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## THE ROLE OF SUPREME COURTS IN THE UNIFORM APPLICATION OF THE LAW

*ABSTRACT. This paper analyzes the ageless subject of the functions of supreme courts relative to the uniform application of the law, a constant concern for the legal community. It gives an overview of the importance of an equal and uniform application of the law. It also examines the role of courts and the ways in which, with specific or general criteria, their nomophylactic power is guaranteed. The relevant systems of France, Spain and Germany have been taken into consideration.*

*CONTENT. 1. Introduction – 2. Uniform application of the law – 3. A renewed view of case law – 4. Different approaches to providing judicial uniformity – 5. Approaching uniform application of the law in civil law tradition in Europe – 5.1. France – 5.2. Spain – 5.3. Germany*

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## **1. Introduction**

Society is developing at a speed that has no equal in history. Nations allow limitations of their sovereignty,<sup>1</sup> regarding it necessary to ensure peace and justice among nations. Their powers, on the other hand, are also expanding, dissolving frontiers as never before. Dialogue and confrontation have led to the creation of supranational regulatory bodies, such as the European Union and the Court of Human Rights, with a multiplication of sources of law. The productive system has developed very rapidly, affecting the conduct and customs of all citizens. The third industrial revolution is profoundly changing our way of living, leading not only to a greater integration of peoples and to extensive migrations, but also to an exponential growth of data flows.<sup>2</sup> The legislator has not always been able to respond to the needs of citizens and to the new challenges. In many cases this has caused a loss of cohesion in the regulatory system.

Equal and uniform application of the law, decisional predictability – which only a Supreme Court endowed with supreme authority can provide – are needed now, more than ever before. *Nomophylachia*, either in civil law or in common law systems, seems to be the only tool we have today to achieve this goal, as the persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the essential components of a state based on the rule of law.

## **2. Uniform application of the law**

The uniform application of the law is essential to the implementation of the principle of equality before the law. In a state governed by the rule of law, all citizens justifiably expect to be treated the same and to be able to rely on previous decisions in comparable cases, so that they can predict the legal effects of their acts or omissions.

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1 Article 11 of the Italian Constitution (one of the core principles of our democracy) states that: «*L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo*».

2 See J.S. BERGÉ, S. GRUMBACH and V. ZENO-ZENCOVICH, *The 'Datasphere', Data Flows beyond Control, and the Challenges for Law and Governance*, in *European Journal of Comparative Law and Governance*, V, 2018, p. 144.

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*Nomophylachia* enhances the public's confidence in the courts and the public's perception of fairness and justice. It can also reduce the need for judicial intervention in resolving disputes, since when parties are able to know in advance where they stand, they might often decide not to go to court in the first place.

Divergences in interpretation have to be accepted as an inherent trait of any judicial system which is based on a network of courts. Especially those where judges are "*bouche de la loi*" and are not obliged to follow the *stare decisis* principle.

However, under certain circumstances, conflicting decisions of courts, especially those of higher courts, can constitute a breach of the fair trial requirement enshrined in modern constitutions and in Article 6 of the ECHR. In this regard, the *Conseil d'Europe* states that in cases of inconsistent decisions there needs to be assessment of whether "profound and long-standing differences exist in the case law of the domestic courts, whether the domestic law provides machinery for overcoming those inconsistencies, whether that machinery has been applied and, if appropriate, to what effect."<sup>3</sup>

Greater clarity would help judges and litigants to identify rapidly the principles and guidelines that should be followed, thus concretely advancing legal certainty. Much as we might wish to exalt this unifying function, the Supreme Court is still however called upon to guarantee the full and complete protection of the correct application of the law in specific cases. One cannot and must not undermine the fundamental rights of those who resort to justice. Where there is opposition between those who have respected previous rulings of the Court and those who try to evolve the system, there can be no winner and no loser. Each particular case is different and can involve different principles. Only a Court of Cassation which is internally consistent will be able to strike the correct balance between opposing views. The instrument of prospective overruling could also be adopted. The representing lawyer might have a greater knowledge of the issues, having studied in greater depth the multiplicity of national and supranational sources concerning the subject; a case may be so unique or particular that it requires diverse legal protection; previous jurisprudence, even if consolidated, may be faulty.

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3 CCJE Opinion N. 20 The role of courts with respect to the uniformity of the law, para. 9, at <<https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>>.

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### 3. A renewed view of case law

In the European Community, Common and Roman Law institutes tend to merge,<sup>4</sup> and a new common ground has been created, causing important repercussions on all European legal systems. Judicial decisions in systems known to be formally of civil law are increasingly becoming a *res iudicata*, not only between the litigants (as has always been the case), for they are becoming a genuine source of law – the so called “living law”.<sup>5</sup>

Referring to previous decisions can be a very powerful instrument for judges, whether or not these decisions have the full power of precedents and are considered a source of law, as citizens feel a strong need for legal certainty, to be guaranteed through institutions and regulations that ensure universality and effectiveness. In this context the predictability of future decisions is one of the basic elements which, as Renato Rordorf<sup>6</sup> recalls, has also had<sup>7</sup> a very important economic function. Consistent jurisprudence allows people to weigh the risks of a possible appeal to the judge. The authoritativeness of the decisions therefore has a central role for the efficiency of justice, for the conduct of economic activities and is a basic pivot of the structure of the political and social system.

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4 These two icebergs that could merge or collide, as FEDERICO CARPI calls them, have been the focus of the XX seminar of the *Rivista Trimestrale di Diritto e Procedura Civile* on the matters of comparative law, common law and civil law. See F. CARPI, Introduction; A. GAMBARO, *Common law e civil law: evoluzione e metodi di confronto*; V. VARANO, *Civil law e common law: tentativi di riflessione su comparazione e cultura giuridica*; C. CONSOLO, *Il processo civile alla high court di Londra, un intarsio fra Medioevo e globalizzazione economica*; M. LUPOI, *Comunicazione e flussi giuridici*; M. TIMOTEO, *Un paese due sistemi - Il diritto cinese fra civil law e common law* and S. CHIARLONI, *Riflessioni microcomparative su ideologie processuali e accertamento della verità*; speech by M. RUBINO-SAMMARTANO, L. QUERZOLA, P. BIAVATI, G. RICCI, G. ALPA, M. TARUFFO and M. LUPOI, in *Riv. trim. dir. e proc. civ.*, 2009, suppl. at n. 4

5 On “living law” and “predictive justice”, as an opportunity to predict the outcome of judgements, for a uniform application of the law see D. DALFINO, *Creatività e creazionismo, prevedibilità e predittività*, in *Foro it.*, 2018, V, p. 385.

6 R. RORDORF, *Nomofilachia e precedente giudiziario: Il precedente nella giurisprudenza*, in *Foro italiano*, IX, 2017, p. 277.

7 For an incisive view on the supremacy of economy on justice see A.D. DE SANTIS, *Contributo allo studio della funzione deterrente del processo civile*, Napoli, 2018, p. 89 *et seq.* Where the author underlines the peculiar incipit of the EU Justice Scoreboard: «Effective justice Systems support economic growth and defend fundamental rights. That is why Europe promotes and defends the rule of law». It seems clear by reading this statement that fundamental rights come after economic growth.

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In common law countries precedents are binding *de jure*. When a higher court settles a legal issue all cases thereafter are bound to follow it. Precedents are thus considered to be a proper source of law. The literature on the role of *stare decisis*, going back to the nineteenth century, argues that the rule of precedents is the best way to provide the much-needed predictability of the rulings of Courts. Henry Campbell Black, citing James Kent, is very persuasive about why the *stare decisis* principle is necessary. In his words: «it would be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. [...] On the other hand it has also long been understood that precedents evolve since genuinely new issues are bound to arise».<sup>8</sup> Thus, in these legal systems a precedential decision has relevance. However, a consolidated trend of decision on a certain legal issue has generally been required in order for the judicial opinion to become relevant in civil law countries. The guarantee of the independence of judges, on the other hand, means, *inter alia*, that they are independent and are bound only to the Constitution and the law in their decision making, not by judicial decisions reached in similar cases.<sup>9</sup>

Article 111, paragraph 7, of the Italian Constitution does not allow the introduction of normatively prefigured filters to access the claim before the Court of Cassation and Article 101 states that «Justice is administered in the name of the people. Judges are subject only to the law». Therefore, a way to achieve uniformity of the law may be to design different procedural paths when the nomophylactic function is at stake.

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8 H. CAMPBELL BLACK, *The principle of stare decisis*, in *The American Law Register*, 1886, pp. 745-757.

9 Although lower courts are not formally bound to the decision of Supreme courts, they will usually follow their decision in similar matters. See V. ZAGREBELSKY, *Dalla varietà della giurisprudenza alla unità della giurisprudenza*, in *Cass. pen.*, 9, 1988, p. 1576; G. GORLA, «*Precedente giudiziale*», in *Enc. Giur. Treccani*, vol. XXIII, Roma, 1990; U. MATTEI, *Precedente giudiziario e stare decisis*, in *Dig. Disc. Priv. - Sez. civile*, vol. XIV, Torino, 1996; M. TARUFFO, *Precedente e giurisprudenza*, in *Riv. trim. dir. proc. civ.*, 3, 2007, p. 712; A. CADOPPI, *Il valore del precedente nel diritto penale*, Torino, 2007; A. CADOPPI, *Giudice Penale e giudice civile di fronte al precedente*, in *Indice penale*, 1, 2014, p. 11; G. COSTANTINO, *La prevedibilità della decisione tra uguaglianza e appartenenza*, in *Riv. Dir. Proc.*, 3, 2015, p. 646.

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In contemporary literature many distinguished jurists<sup>10</sup> have asked a question that still echoes strongly: what is the role of the supreme courts? This is of course a rhetorical question, but one which sheds light on the critical nature of the current situation. However, the answer to a question that tries to penetrate to the very heart of the civil law system is necessarily complex. Courts of last resort are designed to address different needs, they are an “ambiguous” summit, as Michele Taruffo<sup>11</sup> wrote, since they must ultimately ensure the justice of a concrete case, an individual case, but at the same time they must articulate unequivocal and authoritative guidelines. The judges’ gaze brings to mind the image of the two-faced Janus. On the one hand, they must have the ability, looking to the future, to create precedents and to dictate the jurisprudential solutions destined to operate in a multiplicity of future cases. On the other hand, since it is customary to distinguish between *ius litigatoris* and *ius constitutionis*, the Supreme court must address the individual case in order to be able to abstract the principle of law, in a continuous dialogue between present and future.

The judges themselves seem to believe that a new principle of *stare decisis* should be introduced in civil law systems as the certainty of the law, the equality of everyone before the law and the legitimate expectation in jurisprudence cannot be guaranteed by a plethora of decisions coming from a large number of Colleges, among which it is difficult to attempt perfect coordination.

In the words of Benjamin Cardozo: “it is when the colours do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them he will be fashioning it for others”.<sup>12</sup>

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10 For an overview on the role of precedents in Italy and other countries see L. PASSANANTE, *Il precedente impossibile*, Torino, 2018.

11 M. TARUFFO, *La giurisprudenza tra casistica e uniformità*, in *Riv. trim. dir. proc. civ.*, 1, 2014, p. 35.

12 B.N. CARDOZO, *The Nature of the Judicial Process*, New Haven: Yale University Press 1921, pp. 20-21.

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#### ***4. Different approaches to providing judicial uniformity***

While civil law supreme courts hear up to 90%<sup>13</sup> of the petitions for review, common law supreme courts hear as little as 1% of the same type of cases.

In the first approach, particularly in the so-called cassation model,<sup>14</sup> the procedural regulation should ensure that each litigant has a high probability of a supreme court revision. In the common law approach the access tends to be restricted thanks to the presence of limitation, such as the discretionary *certiorari* or the permission to appeal.<sup>15</sup>

In civil law systems, even though traditionally there is no formula as to how to identify the moment in which a case law can be considered settled, numerous courts of last instance now have the power to select certain cases with the primary intention of setting rules that should be applicable for the future.

Even though access to supreme courts is framed differently across Europe, due to differences in legal traditions and the organisation of judiciaries, formal and semi-formal mechanisms are being enforced to achieve consistent case law.

Four formal mechanisms can be found in most European civil law supreme court regulations to implement their nomophylactic powers:

1. Deciding an individual litigant's appeal on a point of law. It is in this field *par excellence* that courts are able to perform their unifying and often innovative action as regards the construction of the rule of law, whether substantive, procedural, or part of old or new legislation. It is essentially in this area that the case-law of the Court of Cassation is developed;

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13 P. BRAVO-HURTADO-A. BUSTOS, *Explaining Difference in the Quantity of Supreme Court Revisions: A Model for Judicial Uniformity*, 2016, at <<https://ssrn.com/abstract=2886390>>.

14 For a subdivision of supreme courts see M. BOBEK, *Quantity or quality? Reassessing the role of supreme jurisdictions in central Europe*, in *The American Journal of Comparative Law*, 1, 2009, p. 33.

15 Once a relatively passive institution which heard all appeals that Congress authorized, now the American Supreme Court is a virtually autonomous decision-maker with respect to the nature and extent of its own workload. No longer is it true, as Chief Justice Marshall declared in a bygone era, that the Court has «no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given», or that the Court «must take jurisdiction if it should». M.M. CORDRAY-R. CORDRAY, *The philosophy of certiorari: Jurisprudential considerations in Supreme Court case selection*, in *Wash. ULQ*, 82, 2004, p. 389.

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2. Special appeals brought by a public prosecutor, or another public body, with the aim of ensuring the uniform application of the law – these usually result in a declaratory judgement thus not regarding the litigants;
3. Interpretational statements, also known as uniformity decisions or legal decisions, that do not stem from any real trial. These statements do not have any direct impact on individual cases since they are decided *in abstracto*,<sup>16</sup> thanks to the court's, the minister's or other similar authorities' proposal;
4. Preliminary rulings adopted in pending cases on specific issues, usually upon the request of lower courts, such as jurisdictional questions.<sup>17</sup>

Semi-formal mechanisms, on the other hand, can include regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court. Such meetings can have either a purely informal character or, by issuing certain guidelines, they might become “institutionalized”. Judicial networks have a very important role as they have the potential of consolidating the uniformity of the law and developing judicial communities such as the European one.<sup>18</sup>

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16 These statements are largely found in post-Communist judicial systems, such as Czech Republic or Hungary. In the CCJE's view – as stated in Opinion N. 20 (2017) – the uniformity of the case law and the development of law should be achieved through a proper filtering system of appeals. These, in the Court's opinion, should be preferred over making law *in abstracto* in the form of binding interpretative statements or general opinions, adopted in plenary sessions of a supreme court. Such instruments (unlike the instrument of preliminary rulings) are, in fact, adopted irrespective of any real-life or pending cases and without the parties and their lawyers being able to argue their positions. While admitting that such instruments can have a positive impact on the uniformity of case law and legal certainty, the CCJE is of the opinion that they raise concerns from the viewpoint of the proper role of judiciary in the system of separation of state powers. However, some authors don't agree with this assessment such as Z. KÜHN, *The authoritarian legal culture at work: the passivity of parties and the interpretational statements of supreme courts*, in *Croatian yearbook of European law & policy*, 2, 2006, p. 19.

17 Article 41 of the Italian Civil Procedural regulates conflicts of jurisdiction, stating that litigants can resort to the *Corte di cassazione* to establish the rightful judge.

18 S. BENVENUTI, *National Supreme Courts and the EU Legal Order: Building a European Judicial Community through Networking*, in *Perspectives on Federalism*, 1, 2014, p. 1.



### ***5. Approaching uniform application of the law in civil law tradition in Europe***

The European Community, now the European Union, was born under the banner of mutual interaction. It resulted in new dialogue between common and civil law systems, causing one to learn norms and principles from the other. The process of integration that was set in motion is today inevitable.

The prospect of the nomophylactic function is, in fact, permeated by international law stemming from the Court of Justice and the ECHR. As Roberto Conti states “the changing of the coordinates represented by the advent of supranational law – Euro-EU law, ECHR, international treaties – clearly indicates the change of perspective of the nomophylactic function, and ultimately the genetic mutation of the Court of Cassation, now “legally obliged” to guarantee, also, the uniform interpretation of the law as reinterpreted in the light of a supranational system.”<sup>19</sup>

For this reason, it important to compare and study different approaches to the uniform application of the law throughout Europe.

#### ***5.1 France***

In the other civil law countries closest to our legal tradition the problem of the excessive workload of the courts of last resort, contrary to what has happened in Italy, has long been addressed.

From a historical point of view, we should recall that access to the French *Cour de Cassation* was subordinate, until 1947, to the screening of a special “filter section.”<sup>20</sup> *La Chambre des requêtes* examined all appeals for the immediate purpose of rebutting those deemed inadmissible or unfounded. Following a long debate on the usefulness of the preliminary examination of appeals, the *Chambre* became an ordinary civil Chamber. The opinion of those who thought it increased costs and elongated the trial – while

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19 R. CONTI, *Il rinvio pregiudiziale alla Corte UE: risorsa, problema e principio fondamentale di cooperazione al servizio di una nomofilachia europea*, Report on ‘Le questioni ancora aperte nei rapporti tra le Corti Supreme Nazionali e le Corti di Strasburgo e di Lussemburgo – 23 e 29 ottobre 2014 –’, at <[http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/23\\_ottobre\\_relazione\\_Conti.pdf](http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/23_ottobre_relazione_Conti.pdf)>.

20 As per Article 606 lett. b) of the Italian Penal Procedural Code or Article 360 n. 3) of the Civil Procedural Code.

acknowledging the merit of an obligatory passage that eliminated claims that would certainly be unsuccessful – prevailed.

The legal issue was, *de facto*, subjected to a double, and almost identical, scrutiny.<sup>21</sup>

Due to the increase in the number of pending charges before the *Cour*, the idea of selecting appeals resurfaced. In 1979, therefore, new internal organs were introduced in the *Cour*, called *formations restreintes*, modeled on the *Chambre des requêtes*. These filter mechanisms were then perfected, thanks to two legislative acts, the 1981 Reform and the 25 June 2001 Law.

Initially, each civil section of the Court was equipped with these organs. They had the exclusive function of examining, in advance, all appeals, in order to discard, following a simplified and non-contradictory procedure, those deemed irrelevant and *prima facie* inadmissible.

This deflationary instrument soon proved to be difficult to implement, neither it did not respond to the needs that had emerged. Instead of decreasing the workload of the *Cour de Cassation*, the *formations restreintes* increased the duration of trials, due first and foremost to the double examination to which appeals were subjected. Strong criticisms were also addressed to the lack of the right to be heard in court and the difficulty of identifying the real selection criteria, beyond the general ones found in the specific law. The greatest doubts, however, were sparked by the choice to make the *formations restreintes* simple «chambre(s) de rebuts». These, having only the power of rebuttal, had no power to analyze the legal issues, therefore, or to examine them in depth.

In response to these criticisms, Law of 6 August 1981 was enacted.

Article 131-6, paragraph 2 of the *Code de l'Organisation Judiciaire* eliminated the *formation restreinte* within each *Chambre*. They could be *ad hoc* instated when the president of the section or the first president considered an appeal manifestly inadmissible or unfounded, or, again, when the question raised seemed of easy solution given the constant orientation of the *Cour de cassation* in the matter.<sup>22</sup>

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21 E. SILVESTRI, *L'accesso alle corti di ultima istanza: rilievi comparatistici*, in *Foro it.*, IV, 1986, col. 289.

22 Report n. 316 of the French Senate at <[https://www.senat.fr/rap/1980-1981/i1980\\_1981\\_0316.pdf](https://www.senat.fr/rap/1980-1981/i1980_1981_0316.pdf)>: «qu'il appartiendra au premier président ou au président de la chambre concernée de renvoyer l'affaire devant une

Thus, a double track was created. On the one hand, the *formations restreintes* continued to perform their function as “filter,” rejecting appeals. On the other, an ordinary procedure was opened, in which parties had a right to a fair trial, so as to decide on the merit of the appeal. For less complex cases, those not raising particular legal issues, a “preferential” path was implemented.

The 1981 Reform gave positive results overall, lightening the Court’s workload. This was achieved by reserving the decision of the most complex cases, or those of particular relevance, to sections in their ordinary composition. The majority of cases, the so-called routine cases, were, however, referred to the *formations restreintes*.

Since the 15<sup>th</sup> of June 2001, the *Cour of Cassation* has adopted a simplified procedure which allows it to declare appeals unacceptable, without giving any reasons, when these seem *prima facie* inadmissible or not based on any serious legal question. The adversary is granted through the particular requirement that parties produce their memoirs. The *rapporteur* will then draw up a single document containing the report and the refusal opinion that will be communicated to the parties. An only deed-based procedure has thus been implemented.<sup>23</sup>

Article 5 of the Civil Code prohibits judges from issuing *arrêts de règlement*.

It reads as follows: «il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises». However, using case law –«jurisprudence» – to fill gaps in legislation is common practice in France. A well-known manual of law defines it as a «set of judicial decisions from which it is possible to extract general rules that allow the solution of similar disputes in the future to be foreseen. Each sentence has a limited scope in the specific case, but the repetition of similar decisions leads to the conclusion that the courts recognize the validity of the rule and that they will observe it in the future. It therefore becomes necessary to consider this rule when addressing legal issues».<sup>24</sup> It often happens that important norms and institutions stemming from the courts’ decisions were, subsequently, issued by the

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formation restreinte lorsque la solution du pourvoi lui paraît s’imposer».

23 *Le Corti Supreme in Europa: le regole per l’accesso, Ufficio del Massimario*, <[http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione\\_Corti\\_Supreme\\_08.pdf](http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Corti_Supreme_08.pdf)>.

24 M. PLANIOL, *Traité Élémentaire de Droit Civil*, Pichon, 1908.

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legislator. For example, administrative law is largely created by the *Conseil d'État*.

In France problems arise from the challenge of striking a balance between the principle of legitimate expectation and the principle of the uniform application of the law, and its polyform application.

Prospective overruling has therefore been implemented in France since 2004. This important mechanism came into being thanks to a sentence issued in July by the second *Chambre civile*, of the *Cour de cassation*. In line with the interpretation of Article 6, § 1 of the ECHR, the French Court stated in particular that: «que si c'est à tort que la cour d'appel a décidé que le demandeur n'avait pas à réitérer trimestriellement son intention de poursuivre l'action engagée, la censure de sa décision n'est pas encourue de ce chef, dès lors que l'application immédiate de cette règle de prescription dans l'instance en cours aboutirait à priver la victime d'un procès équitable, au sens de l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales».<sup>25</sup>

Case law and legal opinions<sup>26</sup> often recall Art. 2 of the *Code civil*<sup>27</sup> on the application of law in time, that also addresses the problem of the non-retroactive nature of legislative acts, when discussing the possible application of the prospective overruling in France.

It is believed that, in order to circumscribe the application of prospective overruling, it would be preferable to give the power of implementing it exclusively to the Court of Cassation, preferably *en banc*, never to the courts of merit.

## 5.2. Spain

In Spain, since 1881 – the year in which the Law on civil proceedings and the respective code was adopted with a Royal Decree of 3 February – the right to appeal to the Court of last instance presented no restrictions.

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25 Cour de Cassation, Chambre civile 2, du 8 juillet 2004, bulletin 01-10.426, at <<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007048778>>.

26 P. MORVAN, *Le sacre du revirement prospectif sur l'autel de l'équitable*, Recueil Dalloz, 2007.

27 «La loi ne dispose que pour l'avenir elle n'a point d'effet rétroactif», literally translated and introduced in the Italian Civil Code at Art. 11 of the preliminary norms.

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However, as in many other countries, this led to an abuse of power by the parties in order to delay the natural course of decisions and thus it created a severe burden of work for the Supreme Court and a significant increase in the length of trials.<sup>28</sup> And as the legal adage states “justice delayed is justice denied”.

The intention of the Spanish Parliament in 2000 to reduce the time necessary to deliver justice through filter mechanisms is apparent in the new cassation procedures.

In order to deal with the incessant growth of pending appeals *Ley* 1 of 7 January 2000 (*Enjuiciamiento Civil*) reformed the process of appeal to the Supreme Court.

First of all, to strengthen the *funcion nomofilactica*, the provisional regime of cassation in the new Civil Procedure Law features two types of appeal: “cassation” and “the extraordinary appeal for procedural infringement”.

With regard to the effects of an appeal to the Supreme Court, the system introduced in Spain in 1855<sup>29</sup> remains in place, with an *iudicium rescindens* and *iudicium rescissorum* when deemed fit.

What is thought to be really innovative, on the other hand, is the selection of cases where access to cassation is granted. The Superior Regional Court of Justice can review all proceedings for the protection of fundamental rights, those with a considerably high *summa gravaminis*<sup>30</sup> and any case featuring cassational interest.<sup>31</sup>

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28 For and in-depth analysis of the Spanish Higher Court see A. BRIGUGLIO, *Storia e riforma della Cassazione civile Spagnola*, in *Riv. trim. dir. proc. civ.*, 1, 1991, p. 117.

29 M. DE BENITO, *Civil cassation in Spain: past, present, and future*, Cham, 2017.

30 The law states that in order to access the cassation judgment certain prerequisites, that have become increasingly stringent over time, must exist. The value of the lawsuit, for example, must be higher than 600,000 euros (this value increased with the 2011 reform, a minimum of 150,000 euros was previously envisaged).

31 Art. 477 Código de Enjuiciamiento Civil: «Motivo del recurso de casación y resoluciones recurribles en casación. 1. El recurso de casación habra de fundarse, como motivo único, en la infracción de normas aplicables para resolver las cuestiones objeto del proceso.

2. Serán recurribles en casación las sentencias dictadas en segunda instancia por las Audiencias Provinciales, en los siguientes casos:

1°. Cuando se dictaran para la tutela judicial civil de derechos fundamentales, excepto los que reconoce el artículo 24 de la Constitución.

2°. Siempre que la cuantía del proceso excediere de 600.000 euros.

3°. Cuando la cuantía del proceso no excediere de 600.000 euros o este se haya tramitado por razón de la materia, siempre que, en ambos casos, la resolución del recurso presente interés casacional.

*Interés casacional* occurs when (i) the lower court has diverged from a consolidated orientation of the Cassation, (ii) when the jurisprudence of the *Audiencias Provinciales* is contradictory or, finally, (iii) when a provision of substantive law has recently been applied. An appeal shall be deemed of cassational interest «when the judgment *a quo* contradicts the Supreme Court’s case law or decides on points and issues about which contradictory case law from the Provincial Courts exists, or where it applies rules that have been in force for less than five years, as long as, in the latter case, no case law from the Supreme Court exists concerning previous rules of identical or similar content».

The balance between private and public interest seems to have thus reached an acceptable status. On the one hand, the *ius constitutionis*, the public interest in the uniformity of law, has increasingly become central, and a low or undetermined economic value is no longer incompatible with it. On the other hand, the *ius litigatoris*, the private interest, is fully recognised in cases of fundamental rights and those that are economically relevant.

Cassation *sentencias for errores in procedendo* are also issued in the interest of the law following an *infracción de ley procesual*. In such cases the *sentencia* will set the doctrine. The new jurisprudence will not produce any effects on the parties. It is only intended to maintain the unity of jurisprudence.

These fundamental decisions will then be published in the official State Bulletin. After their publication, the doctrine will “complete the legal system”, obliging all judges and courts of the civil branch, excluding the Supreme Court, to follow it.

The preparatory work relating to the law (*Exposición de motivos*) is also particularly significant for understanding the *ratio* that moved the legislator to adopt

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3. Se considerará que un recurso presenta interés casacional cuando la sentencia recurrida se oponga a doctrina jurisprudencial del Tribunal Supremo o resuelva puntos y cuestiones sobre los que exista jurisprudencia contradictoria de las Audiencias Provinciales o aplique normas que no lleven más de cinco años en vigor, siempre que, en este último caso, no existiese doctrina jurisprudencial del Tribunal Supremo relativa a normas anteriores de igual o similar contenido. Cuando se trate de recursos de casación de los que deba conocer un Tribunal Superior de Justicia, se entenderá que también existe interés casacional cuando la sentencia recurrida se oponga a doctrina jurisprudencial o no exista dicha doctrina del Tribunal Superior sobre normas de Derecho especial de la Comunidad Autónoma correspondiente».

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the aforementioned Law 1 of 2000.

In § XIV we read that *en un Sistema juridico como el nuestro* in which precedent lacks binding force – that only the law and other sources of objective law have – it cannot, however, «lack and it must not lack a relevant interest to the singular efficacy of doctrine linked to precedents, that are not binding, but which have particular legal authority». The interest *casacional* is here explained as «the transcendent interest for the procedural parts that the resolution of an appeal can represent». The cassational interest is thus the main subject of this law and it is guaranteed «not only by means of the parameter of the high economic value, but with the requirement that the cases have been decided, on the one hand, violating the substantive law and, on the other hand, against the previous jurisprudential doctrine of the Supreme Court (or, if applicable, of the High Court of Justice)». It is also believed that there is an interest of cassation when the law of which the infringement is reported has not been applied for long enough to allow an authorized jurisprudential doctrine to have been formed on its application and interpretation.

«In this way, the necessity of an appeal is established with reasonable objectivity. This objectification of the interest of cassation, which provides greater legal certainty for the parties and their lawyers, seems preferable to the method of attributing to the court itself the choice of matters worthy of their attention». A more objective view on the nature of the cassational interest and thus of the uniformity of the law, as per the preparatory work, «eliminates the risk of mistrust and disagreement with court decisions».<sup>32</sup>

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32 <<https://www.boe.es/eli/es/l/2000/01/07/1/con>>

«En un sistema jurídico como el nuestro, en el que el precedente carece de fuerza vinculante – sólo atribuida a la ley y a las demás fuentes del Derecho objetivo –, no carece ni debe carecer de un relevante interés para todos la singularísima eficacia ejemplar de la doctrina ligada al precedente, no autoritario, pero sí dotado de singular autoridad jurídica.

De ahí que el interés casacional, es decir, el interés trascendente a las partes procesales que puede presentar la resolución de un recurso de casación, se objeive en esta Ley, no sólo mediante un parámetro de cuantía elevada, sino con la exigencia de que los asuntos sustanciados en razón de la materia aparezcan resueltos con infracción de la ley sustantiva, desde luego, pero, además, contra doctrina jurisprudencial del Tribunal Supremo (o en su caso, de los Tribunales Superiores de Justicia) o sobre asuntos o cuestiones en los que exista jurisprudencia contradictoria de las Audiencias Provinciales. Se considera, asimismo, que concurre interés casacional cuando las normas cuya infracción

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### 5.3 Germany

Germany is one of the original countries of the “civil law system.” The primary source of law is national legislation. As courts only deal with individual cases, such a binding effect should remain only *inter partes*. However, the decisions of the highest courts (e.g., Federal Courts or the Federal Constitutional Court) have *de facto* a binding legal effect.

Germany has a particular judicial structure with five higher courts: the Federal Court of Justice, *Bundesgerichtshof*, the Federal Administrative Court, *Bundesverwaltungsgericht*, the Federal Finance Court, *Bundesfinanzhof*, the Federal Labour Court, *Bundesarbeitsgericht*, and the Federal Social Court, *Bundessozialgericht*. The task of the Federal Courts is primarily to ensure the uniform application of law, to clarify fundamental points of law and to develop the law.

Although the binding effect of the judgments and rulings of the Federal Courts are technically confined to the individual case, lower courts follow their interpretation of the law with few exceptions.

The far-reaching effect of rulings of the Federal Court of Justice can also be determined by the fact that, particularly in the field of civil law, legal practice is often guided by these rulings. Banks and insurance companies, as well as landlords and divorce lawyers, respond to a “ruling from Karlsruhe”, as happens in Italy with the “Milanese rulings”.

There are however special arrangements, in Germany, which aim to secure a uniform application of the law. A chamber common to the Federal Courts guarantees a uniform application of the law within the different Federal Courts (Article 95 of the *Grundgesetz*). This is the joint chamber of the Federal Courts («Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes»). If a chamber of one of the Federal Courts plans to deviate from the current jurisprudence of a chamber of a different Federal Court, it

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se denuncie no lleven en vigor más tiempo del razonablemente previsible para que sobre su aplicación e interpretación haya podido formarse una autorizada doctrina jurisprudencial, con la excepción de que sí exista tal doctrina sobre normas anteriores de igual o similar contenido.

De este modo, se establece con razonable objetividad la necesidad del recurso. Esta objetivación del ‘interés casacional’, que aporta más seguridad jurídica a los justiciables y a sus abogados, parece preferible al método consistente en atribuir al propio tribunal casacional la elección de los asuntos merecedores de su atención, como desde algunas instancias se ha propugnado. Entre otras cosas, la objetivación elimina los riesgos de desconfianza y desacuerdo con las decisiones del tribunal».

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has to submit the case to the joint chamber of the Federal Courts.

In 2001 a substantial reform changed the admissibility of appeals. The *Zivilprozessreformgesetz*, implemented on the 1 January 2002, changed many of the articles that can be found in Book III of the Civil Procedural Code, the *Zivilprozessordnung* (ZPO).<sup>33</sup>

In general, the reform in question has provided that access to the Supreme Court (*Bundesgerichtshof*, BGH) is limited to cases that present a matter of fundamental law issues (*grundsätzliche Bedeutung*), or offer the Court an opportunity to insure the uniformity of jurisprudence or the “improvement” of the law.<sup>34</sup> The reform has therefore changed the discipline of the judicial cassation by limiting the use of the appeal and introducing, among other things, a preliminary verification by the appeal judge.

In regard to the eligibility of each ruling when the appeal is granted by the referring court, the respective Federal Court will not be able to refuse to examine the case, since in the words of Antonio Briguglio «what dominates the proceeding is the interest, even objective, in the proper functioning of the *Bundesgerichtshof* and in particular that the supreme body of the jurisdiction isn’t unnecessarily engaged».<sup>35</sup>

The procedure in question, which takes place before the BGH, is known as *Revision*. It has as its subject the control of decisions taken in lower courts in terms of their compliance with the rule of law. The violation of a law (*Rechtsverletzung*) is therefore the necessary requirement to request the cassation of a provision.

A definition of this violation is established by § 546 ZPO according to which there is a violation of the law when a rule of law (*Rechtsnorm*) has not been applied or when it has not been correctly applied.<sup>36</sup>

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33 See the Italian Senate’s website, *Le impugnazioni dinanzi al giudice civile in GERMANIA*, in “Legislatura 17<sup>a</sup> – Servizio studi – Dossier n. 171”, at <[https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/803980/index.html?stampa=si&part=dossier\\_dossier1-sezione\\_sezione11-h2\\_h23&parse=si&spart=si](https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/803980/index.html?stampa=si&part=dossier_dossier1-sezione_sezione11-h2_h23&parse=si&spart=si)>.

<sup>34</sup> R. CAPONI, *La riforma dei mezzi di impugnazione*, in *Riv. trim. dir. proc. civ.*, 4, 2012, p. 1153.

35 A. BRIGUGLIO, *Il controllo sull’ammissibilità della impugnazione nel processo civile spagnolo e in quello tedesco (Documentazione per la riforma della Cassazione Civile)*, in *Giust. civ.*, 2, 1982, p. 515.

36 V. DI CERBO, *Le Corti Supreme degli altri. Il procedimento civile dinanzi al Bundesgerichtshof (cenni), Relazione 12 aprile 2012*, at <[http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20120412\\_RelazioneCerbo.pdf](http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20120412_RelazioneCerbo.pdf)>.

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The Revision is therefore admissible only in the light of the parameters in the second paragraph of the aforementioned § 543 ZPO, which states:

1. First, there must be a question of law (*Rechtssache*) of fundamental importance;

2. Secondly, the situation must be such that a decision by the BGH is necessary for the evolution of the law (*Fortbildung des Rechts*) or to guarantee the uniformity of the jurisprudence (*die Sicherung einer einheitlicher Rechtsprechung*).

The parameter in point 1 will subsist in those cases in which the question of law, on the one hand, must be clarified for the decision of the *sub iudice* case and, on the other, has a significant effect in an indeterminate number of future cases. The issue on which doubts arose must not have previously been clarified by the Supreme Court and must have a fundamental value for the uniform application of the law. Often, in fact, in the German system the so-called pilot cases are brought in front of the BGH.

In point 2 it is necessary to distinguish the first hypothesis from the second. The first implies that the decision of the BGH is essential to the evolution of the law. A concrete case could in fact constitute an opportunity to affirm a legal principle regarding the interpretation of laws or the integration of these rules (*Gesetze-sluckenausfüllen*, literally filling the gaps in the law). The second hypothesis exists in cases where the jurisprudence is divergent with respect to that of the Supreme Court. For example, when there is a recurring mistake in the interpretation of the law. It includes symptomatic errors in the application of the law (*Rechtsanwendungsfehler mit symptomatischer Bedeutung*) with a possible non-negligible impact on the interests of the community. For example, the incorrect application of the rules on the burden of proof can render an appeal for *revision* admissible if there are concrete indications that the wrong judgment could give rise to similar erroneous applications by the same judge or by other judges.

The assessment of the admissibility of each appeal thus has as a prerequisite the evaluation of public interest. The review is also considered admissible in the case of violation of procedural principles considered fundamental, such as the right to be heard (*das Recht auf rechtliches Gehör*), guaranteed by the Constitution, and finally the right to a fair and non-arbitrary process (the English due process).

The uniform application of law is also ensured on a horizontal level within the

*Bundesgerichtshof*, thanks to the rules contained in § 132 of the organisational law of the courts (*Gerichtsverfassungsgesetz - GVG*).<sup>37</sup>

The law requires that when one chamber believes that the jurisprudence on similar cases is faulty, and thus believes that it should be changed, the chamber must ask whether the other chambers still uphold the older interpretation. In such instances, the matter is referred to a joint chamber (*Großer Senat*) of judges – the president of the Court and one judge from each chamber – in order to solve the discrepancies of views and to ensure a unified decision. This procedure is called *Divergenzvorlage* (literally diverging submission). There is one joint chamber for criminal cases and one for civil cases.

Chambers can also request a decision of the joint chamber of judges if a uniform decision is needed in a question of fundamental importance for the development of legal principles or for securing a uniform jurisprudence. This procedure is called “*Rechtsfortbildungsvorlage*”. The deciding chamber is then bound by the rulings of the *Großer Senat*. This special procedure of submission to the joint chamber is unique in having this binding effect. In all the other cases there will be a binding effect only to the extent that the chamber will have to submit the case to the joint chamber if it plans to deviate from the decisions of the joint chamber judges.

This exact process described above takes place in the BGH, but other Federal Courts also have similar rulings to guarantee a uniform application of the law.

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<sup>37</sup> *Gerichtsverfassungsgesetz* § 132: (1) A Grand Senate for Civil Matters and a Large Senate for Criminal Matters are formed at the Federal Court of Justice.

(3) A submission to the Grand Senate or the United Grand Senates is only permissible if the Senate, whose decision is to be departed from, has declared at the request of the recognizing Senate that it will maintain its legal position. If the Senate, the decision of which is to be deviated from, can no longer be addressed with the legal question due to a change in the business distribution plan, the Senate will take its place, which according to the Business Distribution Plan would be responsible for the case in which a different decision was made. The respective Senate decides on the question and the answer by resolution in the form required for judgments; Section 97 (2) sentence 1 of the Tax Consultancy Act and Section 74 (2) sentence 1 of the *Wirtschaftsprüferordnung* remain unaffected.

(4) The recognizing Senate can submit a question of fundamental importance to the Grand Senate for a decision if, in its opinion, this is necessary for the further training of the law or to ensure uniform case law. As found at <[http://www.gesetze-im-internet.de/gvg/\\_132.html](http://www.gesetze-im-internet.de/gvg/_132.html)>.