors made by parties is highly restricted.²⁹ For our analysis, it is helpful to distinguish error correction and correction of first-instance decisions on the basis of a different appreciation by the appeal court. Error refers to decisions made by parties or judges that are based on an evidently incorrect or incomplete perception of facts or matters of law, and to a clear failure to act according to certain procedural rules. Decisions that are made within a judge's discretion of how to decide a case do not fall under this definition.³⁰ This type of "rectification" will be discussed under the heading of re-evaluation.

In case of an error, the appellant benefits from the rectification of the outcome, an improvement that he was entitled to. The appellee suffers a corresponding worsening of the outcome, but it was an undeserved one. Therefore, the net result in outcomes can be

²⁶ Obviously, the authors do not define all functions mentioned in the same way, However, these seem to be the most common ones.

²⁷ See Hovens, *supra* note 9, at 266-270.

²⁸ The latest developments in Germany and England in appeal proceedings seem to justify the conclusion that the gap between the two law systems has narrowed. Although, in England, the finality of a judgment is still the leading principle, the English appellate court can decide the matter itself instead of referring the case back to the first level. Nowadays, it even seems that the Court of Appeal is less reluctant to interfere with findings of facts or to receive new evidence, Andrews, *supra* note 14, at 38.32. In Germany, on the other hand, the appeal process has since January 2002 no longer been intended to be a second trial. It is meant to be a review of judgment at the first level, although in practice, the appeal procedure is in most cases more a rehearing than a review, see for an evaluation of the reform Huber et al., *supra* note 2.

²⁹ Andrews, *supra* note 14, at 38.01-38.02.

³⁰ See for instance H.J. Snijders, *Nederlands Burgerlijk Procesrecht* (2002), Deventer: Kluwer, at 31-32.

considered to be positive, because we may assume that getting what a person is entitled to is more valuable than receiving an undeserved advantage.

The main factor that determines the net value of the benefits is the value of a change of outcome caused by the error. Some errors will not affect the outcome, or only alter it slightly. The value of the change in outcome also depends on the value in dispute. Whether the case is about an all or nothing issue, or about an issue which is a matter of degree, is relevant as well.

The value of error correction by appeal procedures also depends on the quality and costs of other error correction mechanisms. Examples are internal quality management systems by courts, or other measures that detect errors before the judgments are issued. The higher the quality of other correction mechanisms in the system, the lower the net benefits of error correction by hearing appeals will be. The higher the costs of other correction mechanisms, the higher the net benefits will be. According to Shavell, appeal proceedings are likely to be a more attractive correction mechanism than, for example, investing in the prevention of errors because, in appeal proceedings, error correction depends on the parties' initiative. This means that not all errors need to be corrected, which makes appeal proceedings in general a correction mechanism at lower costs.³¹

2. *Re-evaluation*

Re-evaluation, in our view, means a second chance for evaluation of an aspect of the case that falls within the discretionary power of judges. The first outcome is not wrong, but a different outcome can be justified.³² Not all appeal courts have the power to re-evaluate in this sense. In England and Germany, there is discussion on whether civil appeal proceedings should be focused on rehearing or on review. The difference between the two was discussed earlier. Review is often restricted to correcting errors, which means that re-evaluation will be an exception. The English Civil Procedure Rules (CPR) contain a system that, though more review than rehearing, has elements of both; the same applies more or less for the German *Zivilprozessordnung* (ZPO).³³ The Dutch appeal system can be categorised as a rehearing procedure.

If appeal courts do have the power to re-evaluate, the parties are the beneficiaries. However, an improvement of the outcome for one party is set off against a decrease in outcome for the other one, which means that the net result in outcomes is zero. The net result is positive if another type of benefit is focused upon: both parties benefit from the idea that a second, more senior judge has evaluated the case. Being heard in a neutral, trustworthy court and being treated respectfully is likely to have an intrinsic value, as procedural justice research suggests.³⁴ It is to be expected that these considerations of procedural justice are particularly relevant in criminal cases, where the impact of decisions on the life of the defendant can be enormous. Whether the benefits of being heard by a second level court are as high as the

³¹ Shavell, *supra* note 22.

³² See also P. Loughlin & S. Gerlis, *Civil Procedure* (2004), London: Cavendish, 595: "If the appeal is against the exercise of a discretion then the appellate court should interfere only when it considers that the judge in the lower court has not merely preferred an imperfect solution which the court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

³³ 52.10-52.11 CPR: Appeal court has all the powers of the lower court (which refers to rehearing); however, most appeals are limited to a review of the decision of the lower courts.

³⁴ T.R. Tyler, Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform (Symposium: Civil Procedure Reform in Comparative Context), 45 *American Journal of Comparative Law* 871 (1997).

benefits of being heard for the first time by a court is uncertain. We tend to think that there will be decreasing returns on being heard more often. But still, being heard (again) counts as benefits. What otherwise determines the net value of those benefits? The degree of trust in judges in general (two judges know more than one) and also the difference in degree of trust in judges at the first level and judges at the second level may be relevant. If the quality difference (and hence the degree of trust) is higher, the benefits will be higher as well.

3. *Supervision*

Error correcting and re-evaluation are, what Jolowicz calls, private functions of appeals.³⁵ The private purposes behind the right of appeal are reconsideration and ensuring that justice is done between two parties. The public purposes of appeals are strongly related to maintaining public confidence in the administration of justice. Obviously, it is an essential public purpose of every legal system to maintain the public confidence. Appellate courts contribute to public confidence mostly by supervising the lower courts, but also by making new law if needed and by ensuring uniformity in law.

The preventive effect of supervision is described in detail by Drahozal. According to this author, appeal proceedings provide incentives for judges at the first level to avoid errors. Unlike judges, arbitrators have to compete for each new case, which is their incentive to avoid errors and to maximise the benefits of the parties. The lack of appeal proceedings in arbitration can be explained from this point of view. Judges do not have these kinds of incentives, since they usually have an overload of cases automatically brought to them.

For an analysis of the benefits of supervision by appeal courts, it is necessary to understand the incentives for judges. What do they value most in their work? Among other preferences, judges value prestige and respect, promotion to a higher court and little reversal by higher courts.³⁶ A high reversal rate often reduces the chance of promotion to a higher court. Even judges who do not have such aspirations usually experience less satisfaction in their work if their decisions are regularly overturned by higher courts.³⁷

Future users of court systems in particular seem to benefit from the supervision function. The incentives that judges at the first level experience may improve their decisions, which reduces the risk of appeal. Parties in appeal proceedings will not benefit from this function, since they already made it to the second level. We expect that the following factors determine the net value of the benefits: 1) the probability of errors at the first level; the lower the probability of error at first level, the lower the benefits,³⁸ 2) the probability of errors caused by the supervisor (second level court); the higher the chance of errors made by the supervisor, the lower the benefits, 3) the difference in probability of errors made by courts at the first and second levels, and 4) the quality and costs of alternative mechanisms for supervision.

³⁵ Jolowicz, *supra* note 2, at 331 ff.

³⁶ The other preferences identified in literature are: 1) deciding: judges derive utility from deciding cases according to ideological reasoning or, more often, according to professional norms of legal reasoning; 2) discretion: judges value a certain amount of discretion in deciding; 3) leisure: although most judges will not explicitly express their value for leisure time as a factor of influence on a concrete decision, it seems only natural that this value does indeed influence decisions as well (see Drahozal, *supra* note 25).

³⁷ See Drahozal, *supra* note 25, at 478. See also Andrews, *supra* note 14, at 38.07.

³⁸ See also Shavell, *supra* note 22, who compared the costs of decreasing the probability of errors at the first level with the costs of correcting errors and supervising the first level. According to Shavell, the costs of correcting and supervising will be lower as long as the initiative to mobilise the supervisor rests with the parties themselves.

4. *Ensuring Uniformity and Law Making*

In particular in common law countries, appellate judges often decide cases that provide precedents for future cases.³⁹ In civil law countries the 'precedent effect' of appellate decisions is, from historical origins, less important. Future users of court systems, as well as the parties can benefit from this function. The first-mentioned group benefits from this function because predictability of decisions may lead to cost savings, for instance, because of earlier settlements. The parties also benefit from the idea of having been treated equal to others in similar positions. Research on procedural justice shows that this particular benefit should not be underestimated. The feeling of having been treated equally by a neutral judge in a fair and equitable way is one of the key elements that people value highly.⁴⁰

The overall factor that determines the net value of these benefits is the increase in uniformity in judgments in general. The increase in uniformity depends on factors such as the degree of coordination between the first and second levels, the number of appeal courts, and the tendency to generalise in judgments of the second level.

This being said, the law making function of the appeals system should not be overestimated. The number of useful precedents that result from the appeals process, however, seems to be rather limited, because the third level of the court system is often in a better position to set precedents, because there are hesitations in many courts whether law making is the business of courts at all, and because there may be other, more efficient mechanisms to ensure uniformity, or to design more general rules.

An interesting comment on the law making function is brought forward by Shavell, who argues that courts (or similar institutions) can develop new rules, without an appeal brought forward by the parties. If there is a need for law making, the courts could just hear interested parties, or do any other enquiry that would be necessary to establish rules for future cases.⁴¹

A useful indicator of the precedent value of an appeals process may be the number of precedents that are cited in other judgments or legal literature, divided by the number of appeals. It may very well be that some appeal systems need to process several hundreds of appeal cases, in order to produce one precedent that really gives future users of the system the guidance that they need to save substantial costs.

5. *Selection for the Third Level*

The third levels' function is clearly law making and ensuring uniformity in law. It is generally accepted that, once at this level, the interests of the parties are of minor importance compared to the interests of society as a whole. Only cases that benefit society are allowed to enter the third level. To a lesser extend, appeal proceedings have also the function of law making and ensuring uniformity. The most important difference is, at least in civil law systems, that the third level does not deal with factual matters, only matters of law that are of relevance to society as a whole. It is clear that only a few cases will comply with this standard.

³⁹ This can easily be explained by its historical origins, see Jolowicz, *supra* note 2, at 11 ff.

⁴⁰ Tyler, *supra* note 34.

⁴¹ Steven Shavell, *Foundations of Economic Analysis of Law* (2004), Harvard: Harvard University Press, at 463.

One of the functions of appeal proceedings is selection for the third level. This selection is generally not sufficient to weed out all cases that are not to be dealt with at level 3. An extra selection mechanism is necessary in all systems. Some systems use a leave for appeal at the third level as a back-up selection; others have fast-track procedures for cases that do not meet the standard. Still, the appeal procedure does some selection for the third level.

Who will benefit from this function? Mostly the court systems and their sponsors, because they have to spend less time and money on cases that do not meet the standard for review at the third level. Perhaps also the future users of court systems, as far as the selection means that less time and money is spent on procedures that are not likely to contribute to the uniformity of the law. However, it seems likely that this function will primarily benefit courts instead of the clients of the courts. Which factors determine the net value of the benefits? The number of cases that are admitted to the first level, the quality of the selection of cases that are relevant for uniformity of law making and, finally, the quality and costs of other selection mechanisms (for example, a leave for appeal to the supreme court).

Table IV shows an overview of the functions of appeal proceedings and the benefits for the parties and future users of court systems.

The benefits of appeal proceedings for the parties and future users of the court system		
<i>Function of appeal proceedings</i>	<i>Type of benefits</i>	<i>Remarks about factors determining benefits</i>
<i>Correction of obvious errors made by judges</i>	Appellant: improvement of the outcome (the value thereof), that he was entitled to. Appellee: corresponding decrease in outcome, but it was an undeserved one. Net result of the outcome is positive.	Value of change in outcome caused by the error. This depends on: - value in dispute, - all or nothing issue. Quality and costs of other error correction mechanisms.
<i>Correction of obvious errors made by parties</i>	Appellant: improvement of the outcome (the value thereof), that he was entitled to. Appellee: corresponding decrease in outcome, but it was an undeserved one. Net result of the outcome is positive.	Value of change in outcome caused by the error. This depends on: - value in dispute, - all or nothing issue. Quality and costs of other error correction mechanisms.
<i>Re-evaluation: a different outcome can be justified, but the first outcome is not wrong.</i>	Improvement of the outcome for one party is set off against decrease in outcome for the other. Net result of the outcome is zero. Both parties benefit from the idea that a second, more senior judge, has evaluated the case. Net result of the outcome is positive.	The lower the trust in judges at the first, level the higher the value of the appeal possibility. Amount of extra dose of trust because of higher quality in appeal court compared to court at the first level

<i>Supervision</i>	Future users have a smaller probability of error at the first level; in case of error, see under benefits for error corrections.	<p>The lower the risk of error at first level, the lower the benefits.</p> <p>The decrease in risk of error caused by supervision.</p> <p>The difference in probability of error made by courts at the first level and appeal courts.</p> <p>Quality and costs of other error correction mechanisms.</p>
<i>Ensuring uniformity and law making</i>	<p>Appellant and appellee: feeling of being treated fairly and equally.</p> <p>Future users: predictability of outcomes may lead to cost savings.</p> <p>Net result is positive.</p>	<p>The increase in uniformity in judgments. This depends on:</p> <ul style="list-style-type: none"> - the degree of coordination between first and second levels, - the number of appeal courts, and - The tendency to generalise in judgments of the second level.
<i>Selection for third level</i>	Future users: by increased uniformity (see above) because the highest court has fewer cases to deal with, that do not lead to decisions which increase uniformity	<p>Number of cases that are admitted to the third level.</p> <p>Quality of selection of cases for appeal that are relevant for uniformity or law making.</p> <p>Quality and costs of other selection mechanisms for the third level.</p>

Table IV: *The Benefits of Appeal Proceedings for the Parties and Future Users of Court Systems*

6. *Benefits in other areas*

Appeal proceedings and the measures taken to improve them also generate benefits in other areas. The side effects on the first and third levels are complicated. As we saw, improving the accessibility of the lower level will increase the number of cases that come to the next level. Some other effects are mentioned in Table V.

Benefits in other areas (side effects)		
<i>Area</i>	<i>Type of benefits</i>	<i>Remarks about factors determining benefits</i>
<i>In first instance</i>	Appeal may lead to costs savings. If the parties know they can appeal, they will probably give it a try in the first instance, spending less than they would do when they would have only one chance.	These cost savings have a downside: the quality of first instance judgments may be lower, if parties (and courts) know there is a second chance.
<i>In supreme court proceedings</i>	(Unrestricted) access to appeal leads to a big pool of cases to select from for the third level. It also decreases the pressure on third level courts to allow appeals directly from the first level courts,	

	for instance, if their decisions are clearly wrong. Two instances will weed out more mistakes by courts than one.	
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Table V: Benefits in other areas (side effects)

C. The Decision to File an Appeal

In order to gauge the effects of measures to improve the appeal system, it is also important to focus on the decision of the party that issues the appeal. The number of cases an appeal court has to face and the type of cases that enter the appeal system critically depend on those decisions. Rational choice would predict a party will appeal, if the costs for that particular party exceed the benefits for that party.

The benefits are the prospect of success, the estimate of the chance that the judgment in first instance will be overturned, multiplied by the expected change in outcome if the judgment is overturned. So, in situations where the stakes are very high, even a low (but non-negligible) prospect of success is often a sufficient incentive to start appeal proceedings. For some parties, the benefits of getting procedural justice (voice, respect) in appeal will also count.

A party that appeals may, however, also have to face the probability of an outcome that is worse than it obtained in the first instance. This, of course, only applies if it gained something in first instance: a partial recovery, or a criminal sentence that could even have been higher.⁴²

Some common cognitive errors may change the picture, however. There is substantial evidence that disputants suffer from overoptimism, in particular in ambiguous situations.⁴³ They are likely to overestimate the prospects of success in their case by as many as 10 percentage points, leading to a higher number of cases entering the appeal system. Moreover, the sunk costs error may apply. Many parties will have the idea that they already invested so much in winning the procedure, that they better go on trying.⁴⁴ The rational choice approach suggests that a party should only weigh the extra costs for the appeal, against the potential benefits of the appeal. Giving parties better information about the probability of a successful appeal, and of the likely costs that they will incur, may improve their decision making.

The costs of the appeal procedure will consist of the sum of legal costs, court fees, travel expenses, time spent, costs of witnesses and experts, costs of delay, and emotional costs. Tinkering with one cost-element, for instance raising court fees, is not likely to have a substantial effect, because the impact on the total picture of costs and benefits will be limited. Thus, only a small percentage of appeal decisions at the margin are likely to be influenced by such measures.

The costs will sometimes come in phases. A relatively limited investment of the appealing party may be sufficient to enter the screening phase of the appeal, for instance in a leave for appeal system, or if legal advice is sought to determine the likelihood of success of an appeal. More substantial costs may have to be made if the appeal is allowed. A low cost screening procedure, will obviously attract more cases than a high cost one.

⁴² See for this incentive not to use the right to appeal IV.B.2.

⁴³ J. Baron, *Thinking and Deciding* (3rd ed. 2000), Cambridge: Cambridge University Press.

⁴⁴ Baron, *supra* note 43.

D. Preliminary Conclusions: Most Relevant Costs and Benefits

Is there any general picture? Before we discuss individual measures to improve appeal systems, it may help to get an understanding of the most important costs and benefits of appeals and of the main ways in which the decisions of disputants can be influenced. For the parties, the main benefits of appeal procedures seems to arise from the possibility of error correction. The magnitude of the error, and thus the value of the correction, depends on the extent of the change in outcome the correction will cause. In turn, that depends on stakes and on the relevance of the issue on which the court erred for the outcome. Other benefits for the parties evolve from procedural justice: the feeling that yet another neutral, respectful and trustworthy court hears the case, and from the feeling of being treated equally to other people in the same situation. The magnitude of these other benefits depends critically on the difference in the quality of the treatment the parties receive from appellate courts, in comparison to the treatment by the court in first instance.

The costs of appeal proceedings seem to depend on what could be called the extent of the appeal procedure: How many issues? And what amount of (extra) information does the appellate court need? How difficult is it to (re)produce this information? How many exchanges of views between the parties? How many years from filing the notice of appeal to the final judgment in the appeal phase?

The positive effects of appeals for future users of the court system come from supervision, ensuring uniformity, and law making. The benefits of these functions is likely to increase with the effectiveness of the feed-back by the appellate courts. Do courts of first instance listen to appeal courts? Does the information they get from appeal courts really improve the quality of the first instance? A critical factor is the usefulness of the precedents appeal courts set for future users. Do appeal judgments lead to increased predictability and thus to easier settlement and first instance proceedings?

The costs of the courts (if not borne by the parties) are a relevant factor as well. They primarily depend on the number of judges that decide in appeal cases. Again, the extent of the appeal procedure is important.

As to the incentives on the parties to initiate appeal proceedings, measures that improve the information the parties obtain regarding the prospects of success of the appeal seem useful. Then, parties will increasingly self-select the cases that have a real chance of leading to a change in the outcome. But the total costs of appeal proceedings will also determine whether appeal will be launched or not, as well as the probability of deterioration of the outcome, or benefits of an appeal such as suspension of enforcement of the decision in first instance.

Summarising, and very roughly, appeal proceedings are most effective if they are able to correct the biggest errors in the simplest proceedings. Supervision, uniformity, and law making are mostly a matter of organising the best possible learning effects for lower level judges and disputants.

IV. Evaluation of possible measures

In the following paragraphs, we evaluate possible mechanisms for improving appeal proceedings. In our evaluation framework, an improvement can come from a decrease of costs, or from an increase of benefits. In each paragraph, we will first define the mechanism, giving examples from the jurisdictions we studied. If mechanisms come in a variety of types, we will give examples.

Then we will proceed to the costs and benefits that can be expected from introduction of the mechanism. Starting point of the analysis is an appeal procedure that is a complete rehearing of the case: we take as our *reference point* an appeal procedure that has no more restrictions than a procedure in first instance. In this reference procedure, the appeal court considers the same issues as a court in first instance would, and both the appeal court and the parties have the same procedural options and rights. This point of reference is not very realistic, because in the systems we studied appeal is usually restricted. Using this point of reference, however, enables us to study the consequences of each measure that is suggested to improve the appeal system separately. Moreover, for a cost-benefit analysis of several options, the point of reference is rather arbitrary, as long as the same point of reference is used for each option.⁴⁵

We will discuss the changes in costs and benefits that can be expected from the introduction of the mechanism. Starting with the costs for the parties, we will proceed to the costs for the judiciary, onwards to the benefits. Where empirical studies give indications of the scope of effects, we will mention them. Using these studies as indications of the size of possible effects in other jurisdictions, is usually problematic, however. These studies tend to report the effects of a new mechanism in an existing appeal system that may have particularities that are not present in other systems. Moreover, measures are usually effectuated in systems that already have some measures to improve appeal in place, and may not have the same effects in systems with other restrictions to appeal. Still, some empirical studies give an idea of what effects could be. We will conclude the discussion of each mechanism by giving a short summary of the expected effects.

In the concluding paragraph E, we will discuss the possible effects of introducing several mechanisms in an appeal system next to each other. What happens, for instance, if leave for appeal is introduced in a system that has already limited appeal in other ways?

A. Restrictions in Tasks of Appeal Courts

1. *Leave for Appeal*

In some appeal systems, the parties are allowed access to an appeal procedure only if a court permits this. We call such mechanisms “leave for appeal”. The procedural arrangements for getting leave for appeal can vary. Sometimes, the court of first instance is to give leave for appeal. Sometimes the appeal court takes that decision. A combination is also possible. In the English Civil Procedure Rules, the lower court can give a leave for appeal. If the lower court refuses an application for permission to appeal, a further application for permission to appeal

⁴⁵ See for example Peter H. Rossi et al., *Evaluation: A Systematic Approach*, (7th ed., 2004), Edinburgh: Mosby, at 343 ff.

may be made to the appeal court.⁴⁶ Similar rules exist in English criminal appeal procedures and in the German administrative procedures.⁴⁷

The effects of this mechanism depend on the selection criteria that are used. Some systems give the court that makes the selection broad discretion in granting or refusing appeals. In the English civil appeal system, permission is given 1) if appeal has a real prospect of success or 2) if there is some other compelling reason why the appeal should be heard.⁴⁸ In practice, however, courts explicitly or implicitly develop more narrow criteria to allow the appeal in their case law. In other systems, more narrow criteria can already be found in the rules that deal with the selection of cases for appeal. In the German administrative appeal system, leave for appeal is given in case of 1) strong doubts that the judgment at first level is valid, or 2) legal matters of interest, 3) the case is of fundamental importance, 4) divergence from judgments of higher courts or 5) a procedural defect that may have had serious impact on the substance of the judgment.⁴⁹

In the systems we have studied, the following criteria were used to determine whether appeal should be allowed:

Criteria leave for appeal

- probability of the success of the appeal;¹
- strong doubt on the validity of the judgment at the first level¹
- case is of fundamental importance;¹
- legal matters of interest;¹
- divergence from higher level judgments;¹
- procedural defect affecting the substance of the judgment

How will the mechanism of a leave for appeal influence the costs and the benefits of appeal procedures?

Costs for the parties and for courts

Deciding whether to give leave for appeal is an extra procedure. This leads to extra costs for the parties and for the courts (the costs of screening). If no leave for appeal is given, costs are saved (the costs of appeal procedures). Much depends on the number of cases in which appeals are granted.

Leave for appeal leads to cost savings only if the number of cases in which appeal is not allowed is sufficiently high to compensate for the extra screening costs. Moreover, the lower

⁴⁶ CPR 52.3 (3).

⁴⁷ §§ 124 and 124a VwGO. In English criminal procedure, leave is required for the Court of Appeal, see Zander, *supra* note 7 at 639-640. In German civil appeals, a leave for appeal system is known in cases with a financial value lower than €600 (§ 511 (2) ZPO); in German criminal appeals, a leave for appeal is required also in cases with low stakes, see § 313 StPO.

⁴⁸ CPR 52.3 (6).

⁴⁹ § 124 II VwGO. In England, leave for appeal is considered in administrative procedures as well (White paper 'Transforming Public Services: Complaints, Redress and Tribunals', <www.tribunalsservice.gov.uk>).

the screening costs, the higher the cost savings. The higher the appeal costs in comparison to the screening costs, the higher the cost savings.⁵⁰

Screening costs will be lower if the criteria are easier to apply by the parties and by the judge. What can we expect to happen with the screening costs under the various criteria we found? Giving judges wide discretion in the screening procedure is likely to lead to high screening costs, in particular for the parties: they will more or less want to make their appeal case before the screening judge. A criterion such as the value of the case, however, is relatively easy to apply. Whether the decision in first instance departs from existing case law may be more difficult to establish. The probability of success of the appeal is not very attractive from the perspective of cost savings for the parties: this screening criterion may require both parties to make most of the costs they would make in the appeal anyhow.⁵¹

If a criterion is chosen that tends to lead to high screening costs, it may still be possible to save costs by altering the design of the screening procedure. Procedural rules may, for instance, impose limits on the size of the documents to be filed, or time limits in a hearing. The screening costs will thus also depend on the structure of the screening proceedings, the attitude of the officials doing the screening, and the interaction between the parties. Extensive screening procedures will become an extra burden for the parties.⁵² The same applies for the delay caused by the screening procedures.

Benefits

How will a screening procedure influence the benefits of the appeal procedure? Much depends (again) on the screening criteria:

- The benefits of the appeal for the appellant are likely to be affected, if it is the victim of an error. These benefits are high if the change in outcome expected by the error correction is high. Screening criteria that throw out cases with a high probability of correction in high stakes cases are therefore disadvantageous. If possible, the easiest detectable errors, with the greatest effects on outcomes, should be correctable, and thus be granted the leave for appeal.
- The benefits the parties will obtain from re-evaluation will decrease by screening. We saw these benefits – mostly the benefits of having a second court take a look at the case – are higher if the quality difference between lower courts and appeal courts is higher.

⁵⁰ If screening costs are C_S , the costs of deciding on the appeal are C_A , and the number of cases in which appeals are allowed is p , the cost savings amount to: $(1-p)C_A - C_S$.

⁵¹ Leave for appeal does reduce the number of appeals with evidently no real prospect of success, see the annual report of the Court of Appeal published at <www.courtservice.gov.uk> and the interviews with judges at the Court of Appeal, the High Court and the County Courts (see the reports of J. Plotnikoff and R. Woolfson, published at <<http://www.dca.gov.uk/research/2003/res03fr.htm>>. Whether or not these are real cost-saving measures for courts depends, of course, on the screening costs.

⁵² Written procedures are sometimes considered to be less costly than oral ones, though the cost savings may mostly be the courts, and not by the parties. In a recent experiment in England, written procedures to grant permission for appeal were independently shadowed by oral ones. It showed that the outcomes of the two procedures were the same or even better for the parties in written procedures in approximately 85 % of the cases. The study by Genn and Gray led to a proposal to change the CPR (see H. Genn & L.A. Gray, *Court of Appeal, Permission to Appeal Shadow Exercise, Final Report in Confidence* (2005). See also the Consulting Paper, September 2005, Proposed Changes to Civil Appeal Rules, <<http://www.dca.gov.uk/consult/civil-appeal/civil-appeal-cp2005.htm>>).

- As to the benefits of supervision for (future) users of the appeal system, the picture is less clear. If a smaller number of cases is investigated by the appellate court points may lead to fewer benefits of supervision. But more intensive scrutiny of the remaining cases, and increased “teaching” by the appellate court, may very well compensate for this.
- If the appellate court can select cases that may become suitable precedents, and if it indeed renders a judgment that gives relevant information regarding the law (a precedent that makes it easier to settle or decide future cases), then the benefits of ensuring uniformity and law making can increase. This depends, however, primarily on how well the appellate court manages the extra time it creates. Will it really devote its energy to writing decisions with a higher value as a precedent? What are its incentives to do so?
- Any constraint on the number of cases that go to the second level also affects the pool of cases that the third level will select from. Much depends on the selection criteria again. If those are similar, or more lenient than the selection criteria for the third level, there will be no impact. If the second level really refuses cases that are deemed interesting for the third level, the impact will be bigger.

Leave for appeal procedures may thus lead to substantial improvement, but the design is crucial: low screening costs (criteria which are easy to apply, if possible by disputants themselves), a high proportion of cases in which appeal is not allowed, and selection of cases in which appeal has the highest benefits are essential. If possible, the easiest detectable errors, with the greatest effects on outcomes, should be correctable, and thus be granted the leave for appeal. Appeal should also be allowed for cases with a high potential to become a precedent that enables many future parties to settle their differences (or have them decided at an earlier stage). For this category of cases, the benefits also vitally depend on the manner in which the court organises its law making work. Introducing a leave for appeal procedure will certainly not automatically lead to increased law making benefits.

2. *Limiting Grounds for Overturning Judgments on Appeal*

Civil appeal in Germany is only permitted¹⁾ if legal norms are wrongfully applied or not at all and 2) if fact-finding at the first level is incorrect or incomplete.⁵³ In systems like this, appeal is restricted to specific grounds for appeal. Appeal is not a complete rehearing of the case. The appeal court only considers some reasons to overturn a decision.

Similar to the effects of leave for appeal, the effects of limited grounds depend on the criteria used. In the systems we have studied, the following criteria were used to determine whether application for an appeal should succeed:

⁵³ § 513 ZPO.

Criteria grounds for overturning judgments in appeal

- probability of success of appeal;⁵⁴
- strong doubt of validity of judgment at the first level⁵⁵
- legal norms were wrongfully applied or not at all⁵⁶
- fact-finding at first level was incorrect or incomplete⁵⁷
- case is of fundamental importance;
- legal matters of interest;⁵⁸
- divergence from higher level judgments;⁵⁹
- procedural defect affecting the substance of the judgment

The effects of limiting grounds for overturning a decision on appeal are similar to those of introducing leave for appeal. The main difference between the two mechanisms is the moment of establishing whether sufficient reasons for an appeal procedure exist. In a leave for appeal system, most of the screening takes place before the main appeal procedure. In a system with limited grounds, the selection takes place as part of the appeal procedure.

Costs for Parties

The calculation of cost savings is similar. Again, they are only likely to occur if the number of cases in which appeal is not allowed is sufficiently high to compensate for the extra screening costs. The lower the screening costs, the higher the cost savings. The higher the appeal costs in comparison to the screening costs, the higher the cost savings.⁶⁰

Screening costs for the parties under this mechanism can be low if the criteria are clear-cut and easy to apply. If this is so, parties can assess whether the appeal will be allowed before they start appeal proceedings. They will save costs for themselves and for courts, because they are not entering appeal procedures with a low prospect of success.

The screening costs may be rather high insofar as screening takes place at a late stage within the appeal procedure. This may happen if the criteria for allowing appeal are vague, so that the outcome of the screening is unpredictable. If that is the case, many of the parties using the appeal procedure may still have to make the same costs for the appeal they would have made prior to introduction of the mechanism. The only effect on them would be that their benefits would diminish: limited grounds lower their chances of a better outcome. This reduction in benefits is not compensated by any cost savings.

Costs for Courts

⁵⁴ CPR 52.3 (6).

⁵⁵ § 124 II VwGO.

⁵⁶ § 513 ZPO.

⁵⁷ § 513 ZPO.

⁵⁸ § 124 II VwGO.

⁵⁹ § 124 II VwGO

⁶⁰ If screening costs are C_S , the costs of deciding on the appeal are C_A , and the number of cases in which appeals are allowed is p , the cost savings amount to: $(1-p)C_A - C_S$.

The cost savings for the judiciary depend first on the way the criteria are set, because they influence screening costs. If the criteria are clear for the parties, the parties can do the screening themselves.

If the criteria are open and vague, the courts may still save costs if this mechanism is introduced, depending on the way they organise their work. If they are able to first weed out the cases that have no valid grounds for appeal, and then to decide on the cases that are to be considered in appeal, the cost savings can be substantial, even if the criteria are unclear. The amount of screening costs depends on: 1) the amount of information needed, 2) procedural requirements, and 3) the number of ‘screeners’. Procedural requirements may influence the level of costs. It may make a difference whether the screening procedure is in writing, or requires an oral hearing, and also whether reasons for refusal need to be given, summarily, or more extensively.

Another way in which this mechanism leads to cost savings is the effect of lowering the prospect of success in appeal proceedings. This happens mostly under clear-cut criteria, because this will decrease the over-optimism of the appellant, and to some extent even under vague criteria, if the parties learn that the chance that the appeal changes the initial outcome is smaller. The number of appeals that are issued is then likely to drop.

Benefits

The analysis of the changes in benefits under this mechanism closely resembles the one under the leave for appeal mechanism. Much depends (again) on the screening criteria. Summing up:

- Screening criteria that lead to refusal of cases with a high probability of correction in high stakes cases are disadvantageous. If possible, the easiest detectable errors, with the greatest effects on outcomes, should be correctable .
- The benefits the parties will obtain from re-evaluation will decrease by screening. We saw these benefits – mostly the benefits of having a second court take a look at the case – are higher if the quality difference between lower courts and appeal courts is higher.
- The benefits that (future) users of the appeal system will obtain from supervision, uniformity, and law making (useful precedents) depend on the way the appellate courts will use the extra time made available by the reduction of their case load and costs of dealing with cases.
- Constraints on the number of cases that go to the second level, also affect the pool of cases that the third level will select from. Much depends on whether the screening criteria are similar to the selection criteria for the third level.

Thus, the effects of restricted grounds are similar to those of leave for appeal. The main difference is the moment of evaluation, which will increase the costs for the parties, and those of the courts probably as well. This will in particular be true if selection criteria cannot be applied easily by the parties themselves.

3. *No Appeals in Specific Cases*

Statutory provisions prohibit appeal in some specific cases. In the Netherlands, for example, appeal is not possible in cases of termination of employment contracts. Subject to strict conditions, however, appeal is possible directly to the third level.

Costs for parties and courts

Clearly, the parties that do not have the possibility of appeal will save the costs of appeal. The same will apply to the courts. It will be different if the screening criteria are difficult to apply.⁶¹ Normally, it will be quite easy to develop clear screening criteria. Only a few borderline cases are to be expected if appeal is prohibited in specific type of cases. A negative side effect is to be expected at the third instance: there will be an increase of cases at the third level unless the criteria for review at the third instance are very strict or if third level appeal is excluded completely.

Benefits

Not allowing appeal in specific cases obviously decreases the benefits arising out of all the functions. However, a more careful appraisal shows us that prohibiting appeal in a specific type of cases may not affect the benefits of appeal that much. First, the cases excluded from appeal are likely to be those in which the risk of grave errors are very low. Secondly, the judiciary may find other ways to organise law making and uniformity. A formula for severance payments to former employees, for example, has been developed by a committee consisting of Dutch lower court judges that deal with dismissal. This formula contributes significantly to uniformity of the first (and final) instance judgments. Thirdly, prohibiting appeal in specific types of cases might save courts time that they can spend on cases that need more supervision. This effect depends on the number of cases that are affected by this measure.

In short, this measure is easy to implement, and it decreases the costs with limited negative effects. The measure is worth considering in situations where grave errors are unlikely and where other mechanisms exist for supervision, law making and ensuring uniformity.

4. Restriction of New Issues

The restriction of the possibility to introduce new issues on appeal is an important measure to decrease the amount of work that needs to be done at the second level. Two situations can be distinguished. Is it allowed to bring up new facts that occurred after the judgment in first instance, or arguments connected to them? Is the appellant allowed to bring up facts or arguments that could have been brought up at an earlier stage, but did not choose to do?

In German civil procedure, this is an important topic. Some of the most important changes in the reform of the Civil Procedure Rules in 2002 were related to the restriction of new issues on appeal. New facts and arguments are now only allowed under strict conditions.⁶² New exceptions concerning the authority of the courts cannot be brought up at the second level.⁶³

⁶¹ On the screening costs, see IV.A.1 and IV.A.2.

⁶² New arguments are only allowed 1) if courts at the first level have obviously overlooked or wrongly determined an important issue and 2) the claimant cannot be blamed for not introducing that argument at the first level, § 531 (2) ZPO. Courts of second instance are bound by the facts established in first instance. However, the facts are re-established in the event of reasonable doubt about the correctness or completeness of the determination of the facts in first instance. In practice, this means that the appellate court is often not bound by the determination of the facts at the first level. Some doubt about the correctness or completeness of the determination of the facts in first level can easily be established, see Huber (et al.), *supra* note 2.

⁶³ § 513 (2) ZPO.

For common law countries, the ban on bringing forward new issues in civil appeal procedures is deeply rooted in the system. The finality of decisions at the first level is a leading principle in English civil procedure. Among other things, it means that parties are not allowed to bring in new evidence or new facts.⁶⁴ Exceptions traditionally were admitted in the event of clear errors made by the court in first instance.⁶⁵ Nowadays, some additional exceptions have been created in the light of the overriding objective to deal with cases justly.⁶⁶ In the UK, administrative appeal procedures are limited to legal matters only, which means an indirect restriction on bringing in new facts, evidence, and arguments as well.⁶⁷

Costs for parties and courts

A restriction as to new issues means a decrease of costs for both the parties and courts. A new issue may change the procedure radically, with negative consequences on the cost side. Allowing a new issue may lead to a delay of the procedure, the necessity of collecting new evidence, consulting and deciding on a new strategy, more hearings, etc. Moreover, investments already made (a costly expert witness for example) may become useless because of a change in the procedure, which may be added to additional stress as a result of not knowing what might happen next.⁶⁸

But – again – screening costs will be made, because new issues have to be distinguished from existing issues. The screening costs depend on the criteria for allowing new issues: the more vague and open the criteria, the higher the costs. Then the risk of having to deal with “newness” increases, and more debate will take place on whether or not the new issue is allowed. The German civil procedure rules contain the following criteria: 1) new issues are allowed if courts at the first level have obviously overlooked or misjudged an important issue, 2) and the claimant cannot be blamed for not introducing that argument at the first level.⁶⁹ According to the English Civil Procedure Rules, new evidence is allowed if 1) the evidence could not have been obtained with reasonable diligence for use at the trial, 2) the evidence probably has an important influence on the result of the case, and 3) it is apparently credible evidence, although not necessarily indisputable.⁷⁰

⁶⁴ 52.11 (2) CPR.

⁶⁵ Jolowicz, *supra* note 2, at 283-284, Andrews, *supra* note 14, at 38.27-38.32.

⁶⁶ Andrews, *supra* note 14, at 38.34-38.39.

⁶⁷ White paper ‘Transforming Public Services: Complaints, Redress and Tribunals’, <www.tribunalservice.gov.uk>.

⁶⁸ Genn (et al.), *supra* note 23.

⁶⁹ § 531 ZPO.

⁷⁰ The English CPR provides that evidence which was not put before the lower court is not allowed (CPR 52.11 (2)). The exceptions mentioned above have been made in case law, before the reform. They still seem to be of relevance, though now the appellate court can draw any inference of fact which it considers justified on the basis of the evidence, see Andrews, *supra* note 14, at 38.27 ff. On criminal English appeals, see Zander, *supra* note 7, at 675 ff.

Criteria for allowing new issues (facts, arguments, evidence)

- courts at the first level have obviously overlooked or misjudged an important issue
- the claimant cannot be blamed for not introducing an argument at the first level
- the evidence could not have been obtained with reasonable diligence for use at the trial
- the evidence probably has an important influence on the result of the case
- it is apparently credible evidence, although not necessarily incontrovertible

As to the decrease in costs of the appeal proceedings, it seems to be irrelevant who is to blame (if anyone is) for not having dealt with the issues before. Therefore, the distinction between issues that are really new and those that are not really new, but for some reason were not brought before the lower court, is irrelevant for these costs. It might even be that the costs savings will tend to disappear if the responsibility criterion is used, especially in systems where courts are - to a relatively high extent - responsible for managing the case. Then the appellant has good reasons to try to shift the responsibility to the lower court. If this strategy turns out to be successful in many cases, the system of not allowing new issues will not work, but it will probably lead to additional screening costs.⁷¹

The last two criteria mentioned - evidence that may have big impact and is apparently credible - are probably more easy to apply, with few negative consequences for the parties. Evidence that is not important for the result or is not credible will not be helpful anyway. The other criteria, however, seem rather open and vague and leave much room for debate, especially the first one (the first level overlooked or misjudged an important issue). This criterion seems to need serious refinement before it becomes practicable.

Restriction of new issues is likely to have important effects on the first level. Because the parties know that they have to be careful to bring forward all their points and evidence in first instance, they will tend to make more costs in the first instance. If new issues are allowed on appeal, the parties can try to reach a satisfactory outcome by bringing forward the essential issues and the evidence that is rather easy to collect in first instance. This strategy is precluded by rules that restrict new issues later in the procedure. This front-loading of costs is well documented in relation to a procedural measure with similar effects: the introduction of pre-action protocols in English civil procedure.⁷² Thus, the restriction of new issues changes the division of labour between level 1 and level 2, and probably not in a way that decreases the total costs of the legal system. Some might argue that the quality of the first instance will increase, but it is questionable whether this quality increase is necessary for all first instance cases, and certainly whether it outweighs the costs front loaded to the first instance.

A final remark on the cost is necessary. Even if the screening criteria are easy to apply and the division of responsibility between parties and courts is clarified, the total costs may still

⁷¹ Huber (et al.), *supra* note 2.

⁷² J. Peysner & M. Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape* (2005), <http://www.dca.gov.uk/research/2005/9_2005.htm>.

increase. The parties that were not allowed to bring up new issues will sometimes start a new procedure.

Benefits

Restricting new issues on appeal may increase benefits that arise from re-evaluation: the (procedural justice) benefits of being heard again. If new issues are allowed on a large scale, re-evaluation will be impossible in many cases. Instead, appeal will be a more or less new procedure. A true re-evaluation means that a second judge makes a new decision based on the same facts and evidence. Restricting new issues will mostly benefit parties that value the idea of having a second (supposedly more skilled) judge to re-evaluate the case. The extra amount of trust that parties have in appeal courts compared to the courts at the first level is important here.

On the other hand, restricting new issues is likely to decrease benefits that arise from correcting errors. It depends on the criteria used: the benefits from correction of errors made by judges will not decrease if new issues are allowed in cases where the lower court obviously overlooked or misjudged issues. The benefits arising out of correction of errors made by the parties themselves are decreased if a 'responsibility' criterion is used. The other criteria do not affect the benefits arising out of error correcting.

The benefits arising out of the public functions of appeal (supervision, ensuring uniformity, law making, and selection for the third level) are not dramatically affected by restricting new issues.

Summarising, whether this measure leads to an increase or decrease of costs is not easy to say. The main question seems to be whether the new issues would really lead to a major change in the procedure. If this is the case, it may be better to exclude them and leave it up to the parties to start a new procedure. If not, the benefits of excluding them will probably not outweigh the costs, in particular because high screening costs are likely. An important side effect of prohibiting new issues, however, is that costs are front-loaded onto the lower levels, which makes exclusion of new issues a risky measure.

5. *Limiting Appeal to Issues Brought up by Parties*

The measure of limiting the appeal to issues brought up by the parties means that the parties have to describe the object of appeal themselves. Issues that are not brought up by the parties will not be taken into account by the appellate court. The consequences of this measure depend on the type of procedure on appeal. It might have bigger consequences in law systems with a rehearing procedure on appeal than it would have in law systems with a review procedure. In a rehearing procedure, like Dutch civil procedure, courts are now obliged (within boundaries) to check all relevant arguments mentioned in first instance if these arguments have some relevance.⁷³ A limitation to issues brought up by the parties would mean that the courts are no longer responsible for the search for the right issues in appeal. Related to this topic is the discussion in Dutch criminal appeal procedures to introduce partial appeal, in which only a specific part of the decision is reconsidered.⁷⁴ In a review procedure,

⁷³ Hovens, *supra* note 9, at 230.

⁷⁴ M.S. Groenhuijsen & G. Knigge (eds.), *Dwangmiddelen en rechtsmiddelen, Derde interimrapport onderzoeksproject Strafvoeding 2001* (2002), Deventer: Kluwer, 344. In Germany and France, partial appeal in criminal cases is allowed, see for German law § 318 StPO. In France, the object of appeal is the specific grounds of appeal. Those not mentioned are not subject to appeal.

like the English civil and administrative procedure, it might still be a helpful measure. A limitation to issues brought up by the parties means that the parties have to describe exactly to what part of the decision they object.⁷⁵

Cost for parties and courts

A limitation to issues that are brought up by the parties will, at first sight, lead to a decrease in costs for courts. Their focus can be narrower. Dealing with issues of appeal procedure, sorting out appeals that are likely to be successful, the preparation of hearings, decision-making and writing judgments will therefore take less time. However, a measure like this will encourage the appellant to define issues broadly, so that he can be relatively sure that the court has all the arguments to decide the case in his favor. The courts will have to deal with vaguely described points of fact and law, which may ultimately result in an increase of costs for courts and parties. In other words, a limitation of issues brought up by the parties will only lead to costs savings for the courts and the parties if both parties have incentives to be precise and to limit their case. An obvious way to do this is by requiring precise arguments, but this will again lead to screening costs.

The costs of the parties may decrease as well, because they can limit their attention to specific points. This focusing could lead to extra costs as well, however. For instance, it precludes the parties from just repeating their arguments in first instance, and letting the court re-evaluate the case.

More or less the same reasoning applies for partial appeals. A partial appeal will only lead to real cost savings if the parties have incentives to use it; otherwise a full appeal is just a free opportunity to have all arguments reviewed. Choosing a partial review instead of a full one for the same price would just be foolish. Introducing lower court fees for partial appeals, or perhaps even a fee per hearing or written page to be reviewed might be helpful incentives.

Benefits

On the benefits side, changes will mostly occur in the field of the private functions of appeal, not the public ones. The benefits arising out of error correcting will decrease a little, both for errors made by parties and for errors made by judges. As long as parties themselves are capable of revealing the error, the benefits are not affected.

In practice, however, courts may be tempted to help parties who have not pointed out errors which appeal courts are able to see. If appeal courts consider it to be their job to give every appellant a “just outcome”, they will often create ways to correct errors that are not identified by the appellant, maybe because he has a lawyer of insufficient quality. Then, the cost savings of this measure may disappear. The appellee, for instance, may have to anticipate that the court itself broadens the scope of the appeal and will have to bring up more points, and the court will spend time looking in files for possible issues.

In short, whether this measure leads to cost savings depends on the incentives for parties to specify the arguments on which their appeal is based. The effect on the benefits is neutral, provided that most parties themselves are capable of revealing the errors to be corrected and arguments to be re-evaluated. If courts start helping the parties, the cost savings will tend to disappear.

⁷⁵ According to the English Civil Procedure Rules, the appellants need to describe their complaints in an appellants’ notice. This notice is the object of appeal. Courts are not allowed to go beyond this notice, but they are allowed to inform the appellants that some parts are missing in their notice.

6. *Limiting Appeal to Stakes with a Certain Value*

The limitation of the right to appeal to certain interests at stake is the next measure we studied. In Germany, civil appeal is not allowed in cases with a financial interest below € 600.⁷⁶ In Dutch civil appeals, the financial interest should be higher than €1,750.⁷⁷ English civil appeals do not have such limitations, though a low value interest may affect the decision to grant leave for appeal.

Costs for parties and courts

The costs for parties and courts again depend on the screening costs. Clear and easy to apply criteria will restrain the costs; the more vague and open the criteria, the higher the screening costs will be. With the exception of the English criterion, the criteria mentioned are obviously clear and easy to apply. The screening costs for the English procedure were described earlier, in the section on leave for appeal.

Benefits

The benefits from error correcting are not affected drastically, assuming that errors in cases with low interests at stake generally have minor consequences for the parties. The same applies for re-evaluation, although procedural justice benefits may not be directly connected to the value at stake. The problem with this measure may be that it is difficult to establish the real interests at stake. A low financial value does not always reflect what really matters to the parties. Furthermore, ensuring uniformity and law making seems also to be affected. Cases with a low financial value can still be important for the public functions of appeal.

Therefore, a high (financial) threshold combined with a leave for appeal system for cases below the (financial) threshold may be an attractive option.⁷⁸ In such a system, parties are entitled to appeal without restrictions if the value is relatively high. In all other cases, they are entitled to appeal if they can explain the interests at stake have a high value for them.

B. Changing the Incentives to Use Appeal

Now we proceed to measures focused on the incentives for getting a second decision. We have found three different types of measures which influence the decision of parties on whether or not to appeal. These measures increase the price of appeal proceedings, introducing the possibility or increasing the probability of a worse outcome of the appeal procedure, and changing the incentives for lawyers.

1. Price Increases

Increasing the price of appeal influences the decision on whether or not to file an appeal. Two possible measures are increasing court fees and introducing options to order the appellant to pay the costs of the proceedings, for instance, in administrative procedures.

Costs for parties and courts

⁷⁶ § 511 ZPO.

⁷⁷ Article 332 Dutch Code of Civil Procedure.

⁷⁸ See also Jolowicz, *supra* note 2, at 335.

Higher court fees will lead to an increase of the out of pocket expenses for the parties. Usually these fees go to the state. The judiciary does not automatically receive these fees and will therefore not directly benefit from them. The problem with the effectiveness of this measure, however, is that, in most situations, court fees are only a small proportion of the expected total costs of the appellant. These primarily consist of lawyers' fees, together with the costs of time spent by the parties, as well as costs of delay and emotional costs. In order for this disincentive for using the appeal system to work, the court fees should be raised substantially; a three- or even tenfold rise may be necessary. Such a rise may be attractive for yet another reason. Appeal is a second chance, and it might be conceivable to let the parties pay for this second chance, so that it requires no state funding and waiting lists will tend to disappear.

Introducing or enlarging the option that the party that has lost the case on appeal has to pay the costs of the proceedings that the other party has made is another way of increasing the price for the parties. At this moment, in Dutch administrative and civil procedure, the party that loses is not always ordered to pay all the costs that the other party has made. In Dutch civil law, for example, the cost award will be limited to about a quarter of the real costs. In English civil procedure, however, all the costs can be recovered from the party that loses the appeal. This may be one of the reasons why the number of civil appeals in England seems to be rather limited. In Dutch administrative procedure, citizens can be forced to pay the costs of the proceedings only if they have misused the judicial system. If the appellant is a governmental authority, it is normal that the appellant, if it loses the case, has to pay the appellee's costs of the proceedings. Another specific example worth mentioning in this context is the English provision in criminal procedures, according to which an unsuccessful appeal initiated by the convicted party may lead to an unfavourable cost decision. With this measure, convicted parties are stimulated not to appeal in cases with no real prospect of success.

Price increases will affect all decisions to file an appeal. They may be most effective in relation to appeals with a low prospect of success, because the price of the appeal is of primary importance if the appellant tries to make a rational evaluation of the advantages and disadvantages of an appeal.

Benefits

High court fees could lead to a decrease of appeal proceedings. However, the impression is that parties will not be influenced much by the height of the court fees, because these fees will always be a relatively small part of all the costs that parties have to make in judicial proceedings.⁷⁹ Introducing the possibility to order the citizen party to pay the costs of proceedings could lead to fewer appeal cases.

The higher the risk and the higher the costs that the appellant has to pay if he loses the case, the higher the chance that he will be influenced by this risk. Measures in this area will have some influence on the benefits side. It is not likely that, if a party thinks that the judge or the party itself has made an obvious error in first instance, he will not appeal because of the risk of being ordered to pay the costs. The function correction of errors made by judges or parties will therefore not be affected. On the other hand, the benefits that parties get from the re-evaluation function will be affected negatively. A party that would only like to get a second opinion from a higher judge is likely to be influenced by financial risks that lodging an appeal

⁷⁹ The experts had the feeling that increasing the court fee did not influence the parties' decision whether or not to file an appeal. For example, in Austria, the court fees are extremely high, but that does not stop the parties from filing appeals.

will bring. Other benefits that stem from the functions supervision, ensuring uniformity and law making, and selection for the third level will be reduced if a party decides not to appeal. A party will not easily run the risk of high costs if only a matter of legal interest is at stake, for example, law making. In that way, price increases could lead to the loss of these kinds of public functions of appeal proceedings. A way to overcome such effects would be to introduce some form of subsidy in cases of general interest.

Summarising, introducing somewhat higher court fees is not a measure that will have a great impact on the efficiency of the procedure. Changes in court fees should be substantial. Increasing the risks for the parties of being ordered to pay the costs may have a positive impact on the efficiency, without losing too many benefits.

2. *Introducing or Increasing the Probability of Worse Outcomes*

Paying court fees and paying for the costs of the procedure is one thing, but having a chance of getting a worse outcome on appeal is another. Some systems, especially criminal procedure systems or administrative law procedures (for foreigners applying for residence permits, for instance) may have very few disincentives to use an appeal procedure. In criminal procedure, the defendant is sometimes even protected from obtaining a heavier sentence. Parties might be deterred from using appeal proceedings if they could end up with a worse result than they obtained in first instance.⁸⁰ The bigger the difference between the judgment in first instance and on appeal, and the greater the chance of worse outcomes on appeal, the more likely it is that parties will take this aspect into consideration before lodging an appeal.

Costs for parties and courts

The costs for both courts and the parties will decrease because the number of appeals will go down. On the other hand, the costs for the parties who lodge an appeal will increase, in particular the emotional costs involving uncertainty and higher risks. The increase of costs for parties will depend on personal features, such as risk aversion and the interests at stake.

Benefits

Obviously, if the parties decide to refrain from lodging an appeal because of the risk of worse outcomes, all the benefits arising out of the functions of appeal proceedings are affected. If, on the other hand, appeals are lodged in spite of the risk of worse outcomes, the benefits are not affected. This measure will tend to select cases for appeal where the outcome in first instance was at the extreme end of possible outcomes. In such cases, disadvantaged parties will still have reasons to appeal. Appeals in which a party just gives it another try will be discouraged.

Summarising, whether the decrease of costs for courts outweighs the increase of costs and decrease of benefits for the parties depends on the number of appeals, the interests at stake, and the risk the outcome will actually be less favourable.

3. *Changing the Incentives on Lawyers*

⁸⁰ In the English criminal appeal system, a strong incentive not to make a frivolous application on appeal is given by the so-called 'time loss rules'. According to these rules, the time spent by appealing does not count towards the sentence. Though rarely exercised, this power had an enormous impact on the applications on appeal. The number of criminal appeals were almost halved, see Zander, *supra* note 7, at 641.

A lawyers' incentive to lodge an appeal may be the higher fees received in appeal procedures, or a relatively attractive fee although the costs of processing the case made by the lawyer are relatively limited. German civil procedure contains such incentives.⁸¹ Changing incentives for lawyers may reduce the number of appeals. For example, by introducing a 'no cure no pay system' for appellants, the number of appeals will be limited to those with a chance of success that outweighs the extra costs of the appeal. The costs and benefits of this measure depend on the type of changes in incentives. It is likely, however, that these incentives have a substantial impact on both the costs and the benefits. As a result, it is important to identify and analyse them, and change them if they lead to higher costs for parties and courts.

C. Changes in Dealing with Appeal Cases

1. *Special Track for Straightforward Cases*

In some cases, the outcome of the procedure is evident: it is clear that the court is not competent to give a decision, that the appeal is not admissible, or that the appeal is unfounded, or, on the contrary, clearly well-founded. In these situations, it is not necessary to follow the normal procedure; a more effective way is an immediate decision of the court.

Courts nowadays have greater powers to dismiss an appeal without a formal hearing if it has no prospect of success in a fast track procedure.⁸² German criminal procedure contains a specific provision to the effect that cases that are apparently unfounded are dismissed without a formal hearing.⁸³ In Dutch administrative procedure, courts have the authority to decide immediately in straightforward cases.⁸⁴ Of course, these special fast track procedures only make sense if the straightforward cases were not filtered out of the system at an earlier stage.⁸⁵

A fast track procedure for other cases than straightforward ones is also conceivable. In French administrative procedure, for example, there is a special fast track procedure for cases that all relate to one legal issue. A single judge, no hearing, and shorter time limits are the main features of this procedure.⁸⁶

Costs for parties and courts

If a straightforward case is handled in a fast track procedure, the costs of the courts will decrease, because these short proceedings cost less time and money than a normal, longer procedure. The set-up of the procedure is important, however, because the parties may well be induced to do all the work they would have done for a full appeal.

Benefits

In a fast track procedure, the judge will generally be able to identify clear errors made in first instance. If an evident error was made, the judgment in first instance can be reversed immediately in this fast track procedure. The fast track procedure will also be used if there are

⁸¹ See *supra* note 18.

⁸² § 522 ZPO.

⁸³ § 313 (2) StPO.

⁸⁴ Article 8:54 Dutch General Administrative Law Act.

⁸⁵ As, for instance, in the leave of appeal system in English civil procedure.

⁸⁶ This type of procedure is known as an *ordonnance*, Article R. 222-1 CJA. See also article 8.2.4. of the Dutch General Administrative Law Act.

clearly no errors. The benefits that come from the function of correcting errors will therefore not be eroded. The function of re-evaluation, on the other hand, will not benefit from a fast track procedure. Although another judge looks at the case, it will be such a superficial look that the parties will not be satisfied on this point. Even in a fast track procedure, the judge may have enough time to supervise the judgments of first instance and see if these judgments deviate from the normal case law. Therefore, the benefits that arise from the functions of supervision and ensuring uniformity/law making may not be affected.

All in all this could be a useful measure when many appeals are being lodged, and resources are limited. It makes the procedure definitely more time and cost efficient, whereas the benefits derived from re-evaluation will probably be the only ones that are affected negatively. Clear errors will often be easily detectible. It is the careful re-evaluation that causes most of the costs of an appeal.

2. *Single Judges*

Appointing a single judge in appeal procedures is the second measure in this category. The number of appeal judges varies in different procedures in different countries. In most systems (with the exception of criminal procedures), a cut in the number of judges that hear appeals has at least been taken into consideration, or has already been implemented.⁸⁷ In German civil appeals, for example, the categories of cases dealt with by a single appeal judge have been extended.⁸⁸ The Court of Appeal in England normally has a panel of three judges, whereas the county court normally has two. In French administrative procedure, the appeal court nowadays normally consists of three judges rather than five.⁸⁹ Obviously, a single judge will be the most efficient option. Therefore, we will mainly identify the effects of introducing a single judge in appeal procedures.

Costs for parties and courts

That a single judge deals with the case does not influence the costs of the parties. It does not make a difference whether a case is handled by one or more judges. The costs of the judiciary obviously will decrease, because there will be less to pay in salaries. The costs of other members of the court and the extra costs of hearings are independent from the number of judges that decide a case.

Benefits

On the benefits side of appeal proceedings, several changes will take place if only one judge looks at a case again. As more judges know more than one judge, the correction of obvious errors cannot be guaranteed, although clear errors will still be discovered most of the time, especially if the parties point them out. The functions of ensuring uniformity and law making may also be affected slightly. The benefits for the future users of the system of re-evaluation, supervision, and selection for the third level will not be influenced dramatically by the number of judges.⁹⁰

⁸⁷ See also Jolowicz, *supra* note 2 at 344.

⁸⁸ § 526 ZPO. A single judge normally deals with cases that were dealt with by a single judge at the first level, are not very complicated, are no matter in principle and were never dealt with by a full panel of judges.

⁸⁹ Article R. 222-26 CJA, Décret no 2001-710, 31 July 2001.

⁹⁰ In French administrative law, research has been done on the question of whether introducing an *unus iudex* in illegal immigration cases affected the function of ensuring uniformity. This was not the case.

For the courts, this is an efficient measure. It will not lead to any substantial cost savings for the parties, and may influence their benefits somewhat, in particular in appeal systems that also focus on re-evaluation. This may explain why this measure is not a very popular one with lawyers and parties.

3. *Case Management*

Case management is a measure that is applied in particular at the first level of procedures. In fast track and multi track procedures, it has been the most important cultural change in English civil procedure law induced by the Woolf reforms. Shifting the responsibility for the management of civil litigation from the litigants and their legal advisors to the courts has had substantial effects: cooperation between the parties and the parties and the courts has been improved, delays have been reduced and the number of settlements in an early stage of the procedure have increased. However, the costs have probably increased as well. In particular, the legal costs are now 'front-loaded'.⁹¹ In Germany, civil courts also have been given still more responsibility for the management of civil litigation, although they were already very much involved in the process in comparison with their English counterparts. There are no concrete figures on the effects of the latest changes yet.⁹² Whether case management in appeal procedures has similar effects is even more uncertain.

Costs for parties and courts

If case management is organised in such a way that parties are obliged to exchange information intensively and to negotiate at an early stage in the appeal procedure, the result will probably be that fewer cases reach the decision stage of the second level. However, as the English results show, whether the total amount of costs for courts and parties is really decreased, instead of just shifted to the front, is doubtful. Still, managing civil litigation in appeal procedures in such a way that the cooperation between the parties and the parties and the courts is enhanced might lead to some cost savings for the parties, in particular if the case management begins before they file extensive briefs and documents. At the same time, it will probably increase the upfront workload of court personnel, although this may be compensated by having to deal with fewer issues, in a less complex way, later in the proceedings. Furthermore, complex rules of case management can lead to new costs of upholding the rules. This effect seems to be limited, however: the English experience is that there are only a limited number of appeals on case management decisions.⁹³

Benefits

The measure is mostly considered for reducing costs and delays instead of increasing the benefits for the parties. Case management does seem to have a neutral impact on the benefits of appeal, those arising out of the private functions of appeal as well as the public ones, though much depends on the way case management is organised. A more active judge may be perceived as a judge who gives more voice and more respect to the parties, however.

In short, the measure may have a neutral effect on the benefits, depending on how case management is organised. Furthermore, the measure tends to shift the costs from one level to another, instead of decreasing the costs. Cost savings for the parties are likely when case management is done early in the procedure.

⁹¹ Peysner & Seneviratne, *supra* note 72.

⁹² First impressions are given in Huber (et al.), *supra* note 2.

⁹³ Peysner & Seneviratne, *supra* note 72, at ii.

4. *Different Procedures for Evidence and Argumentation*

Changes in the way parties can bring forward their arguments and give evidence can result in faster and less costly procedures. The following measures have been considered in Dutch civil law: parties are obliged to give reasons for their requests to hear witnesses, the court can refuse to hear witnesses if it is unlikely that hearing the witness will contribute to the just resolution of the case, and courts use written witness statements rather than oral ones. In Dutch criminal law, measures regarding the supply of evidence have been taken recently in order to make appeal proceedings more efficient. For example, the appellant has to announce at an early stage which witnesses he wants to call, so a single judge can hear these witnesses before the trial in court before a three-judge panel.

The most drastic way to make the appeal proceedings more efficient in this respect is by excluding new evidence in appeal proceedings, i.e., evidence that was not submitted before the court in first instance and that should have been submitted at that stage of the proceedings.

Costs for parties and courts

Measures in the sphere of the way parties can provide evidence may lead to extra out of pocket expenses for the parties, because they are not free to choose the cheapest way of giving evidence. Measures that exclude evidence in appeal will probably also lead to more expenses for the parties in the first instance. They will try to make sure that they have given all evidence in first instance, because the appeal procedure will not work as a safety net. On the other hand, the parties will save the costs of hearing witnesses or considering other evidence.

The courts may save money by such rules. In the first place, they will sometimes refuse evidence. In the second place, it will be easier to assess the value of the evidence that has been produced. They only have to do a re-evaluation, instead of assessing the value of extra evidence.

Benefits

Accepting only certain evidence this will lead to some loss on the benefits side for the parties. There would be less opportunity to correct errors made by judges in first instance, because the parties are bound by these rules of evidence. The benefits that arise out of the functions of supervision, ensuring uniformity/law making, and selection for third instance will not be affected.

Summarising, limiting the amount of evidence on appeal may lead to some cost savings, in particular for the courts. For the parties, it is likely to turn out as an extra procedural hurdle. The function of error correction is likely to suffer.

5. *Obligations to Use Legal Representation*

Parties are not always obliged to be represented by a lawyer. Introducing an obligation on this point might improve appeal proceedings, provided that these lawyers have special knowledge and skills concerning the procedure in question. This type of measure has been taken in French administrative procedure.⁹⁴ Some legal systems not only oblige a party to have a

⁹⁴ Article R. 811-7 CJA, Décret no 2003-543, 24 June 2003.

lawyer in appeal proceedings, but this lawyer must be specialised in appeal proceedings as well. This instrument is known in German civil law.

Costs for parties and courts

If the obligation to use legal representation leads to hiring a lawyer whereas the party otherwise would not have hired one, obviously this will increase the out of pocket expenses for this party. These expenses will increase if the parties have been represented by a lawyer in the first instance and are forced to hire a different (specialised) lawyer in the appeal procedure. A specialised lawyer is likely to be more expensive, and extra time will have to be spent on the instruction of the (specialised) lawyer. Some delay may be caused by this as well.⁹⁵

The costs for the judiciary will possibly decrease somewhat, because (specialised) lawyers will probably give a clearer picture of the dispute and of the relevant judicial arguments than non-lawyers would. In that way, (specialised) lawyers can make the job for judges easier. Specialised lawyers may know more about the way appeal courts screen their cases, so they may provide better information on the prospects of success for the appellant, leading to fewer appeals. They may have to think about their reputation with the appeal court, and thus may bring fewer cases to the court with negligible prospects of success. On the other hand, specialised lawyers bring in their own incentives. Their introduction may even tend to make proceedings more complicated.⁹⁶

Benefits

The benefits of appeal proceedings for the parties may increase somewhat if more errors are detected by the specialised lawyers. This is not likely to make much difference for the errors with the gravest consequences, however. They may also have a better feeling for cases that are suitable for law making, if this is an important function of the (level 2) appeal.

Introducing this measure means that the parties have to spend more money if they want to appeal. The magnitude of this effect is hard to estimate, but legal costs form a substantial proportion of the total costs. An obligation to use a (specialised) lawyer may well impose higher extra costs than, say, a rise in court fees. The effects are thus rather similar to the effects of other price increases. Cost savings for courts are not very likely. The increase in benefits is not likely to be very substantial.

6. *Postponing Judgment Writing*

In criminal procedures, the writing of judgments in first instance is sometimes postponed. Judgments in first instance normally have two parts: the outcome of the procedure (the decision itself), and the reasoning that led to this decision (the opinion). One way to increase the pace of procedures in first instance is to render the decision and leave out the opinion. The opinion will be written only if one of the parties appeals against the decision. Another option is to give the judgment orally, and not in writing. Only if parties appeal against the decision, will the judgment be put in writing.

Costs for parties and courts

⁹⁵The English experts thought that if this measure were introduced, the parties might save costs as well, because now they sometimes invest time and money that would not have been invested if they had had proper advice.

⁹⁶The experts we consulted were positive that the introduction of specialised appeal lawyers does not contribute in a significant way to cost savings, or to greater benefits for the parties.

This measure is atypical, because the savings in costs for the judiciary will primarily occur at level 1. The effect might not be so great, however, because evidently every judgment needs to be motivated. Writing down the motivation will cost some extra time, but not very much. Writing the opinion will take extra time if the judgment is not written down immediately but after some time, because an appeal has been lodged. Yet, in some legal systems, like in American civil law, not writing down judgments is the starting point. The lower the appeal rate, the more effective this measure will be because, if a large proportion of the judgments does not have to be motivated, the procedure (in first instance) becomes less costly. The parties will not save any costs. They may suffer delay in the event of an appeal, because the court will need time to do the writing.

Benefits

The functions of appeal, and the corresponding benefits, are not affected by introducing this measure, but there is a possible side effect that has to be mentioned: ensuring uniformity and law making in first instance may be negatively affected.

7. *Specialised Appeal Courts*

Specialisation is rather common in the legal systems we studied. Germany has special courts for tax matters, employment matters, and social security matters. Its highest courts have a tradition of specialisation between different divisions as well. Sometimes, one level 1 court is the only court for a certain type of case (patent cases, trade mark cases, for instance) and the territorial division of labour between appeal courts then also leads to specialisation at level 2. An example of a specialised Dutch appeal court can be found in military criminal law: the Court of Arnhem is specialised in this type of cases. In Dutch administrative law, three courts of appeal exist, all three with their own competence: the Trade and Industry Appeals Tribunal is specialised in economic administrative law, the Central Appeals Tribunal in social security and civil servant cases and the Administrative Law Division the Council of State in all other areas of administrative law.

Costs for parties and courts

The out of pocket expenses, more specifically the travel costs, for the parties will be slightly higher because, in contrast to what is normal in most cases, the parties will have to go to a certain court that is not necessarily near their residence. However, travel costs tend to be a tiny proportion of total costs, and this cost increase is compensated by cost saving which can be quite substantial. If parties can expect that a court knows the real issues, the relevant facts and the relevant law, the parties can limit the amount of information they submit to the court. Moreover, they are likely to be able to save costs, because they can anticipate the way a specialised court manages its cases.

The costs for the judiciary will decrease by introducing this measure. The costs of the judges and the costs of other court personnel will decrease, because the court personnel will have more knowledge of certain cases. Therefore, they need less time to prepare cases and write judgments.⁹⁷

Benefits

Specialisation can contribute to a legal system in which equal cases are treated equally, and therefore the function of ensuring uniformity can be positively affected if this measure is

⁹⁷ See also Jolowicz, *supra* note 2, at 343.

introduced. Errors can be detected more easily by specialised courts. The procedural justice benefits of being heard by a knowledgeable court may be higher as well. One possible drawback is that the function of ensuring uniformity and law making could be endangered, if there is specialisation in areas that overlap with other areas as concerns the general aspects. For example, in Dutch administrative law, the three appeal courts sometimes differ in opinion about topics concerning general administrative law. As a result, the case law of the three courts diverges on some points. In that way, specialisation does not always contribute to the function of ensuring uniformity. An additional mechanism to reconcile such differences may be necessary. Another consequence is the risk of “group think”.⁹⁸ The downside of specialisation is that a ‘fresh look’ from outsiders may be lacking. Letting the same judges decide the same issues for too many years is not advisable. Some mechanism for rotation will be necessary, and possibly other organisational measures to encourage innovation.

Summarising, specialisation seems to be an attractive option. The drawbacks seem to be limited and are likely to be remediable.

8. *Decreasing Time Limits for Appeal*

Decreasing the time limit for appeal will affect the number of appeals somewhat. In Dutch law, the time limit in civil law is in principle three months, in administrative law six weeks, and in criminal law fourteen days. What will be the costs and benefits of shortening time limits?

Costs for parties and courts

The costs for the parties could increase somewhat: if they have a shorter time to appeal, it might become more expensive to appeal in time. If a party is really in a hurry, a lawyer might charge a higher fee. Moreover, the time limit may become too short for a well-considered decision on whether to appeal, which may lead to a larger number of appeals which may not all be withdrawn at a later stage. On the other hand, if the parties suffer costs of delay, a shorter time limit is also in their own interest. However, shortening the time span for an appeal procedure, which will often take around a year or more, with a few weeks will not contribute much to decreasing the costs of delay.

Benefits

If a party loses his right to appeal because he exceeds of a time limit, this will affect the functions ‘correcting errors’ and ‘re-evaluation’. The party does not have the opportunity to get a judgment that corrects an error, or another opinion on the same case from another judge. If the time limit is short, some parties may miss it.

Summarising, this measure will not contribute much to less costly appeal proceedings, because it would not substantially change the number of appeals, or even lead to more appeals, and may lead to a decrease in benefits for those who miss the deadline for appeal.

D. Alternatives To Appeal

1. Easier Access to Other Correction Mechanisms

⁹⁸ C.R. Sunstein, *Why Societies Need Dissent* (2003), Cambridge: Harvard University Press.

Easier access to other correction mechanisms is another possible measure. An example of another correction mechanism is a first level's authority to correct its own draft decisions on the basis of the reactions of the parties.⁹⁹

Costs for parties and courts

The costs for courts on appeal will obviously decrease. The downside is that the costs of the other correction mechanism increase. In the event of a minor error, the decrease of costs of appeal courts will outweigh the increase of costs of the other correction mechanism. As soon as the other correction mechanism has the same amount of work to do as the appeal court, the costs will only be transferred, not increased. The same will probably apply for the costs of the parties.

Benefits

The benefits are not dramatically affected by this measure, provided that the other correction mechanism has the same standard in quality. The drawback of letting the lower court correct its own errors is obviously that it may not always be trusted by the parties to do so. Some kind of supervision by the appeal court may be the solution. For re-evaluation, this mechanism seems unsuitable.

In sum, if correction of (clear) errors is an important goal of the system, this measure may be attractive. Some kind of incentive on the lower level court to reconsider its decision seriously may be needed.

2. *Means to Settle a Case Out of Court*

One way to reduce the number of appeals is to expand the means to settle a case out of court. Mediation is one example.¹⁰⁰ Other forms of ADR that may be relevant are arbitration or specific boards of conciliation in employment cases.¹⁰¹ In some jurisdictions, the courts have the power to force the parties to negotiate, but in most jurisdictions, these alternative dispute resolution mechanisms are only accessible on a voluntary basis.¹⁰² These means to settle a case without court judgment are not specific measures to improve appeal procedures. Often

⁹⁹ See, for example, Articles 31 and 32 of the Dutch Civil Procedure Code. Courts have the authority to complement a judgment under strict conditions or to correct 1) a clear 'slip of the pen' or 2) other simple errors which can easily be corrected. Some claim that this specific correction mechanism should be expanded to other types of errors, see W.D.H. Asser, H.A. Groen & J.B.M. Vranken, *Een nieuwe balans: Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht* (2003), Den Haag: Boom Juridische uitgevers, 206. § 139 of the German ZPO contains an approach which is in line with this. This article obliges judges to inform the parties if they have failed to provide all information needed to make a judgment, which prevents "surprise decisions".

¹⁰⁰ The Council of Europe explicitly recommends this type of Alternative Dispute Resolution in various fields (family law, administrative law, and criminal law). For an overview of the practice of mediation in several law systems, see the European Commissions Green Paper on ADR 2002 and also the UNCITRAL Model Law on International Commercial Conciliation.

¹⁰¹ Van Rhee provides an overview of specific means of conciliation in several European law systems, see C.H. van Rhee (ed.), *European Traditions in Civil Procedure* (2005), Antwerpen: Intersentia, at 185-187.

¹⁰² In England, attempts to settle cases must be reviewed in the light of the overriding objective of dealing with cases justly. This means that parties are under an obligation to avoid litigation. In pre-action protocols, the parties are forced to exchange information. If they do not comply with this obligation, they may face an unfavourable cost decision. The results are phenomenal: Peysner and Seneviratne mention that 60 to 80% of the cases in fast and multi-track procedures are settled in the eight courts they examined (*supra* note 72). Furthermore, English courts, as well as Dutch, French, and German courts, encourage alternative dispute resolution mechanisms whenever parties may be able to settle the case, see Van Rhee, *supra* note 101, at 186-187.

they are most effective if used at an early stage in the procedure, but some cases settle through mediation at the appeals level.¹⁰³

Costs for parties and courts

The costs for courts will obviously decrease (provided that the alternative means are out of court means), but the costs for the parties are difficult to measure. It depends on the cost of the alternative dispute resolution mechanism. Figures on this area are ambiguous.¹⁰⁴ At the appeal stage, ADR mechanisms will mostly be out of court negotiations (with or without a mediator), since the parties have obviously already chosen to litigate. From a cost perspective, both parties may think that trying to settle the case by negotiating (with or without mediation) is yet another source of costs, with little chance of success at this stage. As mentioned, the means to settle a case out of court are often most effective if used at an early stage in the procedure.¹⁰⁵

Benefits

Whether or not the benefits are affected by this type of measure depends on the type of alternative dispute resolution system. If mediation is the alternative dispute resolution system, the benefits seem, oddly enough, to decrease. Errors are not directly corrected in mediation, re-evaluation is not an issue either, and supervision, law making and ensuring uniformity are not achievable through mediation procedures. These are, however, the specific goals of appeal procedures, not the goals people may try to achieve by dispute resolution. Mediation is a procedure that typically focuses on other goals people might have, like reaching an interest-based solution and meeting their need for procedural justice. Comparing this measure on a benefit scale therefore implies that the benefits need to be expanded to general goals people might have in resolving disputes.

3. *Prevention*

Preventing appeal procedures is the last measure explored. Instead of investing time and money in improving appeals, resources may also be used to prevent the types of errors or need for re-evaluation that induce the parties to use their right to lodge an appeal.¹⁰⁶ Prevention of errors at the first level can occur in many ways. Quality programme, improved selection, and education of court personnel at level 1, simple measures like reading each others judgments before they are issued, and sharing more information on similar cases are examples. The parties themselves can also contribute to the prevention of errors, for example, if they are obliged to come up with their most important arguments, facts and evidence at an early stage in the procedure. § 139 of the German *ZPO* may be an example of a simple measure that prevents appeals because the parties want a rehearing. This article obliges judges to discuss all the important issues with the parties, and to inform the parties if they have failed to provide all the information needed to make a judgment. This prevents “surprise decisions”, which may be an important cause for appeals that could be avoided.

¹⁰³ However, a recent Dutch experiment shows that an attempt to settle prior to appeal procedures is often successful. According to the researchers, this can be explained by the fact that the court’s judgment at the first level provides parties with further directions on how to deal with the conflict. See W.L. Valk & C.G. ter Veer, *De comparitie na aanbrengen in hoger beroep*, *Nederlands Juristenblad*, 1985-1987 (2005).

¹⁰⁴ See Tyler (*supra* note 34), who compared the cost of mediation with the costs of a judicial procedure. The total amount of costs stayed the same. The decrease of costs per case was set off against an increase in cases that were brought up before a neutral third person.

¹⁰⁵ See, however, *supra* note 103.

¹⁰⁶ See also the final conclusion of Jolowicz: “Only a reduction in the demand for appeals can provide a satisfactory solution; supply side controls can be nothing but a palliative” (*supra* note 2, at 351).

Costs for parties and courts

The costs of this type of mechanisms for the parties and the courts are probably shifted from the second level to the first one. Considering the amount of costs of facilitating the (rather expensive) second level, a decrease of the total amount of costs is thinkable, though we need to take into consideration that only a limited number of cases will go to appeal.¹⁰⁷ Whether or not this measure leads to real cost savings depends on the way the prevention is organised, the total number of cases that go to appeal and the resources spend on appeal compared to what is spent on improvements at the first level.

Benefits

The benefits of appeal are not affected by this measure. On the contrary, a side effect may be that the benefits to the parties of the first level decision and procedure may be enhanced.

E. Adding up Several Mechanisms

In most appeal systems, several mechanisms to restrict access to appeal are in place. A threshold for the value at stake, for instance, is very common. On top of this, many appeal systems have at least some sort of screening device, in which rules restricting access to appeal are applied: leave for appeal, restrictions applied in the appeal procedure itself, fast track proceedings, or limitations to issues brought up by the parties. What are the likely effects if more than one mechanism is applied within one appeal system?

Every successful mechanism will lead to a reduction in the number of cases heard on appeal. The next mechanism will, therefore, only have effect on the remaining pool of cases. If many cases in which stakes are small are already excluded by a threshold, a new mechanism that uses the value of the stakes as an access criterion will be less successful in limiting the number of cases to be heard.

Applying different mechanisms cumulatively may also lead to multiple screening moments, which can be inefficient. Giving leave for appeal, and then establishing in the appeal procedure that the appeal does not meet the criteria for hearing a case on appeal after all, is an inefficiency which may not always be avoidable, but if this is a recurring event, there may be ways to optimize the screening at the leave for appeal phase. Much depends, again, on the manner in which the courts organise their work. In a leave for appeal system, it may be possible not only to select cases that are allowed to go to appeal, but also to establish what cases can be decided in a fast track, because the likelihood of a successful appeal is very high. An outcome of a leave for appeal screening may also be a set of instructions for the appeal procedure, which limits the costs for the parties and the courts to deal with the case.

¹⁰⁷ Shavell, *supra* note 22.

V. Discussion and Conclusions

A. Limitations of this Study and Suggestions for Future Research

In this paper, we investigated the likely costs and benefits of measures that may improve appeal systems. We studied their impact on the costs of the appeal procedure for the parties, the costs for the judiciary borne by the state, and we tried to gauge the benefits for the parties and for future users of the court system. We also took into account the possible effects of those measures on pre-trial dispute resolution, the first level of the court system, and the third level of the court system.

First, a word of caution. What we have developed is a framework for analysis. We established cost factors and benefits that are likely to occur. We subsequently used this framework to evaluate measures with the help of experts on appeal systems. We did find some empirical studies that support this analysis, but they are few in number, so the results critically depend on the quality of our theoretical framework.

Another critical factor is that appeal is a second level, embedded in a system that has at least one level “below” it, and one level above. The effects on these other levels are not always easy to estimate, but they are sometimes essential for the outcomes presented here. In particular, the effects of appeal procedures on the first instance can be substantial. In that respect it would be helpful if a good model existed for the evaluation of the benefits and costs of first level proceedings. In a sense, it is strange to do this type of analysis and to start with the second level, instead of trying to get a better understanding of level 1 first.

An issue that warrants further study is the optimal division of labour between the different levels of the court system. Anglo-American procedures and continental civil law systems have very different ways in dealing with this. The introduction of new, intermediary levels in the form of mediation, summary judgments, and settlement conferences suggest that there is some demand for faster, low cost decisions in first instance, backed up by a more extensive procedure at higher levels. However, some measures we discussed in this paper seem oriented towards improving the first instance, and relieving the pressure on the appeal phase, with the risk of frontloading of costs to the lower level(s). A fundamental choice, it seems, is the one between a rather fast and cheap first instance, with ample correction mechanisms, and an extensive first instance, with hardly any need for improvement of the decision at level 2. Another fundamental choice is whether level 2 should make a serious contribution to law making, or leave that to level 3.

Generally, and tentatively, we suggest as an hypothesis for follow-up research that the benefits of the appeal system are highest, and the costs lowest, if the appeal system performs other functions than the level 1 courts, and in particular those functions that support and enhance the level 1 courts work: error correction, law making, and ensuring uniformity.

B. Enhancing Benefits and Decreasing Costs

In Section III.A and B we developed a framework for evaluating the costs and benefits of appeal procedures, and in particular we translated the different functions of appeal into

concrete costs and benefits for courts, parties, and future users of the court system. This already led to some general conclusions (Section III.D), to which some other general insights can now be added, after we discussed the costs and benefits of concrete mechanisms suggested to improve appeal proceedings.

Our analysis first shows that error correction is the function of appeal with the clearest benefits.¹⁰⁸ The larger the change in outcome induced by the error, the higher these benefits. We distinguish error correction from re-evaluation where changes in outcome may also occur, but within the margin of discretion of the courts. Here, the value of appeal to the parties is limited to that of additional procedural justice (being heard and listened to by another respectful, neutral and trustworthy court), which may not outweigh the costs of appeal for the parties and the state.¹⁰⁹

Public goals of the appeal process (benefits for future parties) may be achieved if the appeal process renders useful precedents that enable earlier and less costly settlement of future disputes or prevents future errors by lower courts. Moreover, an effective appeal system may contribute somewhat to the trust in the justice system as a whole, but it is unclear whether this trust is a benefit that is independent from what the appeal court actually performs in delivering other benefits.¹¹⁰ The first general conclusion directly follows: the more the appeals process focuses on correcting and preventing the errors with the highest impact on outcome, the higher the benefits. Our recommendation therefore is: *focus on errors that have a big effect on outcome, in particular if these errors are easily detectable.*

Secondly, the more useful precedents an appeal system generates, the greater its benefits. This information enables future users of the court system to settle their differences earlier and thus to save costs, as well as the costs of the court system. However, as we saw, the appeal system may not be very efficient in producing useful precedents, and it competes with other law making devices that may be more efficient. An appeal court needs resources to create useful precedents. Protecting it from being overburdened by limiting the number of cases it hears does not automatically lead to more useful precedents. The appeals court should also use its resources efficiently in order to deliver precedents that are really useful for future users. Thus, *if law making is the goal of an appeal system, establish whether there are more efficient ways to create law, free up resources for this function, and organise the work of the court in such a manner that it generates more useful precedents (information that enables large numbers of future users of the court system to save costs in their dispute).*

For some court decisions, the procedural justice value of appeals may be a very relevant factor, for instance, in case of a criminal sanction of some severity, such as a long prison sentence or a high fine. Whether having a second day in court at the appeals level contributes significantly to the procedural justice a disputant perceives is yet unclear, because this has not been researched. What can be said, however, is that allowing appeal for this reason assumes that procedural justice is generally available for these cases at the first instance. In some systems, many cases cannot be heard in any court at all, because hearing them in first instance is too costly, so that these cases are settled, or plea-bargained. The added value, from a procedural justice perspective, would arguably be higher if these cases at least could be heard by one court, instead of allowing some cases to get a second hearing. This argument becomes even more pressing if the appeal court is a more expensive court. Our third recommendation

¹⁰⁸ See III.B.1.

¹⁰⁹ III.B.2.

¹¹⁰ III.B.3.

is therefore: *if the court system lacks the resources to give a certain type of disputants a day in court at the first level, do not use the costly appeals system for re-evaluation in order to give some disputants of this same type a second day in court.*

Generally, therefore, improving the appeal system is a matter of enhancing the benefits. This can be done by a selection of cases in which the benefits of appeals are likely to be high (improving incentives for self-selection by the parties or selection by the courts). It is also a matter of organising the appeals process in such a way that the benefits are highest. Case management – organising the interaction with the parties – can contribute to devoting the resources to the issues that are most likely to lead to the highest benefits. But it is also a matter of organising the work of the court itself. *An appeal court should not only manage the interaction between disputants, but also develop internal procedures, routines for composing judgments and possibly new tools, enabling it to deliver the highest benefits to the parties and to future users of the court system.*

On the side of the costs, we distinguished between the costs for the judiciary and the costs for the parties. Many measures we discussed are being considered by the judiciary, or by the government institutions sponsoring the judiciary. It is therefore not surprising that their focus is on the costs for the judiciary, and not so much on the costs for the parties and for future users of the court system. These costs are outside the view of the judiciary, that has only limited knowledge of the true costs of litigation experienced by users of the court system. In this study, however, we tried to focus on these costs as well. We found some measures that may decrease the costs for courts, but which may lead to cost increases for the parties, or to decreased benefits, with no corresponding decrease in costs. In particular, screening criteria that give appeal courts wide discretion in hearing appeals or not, but that make screening decisions highly unpredictable for the parties, may have this effect. Another example is restricting the possibility to bring forward new issues, which can lead to some cost savings for courts and the parties at the appeal stage, but may lead to extensive front-loading of costs in the first instance.

C. Most Promising Measures

Now we proceed to the measures that we reviewed. Restrictions in tasks for appeal systems (see IV.A) can be achieved in several ways, such as a leave for appeal system, a system limiting grounds for appeal, not allowing appeals for certain types of cases, restrictions on new issues, limiting appeals to issues brought up by parties, and limits to stakes of a certain value. The effect of these measures critically depends on the screening costs, the amount of costs saved in the appeals process, and the possible decrease of benefits.

Screening costs will be low if criteria are easy to apply with sufficient predictability. Disputants will subsequently self-select and be able to save costs. Generally, the earlier the screening takes place, the more cost savings are possible, so leave for appeal is more attractive than limiting grounds.

In order to render the highest benefits, screening criteria should allow appeals for errors with a big impact on outcome (big errors in cases with a high value to disputants). If an appeal system is to have an important public function, cases should be selected that have the potential of leading to a precedent that enables a high number of future disputants to save costs in settling their differences.

Restrictions on new issues can lead to high screening costs. Moreover, they may lead to new procedures.¹¹¹ The most prominent disadvantage, however, is that all parties in all procedures will become more eager to raise all their possible points in first instance. This mechanism is known as front-loading of costs. It is well documented in relation to the introduction of pre-action protocols in the UK.

Forcing the parties to name issues and to limit their appeals will only work if there are incentives to be precise and to limit the scope of the case. This will not be the case if the appeal allows a full re-evaluation. Such a mechanism may be a great tool for self-selection, however, if the appealing party must show the size of its possible benefit (a high probability of a large change in outcome), or that of future users of the court system, in order to be admitted to the appeals process. If this can be combined with a system with leave for appeal, it will also save the court screening costs.

Exclusion of low stakes cases seems consistent with our costs-benefits analysis. For medium value cases, a leave for appeal system could be effective, and for very high value cases (the severest criminal sanctions, civil cases with very high stakes, and administrative cases with a great and direct impact on the interests of many people) a presumption that an appeal should be heard.

If we turn to incentives (see IV.B), increasing prices by raising court fees leads to self-selection. It only works in case of a large increase, because court fees are only a minor part of the total costs incurred by the parties, that also include the fees of lawyers, time spent, and other costs such as delay.

Improving incentives for lawyers seems to be an important issue, because they are likely to influence the decision making of clients, in particular, in ambiguous situations where the probability of success of the appeal is unclear.

We studied several measures to deal with appeal cases more efficiently once an appeal is allowed (IV.C). A fast track procedure for straightforward cases that can be decided easily may lead to some cost savings, but this is less so if these cases already self-select because of clear criteria. It may very well be that a successful fast track procedure should be seen as a sign that the screening criteria can be made more explicit.

Of the various manners in which cost savings can be achieved, we concentrated on single judges hearing appeals instead of three or more judges. Hearing appeals by single judges is a measure that is widely applied. It leads to high savings for the judiciary, and a relatively small decrease in benefits, but not to cost savings for the users of the system. It may be interesting to study other ways to save costs at the appeal level, in particular if appeals processes are oriented towards correcting big errors which are more or less easily detectable (in particular if they have to be identified by the disputants themselves). This suggests, for instance, that identifying errors can be delegated to lower level personnel.

Case management is a good thing if the parties can save costs, but front-loading of costs is a substantial danger, so appeal courts should be careful not to order the parties to give more information, at least not without taking into account the costs of producing the information.

¹¹¹ IV.A.4.

Specialised appeal courts seem to have many advantages: more law making, lower costs of appeals, more self-selection by disputants. The main disadvantage is “group think”: a limited number of judges and lawyers determines the law in a certain area. A third level court which is not specialised or intensified supervision by the legislator may provide safeguards here. Another disadvantage may be that specialization leads to different approaches of common (for instance, procedural) issues by specialised courts. This may – in some situations – lead to extra costs for future parties, or to unacceptable differences in procedural justice parties receive, but whether this is a substantial problem should be researched more thoroughly and, if possible, empirically. The experience with the German third level appeal system, however, seems to suggest that these downsides are manageable, if necessary by an ad hoc procedure to settle differences in approaches between the highest courts.

There are several measures which do not seem advisable or only after more careful consideration: specialised lawyers, limitations on evidence, and decreasing time limits for appeal. Postponed judgment writing may lead to a cost saving in first instance, and this may work if the number of appeals is low.

As to the alternatives for appeal (IV.D), they may be an important area for further research. Appeal is a rather expensive mechanism for error correction, and may (because of the high number of cases that have to be processed for one useful precedent to emerge) be an expensive way to make law as well. Preventing errors at the first level may be an efficient option. This can be achieved, for instance, by rather simple measures such as letting judges interact and comment more on each other’s work, or by procedures that prevent surprise decisions.