

**THE SELECTION OF CASES SUBJECT TO ACCESS TO THE RIGHT OF CASACIÓN
IN SPANISH LAW: TECHNIQUES “IN ORDER TO UNIFY DOCTRINE”
AND “OF INTEREST REGARDING CASACIÓN”***

(ABRIDGED VERSION)

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I. ON THE RECENT REFORMS TO CIVIL CASACIÓN AND THE PRIME TOPIC OF SELECTION OF CASES SUBJECT TO APPEAL

Prior to the drafting of the *Ley de Enjuiciamiento Civil* (*LEC*, Spanish Civil Proceedings Act) the debate had already been initiated over whether the economic value of a case should be a deciding factor to determine whether a court case could be appealed on a point of law. The debate extended beyond civil proceedings to include other analogous jurisdictions such as administrative and labour law proceedings. Nevertheless, the concrete measures reached in the alternative criteria to the so-called traditional criterion, are not consistent, in fact they display remarkable differences. Furthermore, this field reveals a lack of stability which suggests that the matter has not yet been fully resolved.

There are components of the Spanish civil *casación* (appeal on points of law), as opposed to appeals on judgements, which are worth considering, but this would extend the debate too far, and surpass the measures taken in the recent legal reforms, since the matters in question are already subject to more or less long-standing rules.

In the last reform of the *LEC* of 1881, in 1992, there were still no essential changes in the selection criteria for cases subject to access to *casación*.

Along with the very special rules – of little significance given the number of cases which could be appealed – concerning the matter over which judgement had been passed, the special rule with the widest scope of application concerned the minimum monetary amount of the case in point.

In the context of these selection criteria, the reaction of legislators faced with a greatly increased workload in the Civil Division of the *Tribunal Supremo* (*TS*, Spanish Supreme Court), was on the one hand simply to periodically increase the monetary amount required for a case to be appealed on *casación*, and on the other hand to avoid this access to appeal being abused when the quantities involved did not justify it.

On the occasion of the 1992 reform the approach started taking shape that the functions of the *TS* regarding *casación* should be analysed, and the options narrowed down if need be to create a regulation which would be compatible with the functions chosen, in particular with regard to the selection of cases eligible for access to *casación*. This approach led to a wide variety of considerations: some were founded in constitutional concerns while others were considered related to political and technical legal criteria.

* Translated from Spanish into English and revised by Translatio.

II. CONSTITUTIONAL CONDITIONING FACTORS AND GUIDELINES FOR THE SELECTION OF CASES ELIGIBLE FOR ACCESS TO *CASACIÓN*

An analysis of the *Tribunal Constitucional* (*TC*, Spanish Constitutional Court) doctrine shows, more than abundantly, that there are no constitutional rules governing legal foresight in the case of *casación*, nor is there, needless to say, a legal framework on the matter. However, it is of interest to investigate whether this doctrine could at least cast a light on political-legal criteria guiding the *casación* regime: in particular for the selection of cases in issue eligible for access to *casación*.

In this context judgement *STC 47/2004* of the *TC* stands out as a clear example which specifically links the question raised above with the functions of *casación* – in this case demonstrating that such right is of decisive constitutional relevance. The judgment concerned the constitutionality of a procedural rule approved by the Parliament of the autonomous Spanish region of Galicia which abolished the minimum monetary amount required to access *casación*, based on a violation of Galician civil Law. The constitutionality of the case was founded on the fact that this procedural rule took into account the “necessarily special character” arising from the particularities of said Law. The measure was upheld stating that Galician civil Law governs legal relations in the context of an agrarian economy, in which smallholdings generate claims of limited monetary value and are incompatible with the minimum monetary amounts established by the State. This would generate a situation whereby it would be impossible to meet the functions of *casación* consisting in “the establishment of jurisprudence* and uniformity in the application of substantive civil Law” in this case Galician Law.

Nevertheless, the jurisprudence of the *TC* which, in general, has led to the creation of selection criteria for cases with access to *casación* is that worked out regarding compliance with equality under the law, based on Article 14 of the *Constitución Española* (*CE*, Spanish Constitution).

In the context of this complex doctrine, the *TC* has interpreted that a request for protection under the principle of equality under the law can not be considered when the ruling giving rise to such a request contradicts a ruling (or rulings) made in substantially equal cases by a different court of equal or higher power.

According to another explanation of this problem, the jurisprudential uniformity in the interpretation and application of the regulations is based on principles of legal certainty, rather than on the legal equality guaranteed by Article 14 CE.

Yet, no matter how the problem is approached and explained, there is uneasiness surrounding the limited and exceptional protection that the *TC* can provide when unjustifiably different rulings are made in substantially equal cases. The decisions of the *TC* abound with statements indicating that these are matters for common legislator to resolve, the latter having to establish an appropriate appeal system.

III. POLITICAL AND TECHNICAL LEGAL APPROACHES WITH REGARD TO THE SELECTION OF CASES ELIGIBLE AND CURRENT REGULATIONS REGARDING SELECTION CRITERIA

* In Spanish Law “jurisprudence” refers to the doctrine which arises from the judgements made by certain courts.

Complaints of shortcomings in the appeal system before ordinary courts that cannot be covered by constitutional protection, and the *TC*'s positive advice in favour of specific legislation to satisfy the variety of needs arising from the right to equality under the law have influenced (or agreed with) various legal policy approaches that question the traditional criteria governing the selection of cases which can access to *casación* and which offer alternatives to these criteria.

The *lege ferenda* options proposed have been highly varied: setting a sole criterion or various criteria; with regard to the nature of the criteria, conferring on the *TS* discretionary powers of selection, or regulated powers or at least related to undefined legal concepts bearing different configurations. In fact, civil and other non-criminal *casación* at present offers a remarkable variety concerning the appealability of judgements.

If we observe positive Law and the different provisions for appeals specially designed to guarantee the uniformity of the jurisprudence and equality in the application of the law – which are not the only factors affecting the appealability of *casación* – we can see that a legal solution of such appeals has been chosen, as opposed to a discretionary power, although the degree of definition is not the same in all regulations.

In administrative proceedings and proceedings on labour matters, the presumption of appeal has no *nomen iuris*, but a form of *casación* is applied “in order to unify doctrine”. Its formulation is, in essence, the same for both procedures.

In civil proceedings the presumption of appeal could have been formulated in a similar way but it was replaced in the draft bill by the requirement of “interest regarding *casación*” (“*interés casacional*”).

The form in which the selection criteria are expressed, even though their intention is to unify jurisprudence and to apply the premise of equality under the law, is not without its significance.

IV. THE SYSTEM OF APPEALABILITY OF *CASACIÓN* IN ORDER TO UNIFY DOCTRINE IN ADMINISTRATIVE PROCEEDINGS AND PROCEEDINGS ON LABOUR MATTERS

The requirements for appealability of *casación* in order to unify doctrine are based mainly on the fact that the judgment which is being appealed against, when compared with other judgments of particular courts, has reached a different ruling despite sharing identical plaintiffs, or different plaintiffs but identical circumstances, and sharing substantially the same facts, grounds and claims. In short, this definition sets precise limits to the faculty of the *TS* to verify the the necessary requirement of the appealable judgment.

The strict requirement that cases must be identical when a decision is appealed because of similarity to another contrasting case, particularly with regard to the legally relevant facts in both of them, excludes or hinders certain cases from receiving a definitive judgement on their merits which could state how best to interpret and apply the rules to a case which is the subject of the appeal, and from which arises a doctrine to be maintained or established –*ex novo* or via a justified evolutionary change- relevant to cases similar to the one being subject of proceedings. Consequently, the task of unifying – and justifiedly changing – jurisprudence cannot be carried out in a given number of cases.

The problem arises from the fact that the role which an appeal can and must fulfil – i.e.: it must revise the interpretation and application of rules for resolving the

case at hand, maintaining or establishing a means, also closely related to the case, to perform the particular interpretation and application - depends on an appraisal whose nature is very different from the proceedings carried out to resolve on the merits of the appeal – instead it is based on comparing the similarity between the relevant facts of the cases and the resulting judgments, and it is this which determines whether or not an appeal on point of law is granted.

There are reasons which justify these connections between so different rulings and appraisals. However, in certain ways, these connections are incorrect, due to the fact that the impossibility or great difficulty in finding identical facts in certain types of cases cuts off the possibility of deciding whether a more correct interpretation of a particular rule or law could lead to the classification (and highlighting) of facts which, according to the judgment appealed, are irrelevant even for the prior confirmation that there exists a similarity between facts.

It could therefore be said that *casación* appeals in order to unify doctrine have concentrated on the *equality in the application of the law* and as a consequence – at least in some circumstances – have neglected the principle of *equality in the interpretation of the law*.

V. RIGHT TO APPEAL IN CIVIL PROCEEDINGS BECAUSE OF “INTEREST REGARDING CASACIÓN”

Access to civil *casación* specifically designed to cater for the unifying of jurisprudence and protecting the principle of equality in the application of the law is very different from what we have observed up until now. In administrative proceedings and proceedings on labour matters, judgments must be compared for identical cases with divergent rulings; in civil proceedings we must also compare the judgment disputed out of “interest regarding *casación*”, not directly with another judgment, but rather with the jurisprudential doctrine to which the disputed judgment is opposed. This doctrine can be passed down from *TS* judgments, or judgments from various *Audiencias Provinciales* (*AP*, Spanish Provincial Court), and with which the disputed judgment coincides through the resolution of a point of law or question in which the aforementioned judgments uphold contradictory jurisprudence. A completely different circumstance is raised when the judgment appealed applies recent legislation for which there is no doctrine from the *TS*.

Article 477.3 of the *LEC* uses two separate terms when referring to what the judgment ought to be compared to (jurisprudential doctrine and jurisprudence), but the meaning is the same. And perhaps the best term is jurisprudential doctrine since it emphasizes the abstraction drawn out from specific cases, from which legal criteria emerge regarding the interpretation and application of the rules and principles of Law, performed in the resolution of unique cases, but with an interest which goes beyond the judgment itself.

This jurisprudential doctrine, or jurisprudence, although it is established when disputed cases are judged, is linked to the rules which are interpreted and applied to this decision. This is the first difference from appealability in *casación* in order to unify doctrine, where the deciding factor is the similarity of the facts between the judgment appealed and the one it is being compared to. As a second difference, the interest regarding *casación* of the appeal is not dependent upon comparing the purposes of the cases, nor on a comparison limited to the wording of the judgments. These differences do not mean that the material content of the cases resolved by either of the judgments can be ignored. This would go against the *ratio iuris* of the rules which govern the

presumption of appealability and would also ignore that taking into account the precedents in jurisprudence should not be substituted by taking into account a judgment removed from its context. However, the material aspects to be taken into account are different and less clearly defined.

For the presumption of opposition to a jurisprudential doctrine of the *TS* it is worth turning to the court's own definition of what constitutes jurisprudence or jurisprudential doctrine, and also to take note of the interesting circumstance that it is the *TS* itself which determines the characteristics of this parameter of comparison.

The reports leading to the drafting of the *LEC* had already rejected the need for absolute similarity between cases, and since then, this criterion has been the predominant factor in jurisprudential doctrine interpretation. On the other hand, it is not an unusual practice for the *TS* to cite, as a basis for doctrinal decisions, judgments which lack all similarity or have no comparable material facts, although they do coincide on the matter of formulating particular doctrinal arguments. Everything seems to lead to the conclusion that finding a point of contrast is not as difficult as deciding which cases are eligible for *casación* in order to unify doctrine.

In the second example of presumed interest regarding *casación* there is a lack of jurisprudential doctrine on the part of the *TS*, and a conflict in the doctrine laid down in the jurisprudence of the *AP*. The *TS* has upheld general rigorous arguments which go against the letter of the law, which only requires contradictory jurisprudence on "points and questions" and not substantially similar arguments. Scientific doctrine has understood that the necessary conditions for the right to appeal on a point of law are met when there are differences on the interpretation of the rules applied to cases which do not share facts, but are simply analogous or comparable, so long as these differences are the root cause defining the underlying premise of the judgments. A study of decisions by the *TS* concerning the admissibility of appeals seems to ratify the authors' claims.

The final case of presumed interest regarding *casación* distances itself from situations where inequality in the interpretation and/or application of a regulation is a danger, and instead concentrates strictly on the optimal interpretation and/or application of a new regulation.

The rules governing appeals on grounds of interest regarding *casación* has surpassed the traditional rules governing access to appeals, which ostracised important matters of Private Law, although not on economic grounds as the basis for exclusion. Furthermore these rules do not have to satisfy the requirements of unifying doctrine, which means that it is more probable that the necessary contradiction will be found and the case brought to the *TS* for a judgment on the merits of the appeal. However, this in itself leads to a situation where the rules governing the interest regarding *casación* under the *LEC* have had little effect on limiting access to the *TS*, which this court has turned to other means of limiting the admission of cases by applying other kinds of restrictive interpretations on matters.

VI. A FEW CONCLUSIONS AND FORESEEABLE TRENDS

The two appeal techniques considered are worthy of contrasting evaluation arising from the two criteria which are appropriate for the analysis of the rules governing access to *casación*.

As for the effect on the workload of the *TS*, the results of *casación* in order to unify doctrine have been acknowledged as considerable, at least in labour cases, while the rules governing the interest regarding *casación* of appeals on points of law arising

from the *LEC* do not seem to have generated much success, particularly in the judicial context.

On the other hand, in order to have the core matter of a case reviewed by the *TS* in all manner of legal proceedings, the appealability out of interest regarding *casación* has turned out to be the most appropriate technique.

Even though both techniques originate in a concern for equality in the application of a law, the rules governing the interest regarding *casación* seem more effective than appeals on *casación* in order to unify doctrine. Given that the latter is very much determined by the similarity between cases and cases are becoming ever more varied, opportunities to appeal to the *TS* will shrink due to lack of similar cases.

The interest regarding *casación* in the *LEC* gives preference to the equality in interpretation, and concentrates on the regulations and other components of the regulation on sources of law, explaining their meaning. If these explanations are made clearly, they are more likely to be taken into account by the *TS* and courts of instance (first and second), and there will be an ensuing expansion of consistent interpretation of the regulations (or definition of their content) in an increased number of cases of litigation, which will favour the subsequent consistent equal application of these regulations or legal principles.

Probably, the most suitable technique to overcome the conflicting evaluation systems of the two techniques in effect today consists in granting the *TS* the discretionary power to select cases itself. In this way the *TS* itself would control the access, and regulate its workload accordingly, without being bound by strict regulations concerning access to *casación*. This would in turn lead to the *TS* having the possibility of excluding certain types of cases from the outset. However, it does not seem likely that the reforms prior and still considered will adopt this point of view.