The Other Supreme Courts—Vive la Difference

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As the title of this column suggests, we usually write about the United States Supreme Court. But our colleague Jerry Roth recently returned from a sabbatical studying law in France, and talking to him about the French legal system made us realize how little we know about the high courts of other lands. So we invited Jerry to join us as a guest author for a look not just outside our Court's marble walls but also outside our nation's borders.

It is easy to fall into believing that the structure and function of our hallowed Supreme Court is an imperative—that there is no other way for a democracy's highest judicial authority to work. In fact, it is anything but. To take just two examples, the supreme courts of our juridical confreres in France—the model for most of the world's civil law systems—and that of our legal ancestor in the United Kingdom—emulated by most common-law jurisdictions—are vastly different from our own. And both systems are right now undergoing significant changes.

France

France actually has at least four and perhaps as many as six supreme courts, depending on how you count them. Questions of civil law that arise between private parties, such as in contract or tort disputes, as well as criminal law issues are resolved by the Cour de Cassation. (The word *cassation* comes from the verb *casser*, meaning "to break," since only the high court can "break" a lower appellate court decision.) There are more than a hundred judges on the court, divided into chambers based on subject matter. They sit on three-judge or five-judge panels depending on the procedural posture of the case in question.

Administrative law issues, defined as those that involve the state as a party, move up through an entirely independent court system to the Conseil d'État, the Council of State. This body is hardly a court at all. With some

politicized. They are also astounded at the decisions our Court produces, just as an American civil lawyer would barely recognize an opinion of the French Cour de Cassation. That court's decisions rarely exceed one page in length and almost always consist of a single, formalistic sentence divided into three or four syllogistic paragraphs. A typical ruling might read, "Given the facts (disposed of in a few words), and given the arguments made by the parties (stingily summarized in a phrase), but given the applicable statute (often cited only by code section) or principle (which can be as described as succinctly as the "principle of fair trial"), the decision below is (reversed or affirmed)." No decision is signed or otherwise attributed to a particular judge, and the idea of dissents, much less a "stinging" one, is unheard of. French lawyers see no point to them: personalizing the decision or displaying disagreement can only undermine the assumption that the law dictates the "right" answer to the question. They view U.S. Supreme Court decisions as prolix, undisciplined, and ultimately delegitimizing. And don't get them started on plurality decisions.

Selection of French judges is also a *cheval* of a different color. The French insist that they rely on expertise alone. On the Cour de Cassation and Conseil d'État, members basically appoint each other: new judges are selected by current sitting judges based on performance, with virtually no public input. Judges on the Cour de Cassation are also much less known than their American counterparts, in part because there are so many of them that responsibility is fragmented, and in part because their opinions are anonymous. Asking a French lawyer, much less a layperson, to name judges on the court is sure to yield a Gallic shrug. Only the "first president of the court," a position recommended by judges but confirmed by the president of the republic, has any visibility—but even he (currently Vincent Lamanda) is no household name. Our appointment and confirmation processes strike the French as an intolerable intrusion of politics into the judicial realm.

Some distinctions between the French high courts and our Supreme Court can be explained by the differing types of legal systems—civil law based on codes versus common law based on precedent. But those characterizations are oversimplified. American courts theoretically are supposed to interpret and apply statutes, not legislate. And French courts, while they rarely cite precedent, follow "doctrine" (academic interpretation of important decisions) and even "jurisprudence" (the body of the high court's prior rulings). The structural differences are also attributable to French culture and history: the French distrust of judges since the days when they were mere instruments of the king's prerogative and the republican conviction that the judicial role is not that important because the law is merely "given voice," rather than created, by the judiciary.

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Structural change is also at hand. France is in the midst of altering the restrictions on review by the constitutional court to permit referrals from lower courts regarding the constitutionality of legislation even after it has taken effect when relevant to a pending case. The proposal has many French lawyers apoplectic.

United Kingdom

The highest court in the UK is far more recognizable to the American practitioner (perhaps not surprising, because the UK system in some respects was a precedent for our own): it has twelve judges, issues signed decisions and dissents, and has broad jurisdiction over all civil and criminal issues. But the UK is right now

two hundred judges, its principal function is to advise the government on legislation. This dual function—participating in the legislative process while acting as the court of last resort on administrative matters—has not gone unnoticed: some in France believe the centuries-old structure will not survive separation-of-powers scrutiny by the European Court of Justice.

The Cour de Cassation and the Conseil d'État have no occasion to interact and can interpret the same law differently, with no higher recourse. Jurisdictional disputes about which of the two courts should resolve a particular case are decided by yet a third court, the Tribunal of Conflicts.

The French do not stop at *trois*, however. The constitutionality of national laws, including claims that those laws infringe citizens' rights, is decided by the Constitutional Council. The French Constitution, enacted under Charles de Gaulle in 1958, concerns primarily the structure of the government. It contains no equivalent to the Bill of Rights, but it refers in its preamble to the Declaration of the Rights of Man, a founding document of the French Revolution, and several other sweepingly broad tracts. These allusions have been interpreted to give rise to a vaguely defined set of principles that include a variety of individual rights guarded by the Constitutional Council.

But there is a catch. The constitutionality of a statute cannot be challenged before the council except by opposition legislators after a statute has been approved by the legislature but *prior to* the statute's effective date. Citizens have no standing to do so, and once in place, a statute's constitutionality cannot be challenged by *anyone*. The statute then acts as a "shield" for any executive or regulatory action taken under it.

The Constitutional Council has nine members appointed for nine-year terms by the president and the heads of each house of the legislature; in addition, all former presidents are permitted to sit as they choose.

Though beholden in many ways to the administration, the court can surprise. Just before the New Year, for example, it invalidated President Nicolas Sarkozy's pet project imposing a carbon tax on high carbon emitters, a decision that sent shockwaves through the country. The court found that the tax was so riddled with exceptions for large corporations that it violated the "principle of equality," the rough French equivalent of our equal protection doctrine.

Finally, the entire French judicial system is subject to the supremacy of decisions of two European courts—the Court of Justice in Luxembourg, a creation of the European Union, and the broader Court of Human Rights in Strasbourg, established under the European Convention on Human Rights in 1950.

Although this may seem a bizarrely large array of "highest" courts, the French are as put off by our unitary system as we might be by their smorgasbord approach. They see a single supreme court as overly centralized, excessively powerful, and irremediably

in the midst of a Supreme Court revolution of its own, albeit one largely unnoticed on this side of the Atlantic. For over six centuries, England's highest court sat within the House of Lords, the legislative house whose members are named by the monarch. Originally, the very same lords made laws and then applied those laws as judges. But the tasks were separated into different divisions in the late nineteenth century. Since then, some twelve special Law Lords, with the quaint name of Lords of Appeal in Ordinary, acted as the highest court for all legal issues (and certain complicated "devolution" issues related to differing English, Northern Ireland, Scottish, and Welsh jurisdictions), choosing the appeals they would accept based on national importance. Concerns had been raised for years, however, that the functional division within the House of Lords, like that of the French Council of State, would not satisfy new European standards of separation of powers.

History was made this past October 2009 with the creation of the first Supreme Court of the United Kingdom. Essentially, the twelve lords were removed from Parliament and relocated—lock, stock, and barrel—into a newly created institution, complete with its own building, seal, and administrative staff. In the future, judges of the Supreme Court will be selected based on recommendations of an appointments council and may or may not be granted peerage (that is, the coveted nobility title). These judges are better known than their French counterparts—their pictures are displayed on the new court's Web site and currently show one lady dancing among eleven lords a-leapin'.

These comparisons of vastly different approaches to establishing judicial authority are of more than passing interest. One of the great challenges facing not only pan-European courts but also international courts (such as the war crime tribunals in former Yugoslavia and Rwanda and the International Criminal Court) is to reconcile these different civil/common-law approaches to legal supremacy. And with globalization, American companies increasingly find themselves before foreign and international high courts (look no further than the travails of Microsoft, Intel, and Google in the EU) just as foreign companies face judgment from our Supreme Court. Proceeding under the assumption that other systems universally work like ours—or even want to do so—will lead us astray.

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