THE SYSTEM OF FRENCH *CASSATION*[*]

(ABRIDGED VERSION)

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To understand recent reforms of the French *Cour de cassation* it is necessary to consider its organization (I), its functions (II) and its proceedings (III).

I. ORGANIZATION OF THE *COUR DE CASSATION*

The everyday personnel of the *Cour de cassation* consists of judges, prosecutors, auditors and court secretaries. There are 153 judges of which 114 are civil judges. The make up of the *Cour de cassation* must be considered with regard to the numbers of judgments made by it in one year. There were 20,354 civil judgments in 2007, and therefore, about 178 per year per judge, which is a high number for a court which is at the very top of the judicial hierarchical system.

Moving away from its administrative activity, the regular activity of the *Cour de cassation* is carried out by six chambers, five civil law chambers and one criminal law chamber, which are, so to speak, the *permanent* courts. In principle, the panel consists of five judges, which make up the ordinary section (court session). However, when the decision on the appeal is clear cut, it is made up of three judges with a deliberating role (limited section). The possibility, since 1981, of resolving appeals in limited section, reveals one of the problems faced by the *Cour de cassation.* This high court has become overwhelmed with functions and has needed to speed up the *"handling"* of the appeals, as the workload of the judges has multiplied, given that the number of judges has not been increased.

But the *Cour de cassation* also has three *occasional* court sections: The *joint chambers*, the *full assembly* and the *first chamber.* I am going to refer only to this first chamber which demonstrates that there has been a recent evolution in the functions of the *Cour de cassation.*

II. FUNCTIONS OF THE *COUR DE CASSATION*

The *Cour de cassation* has a double role.

Its first function is a *jurisdictional and disciplinary* one. While the principle of the double jurisdictional level enables cases to be retried, with regard to both legal and factual aspects, the *pourvoi en cassation* (appeal on a point of law) means that the legality of a decision passed by the first instance courts and Courts of Appeal can be reviewed. Unlike an ordinary appeal, the *pourvoi en cassation* is an *extraordinary* vehicle, which is only open with reference to certain judgments in specific cases indicated by Law. At the same time, unlike an appeal, the *pourvoi en cassation* does not open a third jurisdictional level. The *Cour de cassation* is a judge of law only. Its function is to rule on points of law and not on points of fact. As a result, if the appeal is

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justified, the *cassation* judge cannot, in principle, overturn the decision of the courts of instance in favour of his own decision, he can only annul the judgment which has been appealed and remand the case to a court of instance, which will be responsible for passing judgment on the case again. This is its main function which explains why it was created and its origins, during the French Revolution, as an adjunct to the legislative body.

However, the *Cour de cassation* has developed progressively from its responsibility as a platform of legal oversight to acquiring the *power to interpret the law,* and gradually develop its own law. This means that its function is both to provide *jurisprudence and regulations.* Without a doubt, the law created by the *Cour de cassation* is not the same as that created by the legal system. A decision of the *Cour de cassation* is only effective with regard to the specific case which has been presented to the *Cour de cassation* and it does not have, in principle, the power to impose its solution on the courts of instance, which remain free when making judgments. Apart from its jurisdictional function in the cases which it hears, nothing prevents the decisions adopted by the *Cour de cassation* from being aimed at "developing jurisprudence", which means that they can serve as a reference for all the courts, not by reason of authority *(ratione auctoritatis),* but by means of their power to persuade the lower courts *(auctoritate rationis).*

It is precisely within the framework of this jurisprudence and statutory rationale that the recent creation of proceedings for request for an opinion has been registered for the *Cour de cassation*. This was created by an Act of 15 May 1991, inspired by a similar mechanism organized in 1987 for the *Conseil d'État* (the government's highest consulting body on administrative matters) and the responsibility of a particular chamber of the *Cour de cassation*, the abovementioned first chamber. Unlike a joint chamber, this arrangement is for advisory purposes only and not for decision making. It is merely responsible for issuing an opinion to the courts which consult it on the merits of the cases and *concerning a new legal issue, which is proving difficult and in posed in multiple litigations*". The aim of this proceeding is to reinforce the legal security of individuals subject to the law, thus preventing conflicts arising due to the uncertainty of a new legal rule. Its other purpose is to speed up the legal processes. Not forgetting the legislative referent of revolutionary law, the *Cour de cassation* has become the destination for interpretation appeal cases, instead of the legislator. This has established the autonomous power achieved by the *Cour de cassation.*

Today, the *Cour de cassation* is divided between these two functions, one which is disciplinary and the other which is statutory. Its jurisprudential and statutory function makes no real sense unless the *Cour de cassation* can act as an educational platform in its decision making, which means that it can take its time to give judgments with extensive reasons on a series of cases with exemplary value, while its jurisdictional and disciplinary function, on the other hand, means that it needs to hear all the appeals brought before it. This faces the *Cour de cassation* with an enormous number of cases which have to be dealt with conveyor belt style and the need to rationalize its proceedings.

III. PROCEEDINGS AT THE *COUR DE CASSATION*

In France, as is the case in other similarly developed countries, the judicial institutions have had no choice but to meet the challenge of an increasing number of cases which are brought before the courts. The question is to know how to ensure the right to access to a judge and at the same time to control the flow of cases, and to

reconcile financial concerns and the demand for a fair trial. As we will see, many of the regulations brought in over recent years have been aimed at finding a way to deal with the high number of cases of *pourvoi en cassation*. This need explains the conditions behind exercise (A) and the effects (B) of the appeal.

A) As a vehicle of extraordinary appeal, the *pourvoi en cassation* is only open to the cases established by Law. Not all judgments can bring about a *pourvoi en cassation*, nor can they do so for just any reason. If the conditions are met, the *Cour de cassation* must decide on all appeals brought before it; it cannot pick and choose the cases it wishes to handle. But this workload is enormous and, therefore, a proceeding which controls the admission of appeals has been created. An Act of 25 June 2001 created a proceeding called admission of appeals, with the aim of reducing the caseload of the *Cour de cassation* and enabling it to concentrate on its statutory mission. This proceeding is regulated in the Code for Judicial Organization and the Civil Proceedings Code, article 1014 of which states: "*Once the brief has been submitted, this court refuses to accept inadmissible appeals or those which are not based on a serious reason for appealing for* cassation".

In a strict sense, this proceeding is not designed to select the appeals but rather it is a *simplified legal proceeding* which leads to a *reduction of court sections* (three judges instead of five) and a *reduction of the procedural steps:* in particular, the resolution of inadmissibility is not a sentence, it is not really reasoned. In practice, in the event of inadmissibility, there is a procedure involving filling in a standardized form, but this can however be filled in by the assistant judge who can add a few lines of explanation. This measure has proved to be very effective because the rate of inadmissibility processes was 37% between 2002 and 2004. But it has been criticized for being unclear and difficult to understand for those going through the legal process, particularly in the appellant. Some authors also show concern about how the function of the *Cour de cassation* has been transformed and they lean towards a supreme court system in which the statutory role takes on a greater importance than the disciplinary role. In any event, this control is now more moderate and the average percentage for 2007 dropped to 24%.

B) As an extraordinary appeal, the *pourvoi en cassation* does not have, in principle, either a remanding effect or a suspensory effect. But more detailed guidelines are necessary concerning the lack of suspensory effect. In fact, if I can put it this way, not only is the appeal no obstacle to the sentence under appeal being carried out but rather its being carried out is at the present time considered one of the conditions for study of the appeal.

By virtue of the provisions in article 1009-1 of the Code of Civil Procedure, the first president decides to withdraw a case from the registry of cases when the appellant does not show that the decision being appealed has been complied with. This measure comes from a decree of 20 July 1989. This measure is designed to ensure the authority of decisions and judgments given in courts of last resort. It has been conceived as a police instrument to ensure a greater control of the *pourvoi en cassation*, thus avoiding any time-wasting appeals.

This proceeding is understood not to run contrary to the right to a fair trial when relationship of proportionality between the means employed and achievement of the objective sought is respected. In particular, the matter cannot be removed from the registry of the cases if, in the opinion of the first president, "*carrying it [the decision] out would bring with it clearly excessive consequences or the plaintiff would not be able*

to comply with the decision". With regard to the matter of clearly excessive consequences, the case cannot be withdrawn, for example, when the debtor "*is unemployed and in a difficult financial situation*" or when the occupant under an eviction order from his or her home "*carries out professional activities in it*". Except when the instance expires, executing the decision appealed enables authorization from the first president to reinstate the case in the registry of cases of the *Cour de cassation*.

To conclude, all of the successive reforms which have been made pragmatically in recent years have had overall positive consequences. This favourable outcome can be measured in particular by making two observations. First, the reduction of the waiting period for trial for *pourvois en cassation*. This waiting period, which was 611 days in 1997, is now 400 days. The aim is to reduce this time to one year (six months to inform on the case and six months to pass a judgment). Second, the number of cases resolved (20,354) is now higher than the number of appeals registered (18,232). The modifications which now need to be made in the future will be merely minor adjustments. Such is the case of the modifications for example introduced in the proceedings before the *Cour de cassation* by a recent decree of 22 May 2008. But we must not lose sight of the fact that the reforms concerning the *Cour de cassation* cannot remain isolated. They must be accompanied by reforms to better rationalize the proceedings before the courts of instance, which is the case. Above all, we should not expect the law to solve everything. We must also consider, apart from the legal reforms, the considerable influence which technological progress can have on the functioning of the *Cour de cassation*. This is a question of dematerializing the proceedings and developing electronic communications between the *Cour de cassation* and lawyers. This must also be applied to the courts of first and second instance. The judicial institutions make up a single system. It needs to be treated as a system with cohesive elements.