

Supreme Courts and Courts of Cassation

Citation for published version (APA):

Bravo Hurtado, P. (2018). *Supreme Courts and Courts of Cassation: A diagonal symmetry: Comparative law study of the US, England, France and Italy in civil procedure*. [Doctoral Thesis, Maastricht University]. Maastricht University. <https://doi.org/10.26481/dis.20180911pbh>

Document status and date:

Published: 01/01/2018

DOI:

[10.26481/dis.20180911pbh](https://doi.org/10.26481/dis.20180911pbh)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

PABLO BRAVO-HURTADO

SUPREME COURTS AND
COURTS OF CASSATION :
A Diagonal Symmetry

A Comparative Study of Adjudication in
Civil Matters in the US, England & Wales,
France and Italy.

- Dissertation -

*To obtain de degree of Doctor at Maastricht University, on the
authority of the Rector Magnificus, Prof. Dr. R.M LETSCHERT, in
accordance with the decision of the Board of Deans, to be defended
in public on Tuesday 11 September 2018, at 14:30 hours.*

April, 2018

Maastricht University,
Faculty of Law.

First Supervisor :

Prof. Dr. C.H. (REMCO) VAN RHEE

Co-Supervisor :

Dr. AGUSTÍN PARISE

Assessment Committee :

Prof. Dr. JAAP HAGE (*Chairman*)

Prof. Dr. ALAN UZELAC, University of Zagreb - Croatia

Prof. ELISABETTA SILVESTRI, University of Pavia - Italy

Prof. Dr. STEFAAN VOET, Catholic University of Leuven - Belgium

Dr. PIM OOSTERHUIS

Funding :

CONICYT - *Chilean Scholarships for Doctoral Studies (BecasChile).*

NWO - *Netherlands Organization for Scientific Research.*

This dissertation is dedicated to my father, in remembrance of his life, and to my mother, in gratitude for her unconditional and unwavering support.

A camel asks a turtle: What do you store under your hump?

PABLO NERUDA (1904-1973) - The Book of Questions.

CURRICULUM VITAE

PABLO BRAVO-HURTADO (Chile, 1982) joined the Faculty of Law at Maastricht University in November 2013. He received the Bachelor degree in Law and Social Sciences at the University of Chile in 2011, graduating with the highest honours (*distinción máxima*). He conducted doctoral studies at the Catholic University of Valparaíso, obtaining the certificate of research sufficiency (*candidato a doctor*) to develop doctoral research in 2013. Mr BRAVO-HURTADO initiated his academic career as a student assistant to the chair of procedural law at the University of Chile (2004-2009). Immediately upon obtaining his LL.B. degree, he was appointed Lecturer in Civil Procedure at the Catholic University of Temuco (2011-2013) and, soon after, at the Alberto Hurtado University (2013).

Mr BRAVO-HURTADO has participated in the reform of the civil procedure of Chile since the early stages of his career. In 2007, he joined the national Forum of Civil Procedure Reform as records secretary, drafting articles of the new Code of Civil Procedure (Bill Project of 2009). In 2012, he became a consultant lawyer in civil procedure at the Chilean Ministry of Justice. After conducting comparative research projects on appeals for the Ministry of Justice, Mr BRAVO-HURTADO was appointed expert discussant to the national Round Table of Experts on Supreme Courts (2014), meant to draft a new recourse of last resort in civil matters for Chile.

Over the course of his doctoral research at Maastricht University, Mr BRAVO-HURTADO has presented his work in seminars in Chile, Europe and Asia. He has published scientific articles in both national and international peer-reviewed journals, and has written chapters for different collective works on supreme courts, civil procedure and appeals.

Mr BRAVO-HURTADO was awarded the Chilean Scholarship for Doctoral Studies (*Becas Chile*) and the funding of the Netherlands Organization for Scientific Research (*NWO*) for his research on supreme courts.

ACKNOWLEDGEMENTS

The elaboration of this work required four years of effort. Endurance, creativity, the flexibility to recognise interrelations – to be able to focus on the details and the big picture at the same time – and to re-examine my own ideas again and again were only a few of the skills that I had to master during this endeavour. Equally important, however, was the support I received from so many people along the way. In this acknowledgement I want to name them and recall their contributions to the best of my memory. My apologies in advance if I have forgot anyone.

I am forever indebted to my supervisors at the Faculty of Law of Maastricht University, Prof. Dr CH (REMCO) VAN RHEE and Dr AGUSTÍN PARISE. REMCO was my first supervisor, who gave me much more than his guidance on conducting the research in my chosen topic. Of great importance to me is that I learned from his example the values of the university life. AGUSTÍN was my co-supervisor. I am thankful for his detailed review of my drafts and his practical advice for the initiation of my own academic career. If REMCO was like an academic ‘father’ to me, AGUSTÍN was certainly my academic ‘older brother’. I am sincerely grateful to you both.

I would like to thank the Assessment Committee for their rigorous evaluation: Prof. ELISABETTA SILVESTRI (Pavia), Prof. Dr ALAN UZELAC (Zagreb), Prof. Dr STEFAAN VOET (Leuven), Prof. Dr JAAP HAGE (Maastricht) and Dr PIM OOSTERHUIS (Maastricht). I hope that for you the reading of my dissertation was as interesting as the writing of it was for me.

At Maastricht University I found the optimal context within which to conduct my research. The Faculty of Law, particularly, is an international environment open to the diversity of viewpoints. This work benefitted from that international context and openness. As regards my colleagues at Maastricht University, I am certainly in debt to them for the continuous feedback they provided me. I would especially like to thank the former and current deans,

Prof. Dr HILDEGARD SCHNEIDER and Prof. Dr JAN SMITS, respectively. I would also like to say thanks to my officemates MAIKE KNOBEN, KATJA ZIMMERMANN, XI CHEN, ADELA OGNEAN and SERBAN VACARELU. Many members of the Maastricht European Private Law Institute (M-EPLI) also kindly helped me with their insights: GIJS VAN DIJCK, WILLIAM BULL, DANIEL ON, MARK KAWAKAMI and CATALINA GOANTA. Colleagues from other departments and faculties also contributed to helping me complete this work, only a few of whom I could mention are Prof. Dr NIELS PHILIPSEN, MARIEKE HOPMANN, SEBASTIÁN ESPINOZA, GONZALO GARFIAS and MARY KALTENBERG. Finally, the secretaries and other administrative staff of the Faculty were truly helpful (and patient) with all of my daily requests. I am very thankful to them too: DIANNE BORGIGNONS, JOYCE BERGHMANS, LYDIE COENEGRACHTS, NOËLLE TILLIE, LOT VAN DE VEN, LICETTE POLL and DIANA SCHABREGS. Maastricht is a lovely town, full of history and romantic places. I have and will keep such good memories of my four years living there.

This work also benefitted from the valuable comments and thoughtful criticism offered by colleagues from places around the world. From Scandinavia, Prof. Dr JØRN ØYREHAGEN SUNDE, Prof. Dr MAGNE STRANDBERG, Dr IGNACIO HERRERA-ANCHUSTEGI (Norway) and Dr ADAM CROON (Sweden). From Asia, Prof. Dr PETER CHAN, Dr WING WINKY SO (Hong Kong), Prof. Dr DAMMIR VALEEV, ELENA BAZILEVKIKH and RUSLAN SITDIKOV (Russia). From Southern Europe, Dr GABRIELE MOLINARO, Dr FEDERICO FERRARIS, ALESSIA MINIERI (Italy), Prof. Dr FERNANDO GASCÓN, Prof. Dr MARCO DE BENITO (Spain) and MARKO BRATKOVIĆ (Croatia). And from Latin America, Prof. Dr LEANDRO GIANNINI (Argentina), Prof. Dr DANIEL MITIDIERO, Dr PAULA PESSOA and TATIANA MACHADO (Brazil).

From Chile there are many deserving of my gratitude. Thanks to Prof. Dr RAÚL NUÑEZ OJEDA I found my academic life's vocation in the procedural law. Prof. CRISTIÁN MATURANA MIQUEL showed me the importance of supreme courts. Prof. Dr ÁLVARO PÉREZ RAGONE introduced me to the academic research of civil procedure. I cannot overlook Dr JORGE LARROUCAU TORRES - we have walked similar career paths, and he guides me from a few steps ahead. Colleagues from my doctoral studies at the Catholic University of Valparaiso also helped me to express and discuss some of my initial ideas: RAMÓN GARCÍA ODGERS, CARLOS URQUIETA and JANAINA CÉSAR. From my collaboration with the Chilean Ministry of Justice, I am grateful to FELIPE RAYO, MÓNICA NARANJO, CÉSAR ABUSLEME, FELIPE OPAZO, RODRIGO SILVA, MILTON ESPINOZA and PABLO PIZARRO. From my time at the Catholic University of Temuco, I must thank Prof. ROLANDO FRANCO, Prof. EDUARDO CASTILLO and Prof. MÓNICA BAEZA for giving me the opportunity of my first academic job; and, for the daily support of my student assistants, I would like to say thanks to DANIELA MELLADO, VIVIANA SOTO YAÑEZ, ARANTXA RÍOS, ALEX REDEL, CAROLINA SANDOVAL and GRACIELA HERMOSILLA.

The final version of this work required many rounds of review. As regards the English language text, I am grateful to RANDOLPH W. DAVIDSON for his diligent proofreading. I am in debt to LAUREN DEAN for her review of the draft for the application to the Canada Prize. NATALIA ZAVALA, GABRIELE MOLINARO and

ELENA BAZILEVSKIKH contributed with the translation into French, Italian and Russian of the book summary, respectively.

At a deeply personal level, I want to say thank you to my friends and family. To my closest friends – FRANCISCA AMIGO, DANIEL LAZO, FELIPE RAYO and ANDREAS SCHIJNS – for sharing my enthusiasm. To VIVIANA PONCE DE LEÓN, for her company, suggestions and the long hours listening to my ideas. I am grateful for all of the help from my brothers JAIME BRAVO HURTADO and GASTÓN BRAVO HURTADO, and for the unconditional support of my mother MARÍA ANGÉLICA HURTADO ARRANZ. My father, GASTÓN BRAVO FONSECA, passed away right before I started the PhD programme at Maastricht. Still, his memory kept me on track to achieve my goal.

Finally, this research was made possible thanks to funding provided by the Chilean Scholarships for Doctoral Studies (BECASCHILE) and a grant from the Netherlands Organization for Scientific Research (NWO). All the people and institutions mentioned helped me in various ways to improve this work. Any errors that may remain are my sole responsibility.

3 April 2018

PBH

OVERVIEW

Chapter I : Introduction	13
PART ONE : HORIZONTAL PERSPECTIVE	53
Chapter II : Courts Functions.....	53
Chapter III : Courts of Last Resort.....	103
PART TWO : DIAGONAL PERSPECTIVE.....	185
Chapter IV : Courts of Precedents.....	185
Chapter V : Courts of Error	249
Chapter VI : Conclusion.....	327

TABLE OF CONTENTS

Curriculum vitae	vii
Acknowledgements.....	ix
Overview	1
Table of Contents.....	3
List of Graphs, Figures and Tables	11
CHAPTER I: INTRODUCTION.....	13
A. Opening	14
B. Main thesis.....	15
1. Current view.....	15
2. Claim: A diagonal symmetry	16
C. Research questions	19
1. General question	19
2. Specific questions.....	20
i. <i>Judicial functions</i>	20
ii. <i>Court attributes</i>	20
iii. <i>Court hierarchical level</i>	21
D. Methodology	22
1. Comparative law.....	22
2. Comparative functionalism.....	24
3. Identifying functions.....	25
i. <i>Four functions</i>	26
ii. <i>Manifest functions</i>	26
iii. <i>Latent functions</i>	27

4.	Period	27
E.	Object and concepts	29
1.	Court of last resort.....	30
i.	Court	31
ii.	Last resort.....	31
iii.	Exceptional vs. normal final word	32
iv.	One or more courts	33
v.	Domestic court.....	33
2.	Civil matters.....	34
3.	Supreme court.....	36
4.	Court of cassation.....	36
i.	Cassation chambers.....	37
ii.	Cassation plenary sessions.....	37
5.	Intermediate appellate court.....	38
6.	Trial court	38
7.	Recourse.....	40
8.	Preliminary screening (access filter).....	42
F.	Jurisdictions	43
1.	The United States of America	43
2.	England and Wales	44
3.	France	45
4.	Italy.....	46
G.	Structure	46
1.	Part One	47
2.	Part Two.....	48
3.	Reading plan.....	49

PART ONE: HORIZONTAL PERSPECTIVE.....53

CHAPTER II: COURTS FUNCTIONS 53

A.	Introduction	54
B.	On Functions.....	55
1.	Diversity and functions	55
2.	Current classifications	56
3.	Criticism.....	57
4.	Judicial functions and the Rule of Law	59
i.	Dispute resolution.....	60
ii.	Error-monitoring	61
iii.	Judicial lawmaking.....	61
iv.	Political counterweight	61
5.	Finding the right courts to compare	62
6.	Manifest versus latent functions	64
C.	Models of Courts.....	66
1.	Trial court	68
2.	Court of error	71
3.	Court of precedents.....	73
4.	Constitutional court	76
D.	Manifest Functions.....	79
1.	United States of America.....	80
i.	Court of precedents	81

ii. Court of error	82
iii. Constitutional court	83
iv. Trial court	84
2. England	86
i. Court of precedents	87
ii. Court of error	88
iii. Constitutional court	90
iv. Trial court	91
3. France	92
i. Court of error	93
ii. Court of precedents	94
iii. Trial court	95
iv. Constitutional court	96
4. Italy	97
i. Court of error	98
ii. Court of precedents	99
iii. Trial court	100
iv. Constitutional court	101
E. Summary table	101
CHAPTER III: COURTS OF LAST RESORT	103
A. Introduction	103
B. Horizontal comparison	107
1. Scope of review	108
i. Supreme courts	109
ii. Cassation chambers	113
iii. Horizontal comparison	115
2. Judgment effects	119
i. Supreme courts	121
ii. Cassation chambers	123
iii. Horizontal comparison	125
3. Exposure	128
i. Supreme courts	129
ii. Cassation chambers	130
iii. Horizontal comparison	132
4. Number of cases	133
i. Supreme courts	135
ii. Cassation chambers	137
iii. Horizontal comparison	139
5. Preliminary screening	142
i. Supreme courts	144
ii. Cassation chambers	147
iii. Horizontal comparison	150
6. Panel composition	153
i. Supreme courts	156
ii. Cassation chambers	157
iii. Horizontal comparison	158
7. Total size	163
i. Supreme courts	165
ii. Cassation chambers	166
iii. Horizontal comparison	167

8. Opinion style.....	171
i. Supreme courts	174
ii. Cassation chambers.....	175
iii. Horizontal comparison.....	177
C. Summary tables.....	183

PART TWO: DIAGONAL PERSPECTIVE..... 185

CHAPTER IV: COURTS OF PRECEDENTS..... 185

A. Introduction	185
B. What is a plenary session?	187
1. Plenum in France.....	190
i. Assemblée plénière	191
ii. Chambre mixte.....	192
iii. Preliminary opinion (avis).....	194
2. Plenum in Italy.....	195
i. Sezioni unite.....	195
ii. Cassation in the interest of the law.....	196
iii. Mandatory referral for overruling	197
C. Diagonal comparison.....	198
1. Scope of Review	200
i. France.....	201
ii. Italy	203
iii. Diagonal comparison	203
2. Judgment effects	204
i. France.....	205
ii. Italy	208
iii. Diagonal comparison	210
3. Exposure	212
i. France.....	213
ii. Italy	215
iii. Diagonal comparison	217
4. Panel composition	217
i. France.....	219
ii. Italy	220
iii. Diagonal comparison	221
5. Total size	223
i. France.....	223
ii. Italy	225
iii. Diagonal comparison	225
6. Opinion style.....	227
i. France.....	229
ii. Italy	232
iii. Diagonal comparison	233
7. Number of cases	235
i. France.....	236
ii. Italy	236
iii. Diagonal comparison	238
8. Preliminary screening.....	240
i. France.....	241

ii. <i>Italy</i>	243
iii. <i>Diagonal Comparison</i>	244
D. Summary tables	246
CHAPTER V: COURTS OF ERROR	249
A. Introduction	249
B. Intermediate appeal as last resort	252
1. United States of America	255
i. <i>Structure</i>	255
ii. <i>Procedure</i>	257
2. England and Wales	259
i. <i>Structure</i>	259
ii. <i>Procedure</i>	261
C. Diagonal comparison	264
1. Scope of review	265
i. <i>Reproduction of evidence</i>	269
ii. <i>Credibility of evidence</i>	270
iii. <i>Oral evidence</i>	272
iv. <i>Written evidence</i>	273
v. <i>Inference on evidence</i>	275
vi. <i>General interpretation</i>	277
vii. <i>Particular application</i>	279
viii. <i>Procedural guarantees</i>	282
ix. <i>Case management</i>	284
2. Exposure	285
i. <i>United States of America</i>	286
ii. <i>England and Wales</i>	288
iii. <i>Diagonal comparison</i>	289
3. Judgment effects	290
i. <i>United States of America</i>	292
ii. <i>England and Wales</i>	294
iii. <i>Diagonal comparison</i>	296
4. Opinion style	299
i. <i>United States of America</i>	300
ii. <i>England and Wales</i>	301
iii. <i>Diagonal comparison</i>	303
5. Panel composition	304
i. <i>United States of America</i>	305
ii. <i>England and Wales</i>	307
iii. <i>Diagonal comparison</i>	308
6. Total size	310
i. <i>United States of America</i>	311
ii. <i>England and Wales</i>	313
iii. <i>Diagonal comparison</i>	314
7. Number of cases	315
i. <i>United States of America</i>	316
ii. <i>England and Wales</i>	317
iii. <i>Diagonal comparison</i>	318
8. Preliminary screening	320
i. <i>United States of America</i>	321
ii. <i>England and Wales</i>	322

iii. <i>Diagonal comparison</i>	323
D. Summary tables.....	324
CHAPTER VI: CONCLUSION	327
A. Research findings	328
B. Judicial functions.....	330
1. Rule of Law and judicial functions	331
2. Rule of Law and court models	332
3. Local manifest functions	333
i. <i>US</i>	333
ii. <i>England</i>	333
iii. <i>France</i>	334
iv. <i>Italy</i>	334
4. Manifest functions compared	335
i. <i>Negative similarity</i>	335
ii. <i>Positive similarity</i>	335
iii. <i>Combination difference</i>	336
iv. <i>Compatibility difference</i>	336
v. <i>Constitutional difference</i>	337
C. Court attributes	337
1. Attributes of the ideal models	338
i. <i>Constitutional court</i>	338
ii. <i>Court of precedents</i>	338
iii. <i>Court of error</i>	339
iv. <i>Trial court</i>	340
2. Attributes of the real courts	340
i. <i>US</i>	341
ii. <i>England</i>	341
iii. <i>France</i>	342
iv. <i>Italy</i>	343
3. Attributes and manifest functions	343
i. <i>US</i>	344
ii. <i>England</i>	345
iii. <i>France</i>	346
iv. <i>Italy</i>	348
4. Attributes and latent deviations.....	348
i. <i>US</i>	349
ii. <i>England</i>	350
iii. <i>France</i>	351
iv. <i>Italy</i>	353
D. Courts hierarchical level	355
1. Horizontal asymmetry: Courts of last resort.....	356
2. Diagonal symmetry (I): Courts of precedents.....	357
3. Diagonal symmetry (II): Courts of error	359
E. Policy recommendations.....	361
1. Clarifying the options	362
2. Taking the decision	362
3. Designing a reform.....	363
i. <i>Interrelations</i>	363
ii. <i>Integral reforms</i>	363
iii. <i>Relocating functions</i>	364
4. Responding to opposition.....	364
i. <i>Against changing traditions</i>	364

ii. <i>Against intermediate courts</i>	365
iii. <i>Against legal transplants</i>	366
iv. <i>Against fewer reviews</i>	367
F. Further lines of research	368
1. Comparative law	369
2. Legal history	370
3. Socio-legal study	371
G. Closing: Legal traditions revisited.....	372
BIBLIOGRAPHY	375
VALORISATION	435
A. Relevance	436
B. Target groups	437
C. Innovative activities	438
D. Diffusion	439
SUMMARIES	443
A. English.....	443
B. French	445
C. Italian	447
D. Spanish.....	449
E. Russian	452

LIST OF GRAPHS, TABLES AND FIGURES

GRAPHS

Graph III.1 : <i>Courts of last resort</i> – Number of cases (only civil cassation)	139
Graph III.2 : <i>Courts of last resort</i> – Number of cases (plus criminal cassation)	140
Graph III.3 : <i>Courts of last resort</i> – Total size	167
Graph IV.1 : <i>Courts of precedents</i> – Publications France, 2014	214
Graph IV.2 : <i>Courts of precedents</i> – Publication Italy, 2014	216

TABLES

Table I.1 : <i>Introduction</i> – Denominations	30
Table I.2 : <i>Introduction</i> – Final word	33
Table I.3 : <i>Introduction</i> – Structure	47
Table I.4 : <i>Introduction</i> – Alternative reading plan	51
Table II.1 : <i>Courts functions</i> – Manifest functions	102
Table III.1 : <i>Courts of last resort</i> – Horizontal asymmetry	184

Table IV.1 : <i>Courts of precedents</i> – Diagonal symmetry	247
Table V.1 : <i>Courts of error</i> – Scope of review.....	269
Table V.2 : <i>Courts of error</i> – Diagonal symmetry.....	325

FIGURES

Figure I.1 : <i>Introduction</i> – Diagonal symmetry of functions.....	17
Figure I.2 : <i>Introduction</i> – Research questions pyramid.....	19
Figure II.1 : <i>Courts functions</i> – Latent deviations	66
Figure III.1 : <i>Courts of last resort</i> – Perspective	104
Figure III.2 : <i>Courts of last resort</i> – Horizontal models.....	184
Figure IV.1 : <i>Courts of precedents</i> – Perspective	186
Figure IV.2 : <i>Courts of precedents</i> – Diagonal models.....	247
Figure V.1 : <i>Courts of error</i> – Perspective.....	250
Figure V.2 : <i>Courts of error</i> – Diagonal models.....	326
Figure VI.1 : <i>Conclusion</i> – Diagonal symmetry of models.....	330
Figure VI.2 : <i>Conclusion</i> – Legal traditions revisited	373

CHAPTER I: INTRODUCTION

TABLE OF CONTENTS

CHAPTER I: INTRODUCTION	13
A. Opening	14
B. Main thesis	15
1. Current view	15
2. Claim: A diagonal symmetry	16
C. Research questions	19
1. General question	19
2. Specific questions	20
D. Methodology	22
1. Comparative law	22
2. Comparative functionalism	24
3. Identifying functions	25
4. Period	27
E. Object and concepts	29
1. Court of last resort	30
2. Civil matters	34
3. Supreme court	36
4. Court of cassation	36
5. Intermediate appellate court	38
6. Trial court	38
7. Recourse	40
8. Preliminary screening (access filter)	42
F. Jurisdictions	43
1. The United States of America	43

2. England and Wales	44
3. France	45
4. Italy.....	46
G. Structure	46
1. Part One	47
2. Part Two.....	48
3. Reading plan	49

A. Opening

Every jurisdiction has its court of last resort for civil matters: a certain panel of judges at the top of the judicial hierarchy that has the final word when resolving our private disputes at a domestic level. Nevertheless, these courts of last resort are remarkably different from one jurisdiction to another. They are different not only in their denominations but, more importantly, on how they function in practice.¹ For instance, the court of last resort for England² is the *UK Supreme Court*,³ a committee of twelve judges,⁴ which resolves around 70 petitions per year.⁵ The French court of last resort for civil proceedings (called *Cour de cassation*), on the other hand, is a legion of 200 judges⁶ that every year needs to cope with 20,000 *arrêts*, or even more.⁷

The UK Supreme Court and the French Court of Cassation, thus, give the impression of contrasting examples. While the UK Supreme Court is a relatively small court with a small number of cases, the French Court of Cassation is a large court with an enormous caseload. Faced with this comparative difference, the interesting question to answer is, Why? Why are these courts of last resort remarkably different? This issue is important because the courts of last resort are a cornerstone in every legal system. A significant part of the Rule of Law depends on them. The courts of last resort are in charge of setting a clear and uniform interpretation criteria among the judicature.⁸ Therefore, analysing why other jurisdictions have different types of courts of last resort will be useful to understanding our legal systems better and to improving the performance of our courts in guaranteeing the Rule of Law.

¹ MAK 2013, p. 36.

² Obviously, the jurisdiction of England includes Wales. Therefore, the conclusions on England are applicable to Wales too.

³ The reader must bear in mind that the court of last resort for England and Wales is the UK Supreme Court, which is the court of last resort also for Scotland and Northern Ireland. *infra* Chap. I.F.2.

⁴ *infra* Chap. III.B.7 (i).

⁵ *infra* Chap. III.B.4 (i).

⁶ CADIET 2011A, p. 186-187; *infra* Chap. III.B.7 (ii).

⁷ CADIET 2011A, p. 187; *infra* Chap. III.B.4 (ii).

⁸ CHIARLONI 2014, p. 82; BRAVO-HURTADO 2014, p. 322-325.

This question has fascinated scholars from several fields. First, there is the approach of procedural law. CALAMANDREI,⁹ CAPPELLETTI¹⁰ and JOLOWICZ¹¹ are only a few of the renowned authors who have addressed this topic in the past. Moreover, the same issue has received attention from the perspective of economics¹² and political science,¹³ as well. This study readdresses that question in four jurisdictions among Western developed countries. Particularly, the comparison will be made between two pairs of courts of last resort that have as common denominator the review of civil matters (but not necessarily *only* civil matters)¹⁴ whose functioning, however, appears as opposite extremes:¹⁵ the supreme courts for the US and England (UK), on the one hand, and the courts of cassation of France and Italy, on the other. The reason that justifies readdressing this question one more time is that, as the study will demonstrate, we have been using a misleading perspective to answer it. If we correct our points of reference, the courts of last resort of these four jurisdictions appear as sharing more similarities than differences. We need to readdress the question about why these courts of last resort appear as opposite extremes because the question itself has, to a large extent, an incorrect premise as to the hierarchical level of courts that we should compare.

B. Main thesis

1. Current view

According to the current view in the comparative procedural law literature, the courts of last resort are different because they have different functions (also referred to as purposes, roles, or goals).¹⁶ The distinction between the ‘private’ and ‘public’ purposes has become the mainstream approach.¹⁷ Therefore, the question

⁹ CALAMANDREI 1920A and 1920B.

¹⁰ CAPPELLETTI 1989.

¹¹ JOLOWICZ 1998.

¹² *e.g.*, PARISI 2006.

¹³ *e.g.*, SHAPIRO 1983.

¹⁴ For instance, the US Supreme Court is included in this study because it has jurisdiction in civil matters despite the fact that it reviews matters of constitutional law as well. Unlike the French *Council Constitutionnel*, which has jurisdiction only in constitutional law and not in civil matters properly speaking and, thus, it is out of the scope of this study. On the definition of ‘civil matters’, *infra* Chap I.E.2

¹⁵ Since this study focuses on opposite extremes, Germany will not be included, because the reform of *Revision* in 2001 transformed the *Bundesgerichtshof* into a middle ground model, as will be explained at *infra* Chap. I.F.

¹⁶ *infra* Chap. II.B.1.

¹⁷ *infra* Chap. II.B.2.

about the difference between these courts has been answered based on that private and public purposes divide.¹⁸

Comparatists stress that in the US and the UK supreme courts a public purpose prevails.¹⁹ These supreme courts operate by setting binding precedents on exemplary disputes with a case law transcendence (judicial lawmaking).²⁰ This public purpose would explain why the US and UK supreme courts, consequently, are small courts with a reduced caseload and restrictive access filters.²¹

In contrast, in the courts of cassation – such as the French and Italian examples, the current view continues – the public purpose tends to mix with a private one, in which the latter might even predominate.²² These courts of cassation are devoted to quashing every possible legally incorrect decision on a case-by-case basis (error-monitoring).²³ The predominance of the private purpose would explain why the courts of cassation of France and Italy are big courts with a heavy caseload that guarantee a broad access to them.²⁴ This current view will be labelled as ‘horizontal asymmetry’, as explained in the next section, because it highlights the differences when comparing the courts at the parallel third level of each jurisdiction.

2. Claim: A diagonal symmetry

This study challenges that current view. I will argue that these four jurisdictions do not aim at different functions in their courts of last resort. In fact, they share the same functions, mainly error-monitoring and judicial lawmaking, with courts of similar attributes, as well. In exchange, this study demonstrates that the differences between the US and England, on the one hand, and France and Italy, on the other, are not about *what* functions are performed, but *where* the functions are performed. The two pairs of jurisdictions have courts that perform equivalent functions, but those courts are located at different hierarchical levels. As a result, this study suggests replacing the current view of a horizontal asymmetry with a new ‘diagonal symmetry’. Figure I.1 represents this change in perspective, which will be described afterwards.

¹⁸ For example, JOLOWICZ 1998; TARUFFO 1998; GARLIC 2014; NORKUS 2015; FERRARIS 2015, p. 6-7.

¹⁹ JOLOWICZ 1998, p. 56; FERRARIS 2015, p. 4.

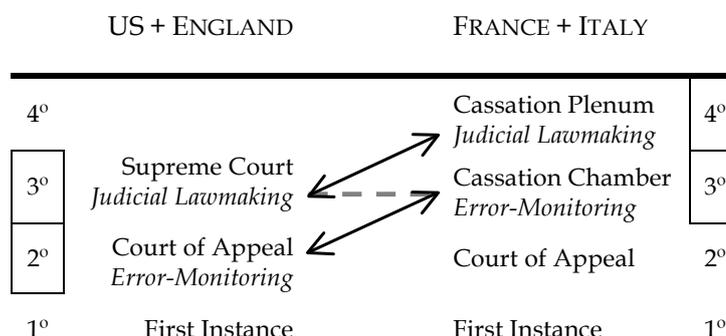
²⁰ *infra* Chap. II.D.3 (i); Chap. II.D.4 (i).

²¹ GOLDSTEIN 1998, p. 308; NORKUS 2015, p. 7-8.

²² TARUFFO 1998, p. 107 ([T]he Courts of cassation in the countries that are considered here have significantly shifted (or are shifting) from the model of a guardian of general legality to the model of a court that performs essentially the “private” function of providing a third instance of judgment.).

²³ *infra* Chap. II.D.1 (i); Chap. II.D.2 (i).

²⁴ GALIC 2014A, p. 7; NORKUS 2015, p. 8.

Figure I.1 : *Introduction* – Diagonal symmetry of functions

The current view – in which the courts of last resort are different because they have different functions – needs to be replaced not because the observations are incorrect. If we contrast one more time the third level of the US and England (their supreme courts) *vis-à-vis* the third level of France and Italy (the *chambers* of a cassation court), we will conclude that, in fact, they are different in functions and attributes, as will be explained in Chapter III of this study. The third level in the US and England performs a judicial lawmaking function, while the parallel third level in France and Italy performs an error-monitoring function instead.²⁵ The current view needs to be replaced not because of the conclusions of the comparison but, in reality, due to the wrong direction of the points of perspective.

In the current view, the comparison is *horizontal*. That is to say, by contrasting the courts that are at the same third level in both pairs of jurisdictions (3rd vs. 3rd): the US and the UK supreme courts, on the one hand, and the French and Italian cassation chambers, on the other. This study claims that the comparison from now on should be conducted not from such a horizontal perspective, but from a *diagonal* one. We should not necessarily compare a certain level of one jurisdiction with the exact parallel level in another jurisdiction. The diagonal perspective suggests that comparative studies should be open to courts which are located at higher or lower levels too.²⁶ From a diagonal perspective, accordingly, the *second* level in the US and England should be compared against the *third* level in France and Italy: the intermediate appellate courts *vis-à-vis* cassation chambers (2nd vs. 3rd).²⁷ And the *third* level in the US and England should be compared against the hidden *fourth* level in France and Italy: supreme courts *vis-à-vis* cassation plenary sessions (3rd vs. 4th).²⁸

²⁵ *infra* Chap. III.C.

²⁶ *infra* Chap. VI.F.

²⁷ *infra* Chap. V.

²⁸ *infra* Chap. IV.

The relevance of switching from the horizontal to the diagonal perspective is that our comparative conclusions will be inverted. Instead of observing prevailing differences between these two pairs of jurisdictions – as the current view concludes – from a diagonal perspective, the similarities between them become apparent.

First, the error-monitoring function is performed in France and Italy at the third level of their judicature, in the *chambers* of their courts of cassation. The equivalent error-monitoring function is not performed in the parallel third level in the US and England; their supreme courts are not error-monitoring courts. In the US and England, the equivalent error-monitoring function is performed not at the third but at the second level, at the intermediate appellate courts.²⁹

Second, the judicial lawmaking function is performed in the US and England at the third level of their judicature, at the supreme courts. The equivalent judicial lawmaking function is not performed at the parallel third level in France and Italy. The *chambers* of their cassation courts are not judicial lawmaking courts. In France and Italy, the equivalent judicial lawmaking function is performed not at the third but at a (hidden) fourth level: at the *plenary sessions* of their cassation courts.³⁰

As a result, the diagonal perspective shows that the US and England, on the one hand, and France and Italy, on the other, are different not in the functions of their courts but in the hierarchical location of these functions.³¹ France and Italy also have judicial lawmaking courts similar to the US and UK supreme courts, but located at the higher fourth level of the plenary session in their cassation courts.³² The US and England also have error-monitoring courts similar to the French and Italian cassation chambers, but located at the lower second level of their intermediate appellate courts.³³ From now on, the relevant question from a comparative perspective is not why these four jurisdictions have courts with different functions, as the current view is used to suggesting, but why these jurisdictions locate the same functions in courts at different levels.³⁴

The diagonal symmetry thesis proposed in this study has significant consequences. If the real difference between these four jurisdictions is not what functions their courts perform but where in the judicial hierarchy the same functions are performed, then several follow-on questions need to be reformulated too. As we shall see, the diagonal symmetry has an impact on the policymaking of court reform,³⁵ the resistance against legal transplants,³⁶ the identity of legal families,³⁷

²⁹ *infra* Chap. V.D.

³⁰ *infra* Chap. IV.D.

³¹ *infra* Chap. VI.D.

³² *infra* Chap. VI.D.2.

³³ *infra* Chap. VI.D.3.

³⁴ *infra* Chap. VI.F.3.

³⁵ *infra* Chap. VI.E.

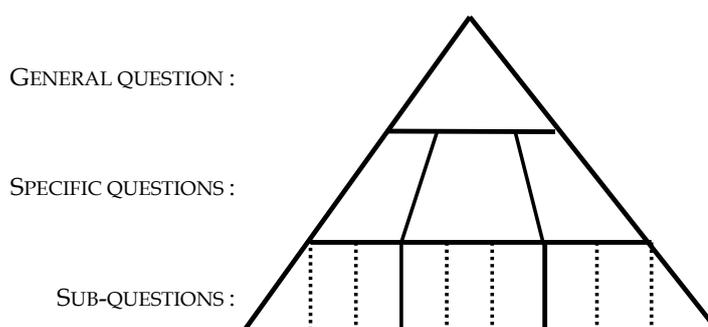
³⁶ *infra* Chap. VI.E.4 (iii).

and on how to conduct further comparative research.³⁸ For these reasons, the diagonal symmetry demonstrated in this study appears as a significant contribution to our comparative understanding of the courts of last resort.

C. Research questions

This study is a comparison of the functions and attributes of the courts of last resort in civil matters of the US, England, France and Italy. Therefore, its main objective consists in identifying the extent to which these courts exhibit similarities or differences in their functions and attributes at different court locations in the judicial hierarchy. To achieve that main objective, the study addresses several research questions in a pyramidal order: general question, specific question and sub-questions.³⁹ Figure I.2 represents the pyramidal order of the research questions of this study.

Figure I.2 : *Introduction* – Research questions pyramid



1. General question

At the apex of the pyramid is the *general* question which encompasses the whole study. The single general question is: *To what extent do the courts of last resort in civil matters of the US, England, France and Italy perform different or similar functions?* The answer will depend on whether the comparison of the various aspects shows the prevalence of differences or similarities as an overall picture. This general question aims at finding an encompassing pattern from a functionalist perspective. The general answer of this study will be the diagonal symmetry of similar functional attributes.⁴⁰

³⁷ *infra* Chap. VI.G.

³⁸ *infra* Chap. VI.F.

³⁹ For the answers to these research questions, *infra* Chap. VI.A,B,C,D.

⁴⁰ *infra* Chap. VI.A.

2. Specific questions

Secondly, that general question at the apex stands above three topics each with its own *specific* questions. Particularly, the diagonal symmetry thesis is based on the answers with regard to judicial functions (*i*), court attributes (*ii*) and court hierarchical location or 'level' (*iii*). Each one of these three topics clusters three or four *sub*-questions at the base of the pyramid. The set of specific and sub-questions were framed as follows.

i. Judicial functions

First specific question: 1. *What are the functions of the courts of last resort?*⁴¹ Obviously, a comparative law research based on the methodology of functionalism, such as this study,⁴² should start by wondering about the functions of the legal institutions under comparison. However, the functions of the courts of last resort might not be readily identifiable because of several reasons. First, the function of these courts in particular could be dependant on more general goals of the legal system as a whole – *i.e.*, the Rule of Law. Moreover, the satisfaction of these general functions may require not one but a combination of several types of courts – *i.e.*, ideal models. Finally, authors from different jurisdictions may phrase the function of the court of last resort in different (or similar) manners according to the local legal language and culture, but pointing at similar (or different) ideas from a comparative perspective. The following four sub-questions aim at addressing one by one these difficulties of identifying court functions:

- 1.1. What are the functions that the courts need to satisfy according to the Rule of Law?⁴³
- 1.2. What models of courts are adequate to perform the Rule of Law functions?⁴⁴
- 1.3. How do the legal actors of each jurisdiction conceive the (manifest) functions of their court of last resort?⁴⁵
- 1.4. How similar or different are the manifest functions between the courts of last resort in these jurisdictions?⁴⁶

ii. Court attributes

Second specific question: 2. *How are the specific attributes of the courts of last resort related to their functions?*⁴⁷ The purpose of this question is to analyse the configuration of these courts in more detail. It could be that the satisfaction of a

⁴¹ *infra* Chap. VI.B.

⁴² *infra* Chap. I.D.2.

⁴³ *infra* Chap. VI.B.1.

⁴⁴ *infra* Chap. VI.B.2.

⁴⁵ *infra* Chap. VI.B.3.

⁴⁶ *infra* Chap. VI.B.4.

⁴⁷ *infra* Chap. VI.C.

certain function requires, for instance, a particular type of judgment delivered by a particular type of judge. Moreover, it could be that the actual type of judgments and judges of a certain jurisdiction are inadequate to satisfy the (intended) function of the same court. The following four sub-questions, thus, aim at identifying the matches and mismatches between specific attributes of the courts *vis-à-vis* the ideal configuration of the same attributes according to different judicial functions:

- 2.1. What are the specific attributes that each court model should combine to perform its functions?⁴⁸
- 2.2. How are these specific attributes configured in the courts of last resort of each jurisdiction?⁴⁹
- 2.3. To what extent does the court of last resort of each jurisdiction combine the specific attributes needed according to its manifest functions?⁵⁰
- 2.4. To what extent do the specific attributes of each court of last resort indicate the presence of different functions at a latent level?⁵¹

iii. *Court hierarchical level*

Third specific question: 3. *Where, in the judicial hierarchy, are the courts that perform similar functions in each jurisdiction located?*⁵² This final question expands the comparison of functions and attributes to pairs of courts that could be sited at different hierarchical levels. Furthermore, as this study will demonstrate, the very notions of both ‘court’ and ‘last resort’ should be relativized from a comparative perspective. On the one hand, the research should include legal institutions that are not formally labelled as a separate ‘court’ from the local perspective but indeed perform a distinctive judicial function – *i.e.*, the ‘hidden’ fourth level of the plenary session in cassation courts.⁵³ On the other hand, restrictive access filters to the highest court of certain jurisdictions may have, as we shall see, the consequence that the ‘last resort’ is, for every practical purpose, situated at a court of a lower level – *i.e.*, intermediate appellate courts of the US and England.⁵⁴ The following three sub-questions, thus, aim at separating the comparison of courts in the also three possible combinations of hierarchical levels.

- 3.1. What are the differences in the functional attributes when comparing the courts of last resort from a horizontal perspective?⁵⁵
- 3.2. Which courts in France and Italy perform a similar function as the supreme courts of the US and England?⁵⁶

⁴⁸ *infra* Chap. VI.C.1.

⁴⁹ *infra* Chap. VI.C.2.

⁵⁰ *infra* Chap. VI.C.3.

⁵¹ *infra* Chap. VI.C.4.

⁵² *infra* Chap. VI.D.

⁵³ *infra* Chap. IV.B.

⁵⁴ *infra* Chap. V.B.

⁵⁵ *infra* Chap. VI.D.1.

- 3.3. Which courts in the US and England perform a similar function as the courts of cassation in France and Italy?⁵⁷

D. Methodology

1. Comparative law

In general, this study is a comparative law research undertaking.⁵⁸ Methodologically, the study will be developed based on individual observations on the court attributes of each jurisdiction, and the comparison between them in different directions. The total individual observations and comparisons will be numerous. First, the methodology covers a set of eight specific attributes which, as we shall see, are particularly relevant for the functioning of the courts:⁵⁹ scope of review, effects of the judgment, decision exposure or publication, opinion style, caseload, panel composition, total size and preliminary screening (+8). The same set of eight attributes will be analysed in the particular configuration of eight functional courts: the supreme court and intermediate appellate courts of both the US and England (+4), and the cassation chambers and plenary sessions of both France and Italy (+4). Therefore, the number of individual observations on the specific attributes per each one of these courts will be 64 in total.

Moreover, these individual observations of each jurisdiction will be compared with another jurisdiction in three different directions: courts of last resort from a horizontal perspective (3rd vs. 3rd),⁶⁰ courts of precedents from a diagonal perspective (3rd vs. 4th)⁶¹ and courts of error from a diagonal perspective (2nd vs. 3rd).⁶² Each comparison direction covered the same eight attributes in four courts per chapter. Therefore, the methodology analyses 32 comparisons in each one of these three directions, giving a total of 96 comparisons for the whole study.

In addition, the study contrasted this number of individual observations and comparisons against a background of four ideal models of courts elaborated based on the social needs of the Rule of Law:⁶³ constitutional court,⁶⁴ court of

⁵⁶ *infra* Chap. VI.D.2.

⁵⁷ *infra* Chap. VI.D.3.

⁵⁸ For discussions on comparative law as a discipline, LEGRAND & MUNDAY 2003; REIMMANN & ZIMMERMANN 2006; ADAMS & BOMHOFF 2012; BUSSANI & MATTEI 2012; NELKEN & ORÜCÜ 2007; SIEMS 2014. For a short introduction, BOGDAN 2013.

⁵⁹ On the selection of attributes under analysis, *infra* Chap III.A.

⁶⁰ *infra* Chap. III.B.

⁶¹ *infra* Chap. IV.C.

⁶² *infra* Chap. V.C.

⁶³ On the elaboration of these models, *infra* Chap. II.B.4 and Chap. II.C.

⁶⁴ *infra* Chap. II.C.1.

precedents,⁶⁵ court of error⁶⁶ and trial court (+4).⁶⁷ Each model has its own ideal configuration of the eight specific attributes according to their particular judicial function: political counterweight,⁶⁸ judicial lawmaking,⁶⁹ error-monitoring⁷⁰ and dispute resolution,⁷¹ respectively. Therefore, the inclusion of the four ideal models, with their respective eight ideal attributes, added 32 more points of reference (*tertium comparationis*) against which to analyse the previous 64 individual observations and 96 comparisons.

The individual observations on the specific court attributes (based on which the rest of the comparative analysis will be built) are made of a selection of the pertinent primary and secondary legal sources of each jurisdiction under study. In this sense, the bibliographical research focused on relevant dispositions in the constitutions, legislation, case law and academic literature (books, chapters and articles) of local authors. The bibliography analysed focused on the courts of last resort for civil matters in the US, England, France and Italy.⁷² Therefore, the individual observations on the court attributes of each jurisdiction rely on references to the descriptions made by these local authors and the direct reading of their local legal sources. These local perspectives, usually phrased using quite different words, were translated into a common terminology of judicial functions, court attributes and court level in order to allow the comparative analysis. Consequently, the similarities and differences found in this study are the results of analysing the sum of these local perspectives on common grounds.⁷³ When pertinent, graphs, tables and figures will be presented to clarify the comparisons visually.⁷⁴

All these individual observations, comparison directions and ideal points of reference will be analysed altogether in the final part of each section, the final summary table of each chapter and in the last Chapter VI, the *Conclusion*. The purpose of this final combined analysis will be to look for an overall pattern. As we shall see, indeed a particular pattern of similarities emerges when comparing in

⁶⁵ *infra* Chap. II.C.2.

⁶⁶ *infra* Chap. II.C.3.

⁶⁷ *infra* Chap. II.C.4. For this word choice, *infra* Chap. I.E.6.

⁶⁸ *infra* Chap. VI.C.1 (i).

⁶⁹ *infra* Chap. VI.C.1 (ii).

⁷⁰ *infra* Chap. VI.C.1 (iii).

⁷¹ *infra* Chap. VI.C.1 (iv).

⁷² Legal literature from other jurisdictions has been used exceptionally, for the sole purpose of providing additional illustrations of these topics, especially in the footnotes. For example, on courts of last resort in Central Europe, BOBEK 2009, GALIC 2014C; Latin-America, OTEIZA 2009, PÉREZ-RAGONE & PESSOA 2015; Scandinavia, LINDBLOM 2000, SUNDE 2017; German-speaking jurisdictions, DOMEJ 2014, 2017; the Netherlands, VERKERK & VAN RHEE 2017; and China, FU 2017.

⁷³ On the exercise of identifying differences and similarities in comparative law, DANNEMANN 2006, p. 383-420.

⁷⁴ For example, *infra* Graph III.1; Figure III.2; Table II.1.

different directions. That pattern is named ‘diagonal symmetry’ throughout this study.

2. Comparative functionalism

From among the several methodologies to conduct comparative law, this study opted for comparative functionalism.⁷⁵ Following the perspective of ZWEIGERT & KÖTZ, here the basic methodological principle is *functionality* of the courts.⁷⁶ Consequently, this study compares courts that perform the same function, regardless of their names.⁷⁷ The mere different denominations of the courts of last resort in the US and England (*Supreme Court*), on the one hand, and in France and Italy (*Court of Cassation*), on the other, is not an obstacle to conducting a functionalist comparison between them. The real obstacle, as we shall see, is that they claim to perform several functions that, to some extent, require specific attributes that could be incompatible with each other.⁷⁸

Moreover, this primacy of functions over denominations implies that a functionalist comparison of courts can be extended even to judicial organisations that are not formally labelled as ‘court’ from a local perspective. That will be the case, for example, when analysing the ‘plenary sessions’ of the cassation courts. Plenary sessions are not considered a separate ‘court’ according to French and Italian authors.⁷⁹ From a functionalist perspective, however, these exceptional plenary sessions perform a distinctive judicial function, separate from one of the ordinary chambers. From a functionalist perspective, therefore, it is justified to describe plenary sessions and ordinary chambers as separate functional courts.

The functionalist approach will imply here not only a primacy of function over denomination but also a primacy of function over hierarchical location. The courts that perform the same function in one jurisdiction may not be located at the parallel level of the other jurisdiction. For instance, as previously mentioned, the same function of the chambers in a court of cassation, which are at the *third* level in France and Italy, is performed by the *second* level in the US and England, at their intermediate appellate courts.⁸⁰ Therefore, functionalist analysis of courts should be extended to compare the functions of courts at higher or lower hierarchical levels too.⁸¹

⁷⁵ In general, GRAZIADEI 2003, p. 100-129.

⁷⁶ ZWEIGERT & KÖTZ 1998, p. 34.

⁷⁷ ZWEIGERT & KÖTZ 1998, p. 34.

⁷⁸ *infra* Chap. II.B.6; Chap. III.C.

⁷⁹ *infra* Chap. IV.B; WEBER 2010A, p. 70; AMOROSO 2012, p. 540.

⁸⁰ *infra* Chap. II.B.5 (c); in general, *infra* Chap. V.

⁸¹ *infra* Chap. VI.F.

The methodology of comparative law functionalism has been subject to criticism.⁸² Some authors argue that functionalism does not pay enough attention to local cultural perspectives,⁸³ and comparatists introduce much of their own standards when evaluating foreign legal systems.⁸⁴ This study takes that criticism not as an objection against using comparative law functionalism, but as a warning on how to use it carefully. Indeed, several sections pay attention to the legal culture with regard to the court's attributes. The observations on each court's attributes were based on the perspective of the local authors. Still, comparative law functionalism appeared as an adequate methodology to conduct this study.⁸⁵ The primacy of function over denomination and hierarchical level provided enough flexibility to explore pairs of courts in ways that have not been compared before: from a horizontal to a diagonal perspective.

Furthermore, that methodological flexibility in choosing the courts to compare corroborated the main postulate of comparative law functionalism: the *praesumptio similitudinis*.⁸⁶ ZWEIGERT & KÖTZ argued that, '[T]he legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.'⁸⁷ Based on the current view of the horizontal asymmetry, quite the contrary, the *praesumptio similitudinis* appeared to be refuted as regards the courts of last resort. From a horizontal perspective, in fact, the US and UK supreme courts *vis-à-vis* the French and Italian cassation courts operate in almost opposite ways with far from similar results. From a new diagonal perspective, the ZWEIGERT & KÖTZ's postulate is corroborated instead. The diagonal symmetry confirms the *praesumptio similitudinis*: these four jurisdictions do exhibit similar results, because they have courts performing equivalent functions but at different hierarchical levels. The methodological flexibility of comparative law functionalism is adequate for this study because it helped to discover similarities where previous studies mainly found differences.

3. Identifying functions

The main goal of this study is to find where, in the judicial hierarchy, the courts perform the same function. Therefore, a core methodological question is how these 'functions' will be defined. First, the function of the particular legal institution is

⁸² An overview of the functionalism debate, GRAZIADEI 2003, p. 100-129; MICHAELS 2006, p. 339-382; HUSA 2013, p. 4-21.

⁸³ REIMANN 2012, p. 30 ('[A] cultural perspective can provide an important corrective for the facile functionalism that has been so prevalent in comparative law for much of the mid- and late twentieth century.').

⁸⁴ For an early example of this criticism against comparative law functionalism, see FRANKENBERG 1985, p. 411-456.

⁸⁵ Successful examples in property law, AKKERMANS 2013, p. 95-114; VAN ERP 2013, p. 90-94.

⁸⁶ MICHAELS 2006, p. 369-372.

⁸⁷ ZWEIGERT & KÖTZ 1998, p. 34.

defined based on the social needs which it aims to satisfy. This approach implies that societies have certain 'needs' which could be identified, as well. The first chapter of this study is devoted to analysing such social needs, especially the ones derived from the Rule of Law requirement.

i. Four functions

This study will demonstrate that the numerous requirements of the Rule of Law can be clustered into four main social needs,⁸⁸ with their corresponding judicial functions: dispute resolution,⁸⁹ error-monitoring,⁹⁰ judicial lawmaking⁹¹ and political counterweight.⁹² In order to satisfy these four social needs, four ideal models of courts are drawn. Each model of court combines the necessary functional attributes to satisfy one of the four social needs: trial court (dispute resolution);⁹³ court of error (error-monitoring);⁹⁴ court of precedents (judicial lawmaking);⁹⁵ and constitutional court (political counterweight).⁹⁶

These four social needs and their respective four ideal models of courts are used as *tertium comparationis* throughout this study. Comparative studies require an invariant element,⁹⁷ a common and stable point of reference based on which the several objects under comparison are contrasted. These four social needs and ideal models of courts are that common point of reference, the *tertium comparationis*, according to which the courts under study in the US, England, France and Italy will be compared.

ii. Manifest functions

Based on that point of reference, the next step is to analyse whether the jurisdictions under study have courts that correspond to these four judicial functions. Here the well-known distinction between manifest and latent functions will be introduced.⁹⁸ On the one hand, manifest functions are the purposes that certain social activity performs based on the perspective of the participants themselves in the same social activity. Accordingly, the manifest functions of the courts are identified in this study based on the statements made by key legal actors of each jurisdiction, such as legislators, judges or prominent legal scholars. Such manifest functions are identified for each jurisdiction under study in Chapter II.D.

⁸⁸ *infra* Chap. II.B.4.

⁸⁹ *infra* Chap. II.B.4 (a).

⁹⁰ *infra* Chap. II.B.4 (b).

⁹¹ *infra* Chap. II.B.4 (c).

⁹² *infra* Chap. II.B.4 (d).

⁹³ *infra* Chap. II.C.4.

⁹⁴ *infra* Chap. II.C.3.

⁹⁵ *infra* Chap. II.C.2.

⁹⁶ *infra* Chap. II.C.3.

⁹⁷ MICHAELS 2006, p. 367-369.

⁹⁸ *infra* Chap. II.B.6.

The question will be to what extent these manifest functions correspond to the configuration of the specific attributes of the same courts⁹⁹ or, quite the contrary, do these courts exhibit any latent deviation from their manifest functions.¹⁰⁰

iii. *Latent functions*

On the other hand, latent functions are other purposes that the same social activity performs that might pass unnoticed by the participants.¹⁰¹ This study identifies the latent functions based on the analysis of eight specific attributes of each court. The assumption is that the adequate satisfaction of each one of the four judicial functions requires a special configuration of these eight court attributes. The error-monitoring function, for instance, requires a court of error capable of reviewing a large number of cases.¹⁰² This is in contrast to a court of precedents, devoted to the pure judicial lawmaking function, in which a small sample of exemplary cases is sufficient.¹⁰³ Therefore, if most of a court's attributes are configured in the direction of a certain model of court (*e.g.*, court of error), the conclusion will be that this court's practical functioning, despite the manifest declarations, operates towards the corresponding social need of that model (*e.g.*, error-monitoring). If the actual configuration of these attributes does not correspond with the manifest declaration of its function, therefore, a latent deviation exists.¹⁰⁴ The identification of manifest or latent functions based on these eight attributes is the task of the remaining Chapters III, IV and V.

4. Period

The period under analysis covers a timespan of ca. 300 years, from the eighteenth century until contemporary times. That timespan is relevant for this study due to several reasons. First, the eighteenth and nineteenth centuries are important because, with the exception of the UK, the origins of these courts (or their immediate predecessors) can be traced back to that time. Second, the last decade of the nineteenth century and the first half of the twentieth century are particularly relevant for the US and the UK, because restrictive access filters were introduced to the supreme courts.¹⁰⁵ The second half of the twentieth century and the beginning of the twenty-first century, on the other hand, are important for the French and Italian cassation courts, because during that period several reforms on the configuration of the plenary sessions and the modification to the preliminary

⁹⁹ *infra* Chap. VI.C.3.
¹⁰⁰ *infra* Chap. VI.C.4.
¹⁰¹ GIDDENS *et al.* 2014, p. 19.
¹⁰² *infra* Chap. III.B.4 (c).
¹⁰³ *infra* Chap. III.B.4 (b).
¹⁰⁴ *infra* Chap. VI.C.4.
¹⁰⁵ *infra* Chap. II.D.3; Chap. II.D.4.

screening procedures were implemented.¹⁰⁶ Finally, the new UK Supreme Court is a product of the twenty-first century but, as we shall see, certain practices of the House of Lords during previous decades need to be taken into account as well.

Since the purpose of this study is to understand the configuration of the courts of last resort nowadays, the historical perspective focuses more on the relevant reforms that led to the current state of affairs of the specific court attributes under analysis in each of the four jurisdictions. In the US, the last significant change in this period is the revision of the *Rules of the Supreme Court of the United States* in 2013. This version introduced certain modifications in the procedure. However, the most important legal reforms as regards access happened at the end of the nineteenth century and during the first and second half of the twentieth century – *i.e.*, *Evarts Act* (1891), *Judiciary Act* (1925) and the *Supreme Court Case Selection Act* (1988).¹⁰⁷ Since then, to understand the functioning of the US Supreme Court, we need to focus our attention not only on the rules but also on the actual practices of granting the writ of certiorari in the twenty-first century.

In the case of England, the primary focus is on the new UK Supreme Court, which was established in 2009.¹⁰⁸ However, the current situation of the new UK Supreme Court is, to a large extent, the continuation of the judicial function of the House of Lords.¹⁰⁹ Therefore, the practices of the Law Lords in the period immediately before (2001-2009) need to be taken into account, as well. From the twentieth century, special attention deserves to be given to the reform of 1934, which introduced the requirement of leave to appeal in the House of Lords, and the Woolf reform of 1999, which expanded the leave requirement (now called ‘permission’) to the English intermediate appeal too.¹¹⁰

In France, the most important legal event so far in the twenty-first century as regards the cassation procedure is the evolution of the *procedure de non-admission*. It was introduced in 2001, but a recent reform of 2014 introduced modifications.¹¹¹ During the twentieth century, however, we need to focus our attention on the abolition of the *Chambres des requêtes* in 1947, and the introduction of the *formation restreinte* in 1979-1981.¹¹² Especially after the reform of 1997, this *formation restreinte* which is a smaller panel of three judges, resembles a kind of filtering or selection stage at the beginning of the cassation procedure in France.¹¹³

Italy has a complicated history of numerous reforms with different levels of success. In the twenty-first century, we can mention the reform of 2006, according

¹⁰⁶ *infra* Chap. IV.B.1; Chap. IV.B.2.

¹⁰⁷ *infra* Chap. II.D.3.

¹⁰⁸ LE SUEUR 2004A, p. 3-20.

¹⁰⁹ NEUBERGER 2009, p. 9.

¹¹⁰ *infra* Chap. III.B.5 (i).

¹¹¹ *infra* Chap. III.B.5 (ii).

¹¹² *infra* Chap. III.B.6 (ii).

¹¹³ *infra* Chap. III.B.5 (ii).

to which the chambers should refer the case to the plenary session if they aim at deviating from their precedents.¹¹⁴ Later on, the reform of 2009 introduced a type of access filter, the new Article 360bis.¹¹⁵ Finally, in 2012 the court was allowed to review facts if the lower court did not take these into consideration.¹¹⁶ Nonetheless, the analysis of access to the court of last resort in Italy needs to be extended back in time to the enactment of the Italian Constitution in 1948, which enshrined a right of access to cassation.¹¹⁷

E. Object and concepts

According to COTTERELL, '[F]rom many standpoints, adjudication and courts seem obviously central institutions of legal systems. *Whether they are held to be present in all legal systems will depend on how the relevant concepts are defined ...*'¹¹⁸ This is a persistent problem in comparative studies because local institutions are named according to the concepts of a foreign language. Differences can be blurred due to a common word,¹¹⁹ or similarities can pass unnoticed when two jurisdictions use different words for an institution that, in practice, performs the same function.¹²⁰ To a large extent, the diagonal symmetry found in this study was possible because these mismatches between local denominations (and hierarchical levels) were resolved by giving priority to the courts' functions.

The object of research is the *courts of last resort for civil matters* in the US, England, France and Italy. Therefore, defining the concepts used in this study – such as 'court', 'last resort', 'recourse' and 'civil matters', among others – will be useful not only to gain precision but also to delimit the object of study. Still, the following concepts should be understood more as 'working definitions' – *i.e.*, definitions that could later on be questioned or relativized for functional comparative purposes during the study – instead of strict *ex ante* boundaries of what should be taken into account or not. In order to avoid conceptual misunderstandings, the study distinguishes between three types of denominations: original, group and common. First, the 'original' denomination is the exact words of the local language based on which legal actors of a certain jurisdiction point at their court of last resort. The original denominations are *Supreme Court of the United States* in the US; *The [UK] Supreme Court* in England; *Cour de cassation* in France; and *Corte Suprema di Cassazione* in Italy. Second, the 'group' denomination is a concept in English used in this study to point at the courts of last resort of a pair of similar jurisdictions. On the one hand, the group denomination of 'supreme court' will be

¹¹⁴ *infra* Chap. IV.B.2. (iii).

¹¹⁵ *infra* Chap. III.B.5. (ii).

¹¹⁶ *infra* Chap. III.B.1. (ii) (d).

¹¹⁷ Italian Constitution, Art. 111, paragraph seven. See *infra* Chap. II.D.5 (ii).

¹¹⁸ COTTERELL 1992, p. 205 [emphasis added].

¹¹⁹ *infra* Chap. II.B.5 (e).

¹²⁰ *infra* Chap. II.B.5 (d).

used to point to the *Supreme Court of the United States* and *The [UK] Supreme Court*. On the other hand, the group denomination of ‘court of cassation’ or ‘cassation court’ will be used to point at the *Cour de cassation* and the *Corte Suprema di Cassazione*. Finally, the ‘common’ denomination is the concept in English based on which this study points at any of these four courts indistinctively, namely ‘court of last resort’. Table I.1 summarises these common, group and original denominations. The forthcoming sections will explain in detail each of these concepts.

Table I.1 : *Introduction* - Denominations

	US	ENGLAND	FRANCE	ITALY
COMMON :	‘court of last resort’			
GROUP :	‘supreme court’		‘court of cassation’	
ORIGINAL :	<i>Supreme Court of the United States</i>	<i>The [UK] Supreme Court</i>	<i>Cour de cassation</i>	<i>Corte Suprema di Cassazione</i>

1. Court of last resort

The judicial pyramid of each jurisdiction has a court at the apex. These courts, however, receive a variety of denominations depending on the local language, culture and history. ‘Supreme Court’ and ‘Court of Cassation’ – as in the jurisdictions included in this study – are not the only names that they may receive. Denominations such as *Bundesgerichtshof*,¹²¹ *Tribunal Supremo*¹²² and *Hoge Raad*¹²³ can also be found in Europe. Comparative studies, however, need a common name to refer to these courts at the apex. Different concepts have been explored to unify their denominations: top courts,¹²⁴ highest courts,¹²⁵ supreme courts¹²⁶ or courts of last resort.¹²⁷

¹²¹ On the German *Bundesgerichtshof* in English, MURRAY & STÜRNER 2004, p. 60-62, 386-399; GOTTWALD 2008, p. 87-106; DOMEJ 2017, p. 131-148 (including Austria and Switzerland).
¹²² On the Spanish *Tribunal Supremo* in English, ORTELLS RAMOS 2008B, p. 233-243; DE BENITO 2017, p. 97-130.
¹²³ On the Dutch *Hoge Raad* in English, CHORUS, GERVER & HONDIUS 2006, p. 57-59, 261-263; HOOIJDONK & EIJSVOOGEL 2012, pos. 683, 1829; VERKERK & VAN RHEE 2017, p. 77-96.
¹²⁴ e.g., LE SUEUR & CORNES 2000; TARUFFO 1998, p. 102.
¹²⁵ e.g., HULS, ADAMS & BOMHOFF 2009; MULLER & LOTH 2009; MULLER & RICHARDS 2010.
¹²⁶ e.g., YESSIOU-FALTSI 1998; SEVERINI 2001.
¹²⁷ e.g., SILVESTRI 1986; MITIDIERO 2015; this concept has been used to compare the apex courts of each state within the US – e.g., CARPENTER 1910; MOSCHZISKER 1924; SQUIRE 2008; VINING & WILHELM 2011.

Among these concepts, ‘supreme court’ seems to have gained a wider acceptance among comparative studies.¹²⁸ The use of that concept as a common denomination, however, can lead to misunderstanding in this study. Two out of the four courts under analysis here have the same original denomination (*i.e.*, US and UK ‘Supreme Courts’). Therefore, using ‘supreme court’ as a common denomination can create confusion as to whether that concept points to all four courts (the French and Italian ones included), or to the US and UK supreme courts exclusively. Moreover, some French authors deny that their court of cassation can be named a ‘supreme’ court.¹²⁹ For these reasons, the concept of ‘court of last resort’ is preferred in this study as the common denomination instead of ‘supreme court’. The next step is to define what a ‘court of last resort’ means.

i. Court

The first element of the definition – which in the course of this study will become far from trivial – is that a court of last resort is a *court*. Being a court means a judicial institution comprised of one or more judges with the function of defining through a judgment the entitlement of rights and duties between litigants as regards particular disputes.¹³⁰ The US and the UK supreme courts, on the one hand, and the French and Italian courts of cassation, on the other, are clear ‘courts’ in this sense. The same definition applies to the intermediate appellate courts of the US (Federal Courts of Appeals) and England (Court of Appeal and High Court), which are included in this study too.¹³¹

Labelling the cassation plenary sessions as ‘courts’, however, can be questioned. French and Italian scholars, as mentioned, deny that these plenary sessions may count as separate courts, different from the broader court of cassation which contains them.¹³² Nevertheless these plenary sessions do have a distinctive function of defining rights and obligations in particular disputes between parties in line with the above definition, as we shall see.¹³³ In that sense, the French and Italian plenary sessions will be considered ‘courts’ in this study, as well.

ii. Last resort

Secondly, the courts under study here are the ones of *last resort*. Being the court of last resort means that there is no other higher court, within the boundaries of that

¹²⁸ Current examples, BARSITTI & VARANO 2012; BESSO & CHIARLONI 2012; WIJFFELS & VAN RHEE 2013, among many others.

¹²⁹ CADIEF 2012B, p. 56.

¹³⁰ A comparative law definition in, VAN RHEE & FU 2017, p. 1-2; ‘courts’ defined by political science, SHAPIRO 1981, p. 1-64; or by sociology, COTTERRELL 1992, p. 206-210.

¹³¹ *infra* Chap. V.

¹³² *infra* Chap. IV.C.2 (iii).

¹³³ *infra* Chap. IV.B.

jurisdiction, authorised to modify what has been resolved.¹³⁴ The court of last resort, therefore, is characterised by the power of the ‘final word’ in defining rights and obligations in particular disputes.¹³⁵

In jurisdictions where a constitutional court exists separate from the court of last resort for ordinary law matters – *i.e.*, French *Conseil Constitutionnel* and the Italian *Corte Costituzionale* – one may question which one has the real power of the final word.¹³⁶ This question comes from the fact that judgments delivered by the court of last resort for ordinary matters may be further challenged by the constitutional court on the grounds of unconstitutionality. On issues of constitutional law, one may conclude, the real power of the final word is not at the ordinary court of last resort but at the constitutional court instead.

Certainly, these power struggles between the ordinary court of last resort and the constitutional court are an important problem that contemporary jurisdictions face.¹³⁷ That topic, however, falls outside the scope of this research. The reader must bear in mind that the object of this study is defined by three conditions combined: (i) court (ii) of last resort (iii) in civil matters. Therefore, even if the French *Conseil Constitutionnel* and the Italian *Corte Costituzionale* may claim to be the last resort in constitutional law (which occasionally could affect civil cases), they are certainly not the last resort for civil matters *per se*,¹³⁸ especially if no constitutional issue is involved.

iii. *Exceptional vs. normal final word*

The courts of last resort are defined here by the power of the final word. From a comparative perspective, however, identifying the court which has that final-word power is not evident. As this study demonstrates, a distinction between ‘exceptional’ and ‘normal’ final word needs to be introduced.¹³⁹ The *exceptional* final word refers to that very last opportunity of review that is contemplated by the procedural rules, even if it is a chance limited to the extent that it is seldom used. While the *normal* final word means the opportunity where the vast majority of cases will get their last review, even if it is not the very ultimate chance hypothetically contemplated by the procedural rules. In simple terms, the exceptional final word is the court of last resort *in theory*, while the normal final

¹³⁴ According to BLACK’S LAW DICTIONARY, a court of last resort is ‘[t]he court having the authority to handle the final appeal of a case, such as the U.S. Supreme Court’. (GARNER 2009, p. 407).

¹³⁵ The word ‘supreme’ also expresses the same idea. Being supreme means that the court has the highest possible rank,¹³⁵ and, consequently, there is no other court higher than the supreme court. Still, for the reason previously mentioned, the term ‘supreme court’ will not be used in this study as a common denomination for the four jurisdictions under study.

¹³⁶ The same question arises in relation to international courts, *infra* Chap. I.E.1. (v).

¹³⁷ In general, GARLICKI 2007.

¹³⁸ On the definition of ‘civil procedure’, *infra* Chap. I.E.1.

¹³⁹ *infra* Chap. V.B.

word is the court of last resort *in practice*. This study includes both, the courts of last resort in theory and in practice, the ones with the exceptional and normal final word for civil matters in the four jurisdictions under study. Table I.2. shows how the courts of exceptional or normal final-word power will be paired in the comparative chapters.

Table I.2 : *Introduction* – Final word

		US + England		France + Italy			
CHAPTER		COURT		FINAL WORD		COURT	
III.	<i>Horizontal Last Resort</i>	3 rd	Supreme Court	<i>Exceptional</i>	<i>Normal</i>	Cassation Chamber	3 rd
IV.	<i>Diagonal Precedent</i>	3 rd	Supreme Court	<i>Exceptional</i>	<i>Exceptional</i>	Cassation Plenum	4 th
V.	<i>Diagonal Error</i>	2 nd	Intermediate Appeal	<i>Normal</i>	<i>Normal</i>	Cassation Chamber	3 rd

iv. One or more courts

Jurisdictions, however, can be different in the number of courts of last resort that they have. Certain jurisdictions may have one central court which is the last resort for the disputes arising from all the legal fields (civil matters included). Other jurisdictions, quite the contrary, may have several courts of last resort because they are specialised in different legal fields. France, for instance, has two separate courts of last resort: one for administrative law (*Conseil d'État*), and another for criminal and civil law in a broad sense (*Cour de cassation*).

If a jurisdiction has more than one court of last resort, this study will include only the one that has proper jurisdiction in civil matters as defined below.¹⁴⁰ For that reason, this study includes the cassation courts of France and Italy, but it excludes the French *Conseil d'État* and the *Conseil constitutionnel*, and it excludes the Italian *Consiglio di Stato* and *Corte Costituzionale*, which are the last resort not in civil matters *per se*, but in administrative and constitutional matters instead.

v. Domestic court

It is important to emphasise that the jurisdiction of these courts of last resort is confined to the territorial limits of the countries under study. In this sense, courts of last resort are *domestic* courts. National jurisdictions, however, tend to be interconnected with international jurisdictions too.¹⁴¹ Therefore, the judgment of a

¹⁴⁰ *infra* Chap. I.E.2.

¹⁴¹ HOL 2009, p. 82; SANDS 2010, p. ix-x.

domestic court of last resort may be reviewed by an international court. From an international law perspective, it could be questioned whether the real last resort is the domestic court or the international court,¹⁴² especially when a domestic judgment violates the international court's interpretation of a treaty (conventionality control).¹⁴³ Certainly, international courts are gaining importance, and they deserve to be analysed.¹⁴⁴ Such an international perspective, however, is beyond the object of this study. Instead, this study focuses on the domestic courts of last resort within national jurisdictions. Still, the analysis of the interplay between domestic courts of last resort and international courts could be the object of further research.¹⁴⁵

2. Civil matters

Secondly, this study focuses on the courts of last resort in *civil matters*. As demonstrated by JOLOWICZ, the concept of 'civil' procedure does not mean the same (it is not coextensive) in jurisdictions such as England and France.¹⁴⁶ In England, that concept is wider than in France because it includes every legal matter that is not labelled as 'criminal'.¹⁴⁷ From the English perspective, thus, legal matters such as administrative law will be included in their broad notion of civil matters. In France, quite the contrary, a specialised structure of courts, separate from the courts for civil and criminal matters, resolves administrative law litigation (*Conseil d'Etat*).¹⁴⁸ From the French perspective, therefore, administrative law is not included in their civil procedure. As a result, the French concept of civil procedure is more restrictive than the English one.¹⁴⁹ Therefore, the broad English definition of civil procedure will not be used in this study since administrative cases will not count as 'civil' in the Continental sense.

Instead, this study defines 'civil matters' in the more restrictive manner internally used at the courts of cassation under analysis. Between the French and Italian courts of cassation, however, the concept of 'civil' matters is not exactly co-extensive either. They could agree on what counts as civil matters in a broad sense, but not in a strict sense. In a broad sense, both the French and Italian courts of cassation have 'civil' chambers, as opposed to their 'criminal' chambers. Among their civil chambers in a broad sense, however, the French and Italian cassation courts are slightly different as to which ones are called 'civil' in a strict sense.

¹⁴² BORÉ & BORÉ 2015, p. 3.

¹⁴³ On the Inter-American Court of Human Rights, for example, FERRER MAC-GREGOR 2015, 93-99; DULITZKY 2015, p. 100-108.

¹⁴⁴ On international courts, MACKENZIE *et al.* 2010.

¹⁴⁵ For example, BENVENISTI & DOWNS 2009, p. 59-72.

¹⁴⁶ JOLOWICZ 2000, p. 11.

¹⁴⁷ JOLOWICZ 2000, p. 13.

¹⁴⁸ CADIET 2012A, p. 56.

¹⁴⁹ JOLOWICZ 2000, p. 13.

Among the non-criminal chambers ('civil' in a broad sense), the French cassation court separates the chambers for commercial and social affairs from the remaining three civil chambers *stricto sensu*. While the Italian cassation court, in turn, separates the chambers for labour and tax law from the also three remaining civil chambers *stricto sensu*.

As a result, the comparative definition of civil matters among these four jurisdictions cannot include the administrative, commercial, social, tax or labour law. In exchange, this study defines civil matters based on the 'least common denominator' between the French and Italian civil chambers *stricto sensu*. To define civil matters, we need to identify a group of legal matters that will be resolved by the civil chambers *stricto sensu* of both France and Italy, but they are not necessarily the only matters that these chambers resolve. This least common denominator seems to be the litigation of contract law,¹⁵⁰ tort law¹⁵¹ and land law¹⁵² between private parties.¹⁵³ Therefore, as long as a court has jurisdiction to resolve contractual, tort and land disputes between private parties, that court will be considered a court of civil matters even if these kinds of disputes are not the only legal matters under its review. This definition of civil matters, built in respect of France and Italy originally, also applies to the US and England, since their definition is broader to the extent that it includes cassation's least common denominator, as well.

Finally, the reader must bear in mind that this study is not about 'civil matters' itself, but about courts of last resort *that have jurisdiction in civil matters* (as previously defined). In other words, this study focuses *not only on the civil cases* that a certain court may review, but *on the court as a whole* that reviews civil cases, even if civil cases are not the only type of cases that such a court reviews. This clarification is important for several methodology reasons. First, the statistics about the number of cases that a certain court reviews could include a mix of civil disputes and disputes of different legal fields, as long as the same court reviews those cases altogether. Second, the same clarification applies for counting the number of judges. The number of judges of a court will include all the judges that comprise the court as a whole, even if not all those judges are exclusively dedicated to civil cases. Third, this study includes courts that have jurisdiction in civil matters, even if such jurisdiction in civil matters is not the main task of the court. For instance, the US Supreme Court is mostly known for its role as a constitutional court. Still, the US Supreme Court is included in this study because

¹⁵⁰ In France, the first civil chamber, WEBER 2010A, p. 66; in Italy, the first, second and third civil sections, CORTE SUPREMA DI CASSAZIONE 2013, p. 25-26.

¹⁵¹ In France, the second civil chamber, WEBER 2010A, p. 66; in Italy, the third civil section, CORTE SUPREMA DI CASSAZIONE 2013, p. 26.

¹⁵² In France, the third civil chamber, WEBER 2010A, p. 66; in Italy, the second and third civil section, CORTE SUPREMA DI CASSAZIONE 2013, p. 25-26.

¹⁵³ If public parties were involve - *e.g.*, a case between a private party and the public administration - the issue may be of the jurisdiction of the administrative courts instead.

indeed has final jurisdiction in civil matters despite the fact that pure civil cases (not combined with constitutional considerations) are only a fraction of its caseload.

3. Supreme court

Supreme court will be the group denomination for the courts of last resort in the US federal system and in England.¹⁵⁴ The supreme court for England also has jurisdiction in respect of the other nations of the United Kingdom.¹⁵⁵ For that reason, this study will point to the supreme court for England as 'UK Supreme Court' without further distinction. As previously explained, the term 'supreme court' will not be used as a common denomination for the four jurisdictions under study,¹⁵⁶ but for the courts of last resort in the US and England exclusively.¹⁵⁷

Also, due to their restrictive preliminary screening,¹⁵⁸ these courts review only a minor fraction of cases.¹⁵⁹ In that sense, the US and UK supreme courts have the final-word power in *exceptional* terms.¹⁶⁰ Moreover, the US and UK supreme courts are courts of last resort in civil matters too. They do have jurisdiction to resolve contractual, torts and land law disputes. Civil matters, as previously defined, is not the only legal field within their jurisdiction. Accordingly, the supreme courts in the US and England are one central court which concentrates the last resort jurisdiction in almost every legal field besides civil matters, such as constitutional law (US) or administrative law (England).

4. Court of cassation

Court of cassation or *cassation court* will be the group denomination for the courts of last resort of France and Italy.¹⁶¹ These courts of cassation are of civil matters, as previously defined. They are the last resort for contracts, torts and land disputes between private parties. They include criminal law but, unlike the US and UK supreme courts, these courts of cassation are not one central court of last resort for every other possible legal field. For instance, France and Italy have a separate court of last resort for administrative law disputes – *i.e.*, the *Conseil d'Etat* and the *Consiglio di Stato*, as mentioned.

¹⁵⁴ See also, GARNER 2009, p. 1578.

¹⁵⁵ *infra* Chap. I.F.2; Chap. II.D.4.

¹⁵⁶ *infra* Chap I.E.1.

¹⁵⁷ See again, Table I.1, at *infra* Chap. I.E.

¹⁵⁸ *infra* Chap. III.B.5 (i).

¹⁵⁹ *infra* Chap. III.B.4 (i).

¹⁶⁰ *infra* Chap. I.E.1 (iii).

¹⁶¹ See also, GARNER 2009, p. 414.

We need to bear in mind that the French and Italian courts of cassation comprise hundreds of judges.¹⁶² They are big and complex organisations that divide their work in several combinations of teams with separate specialisations.¹⁶³ Within such complex organisations, a distinction should be made between cassation chambers (i) and cassation plenary sessions (ii).

i. *Cassation chambers*

Cassation chambers will be the denomination for the internal divisions of the courts of cassation. The chambers are teams of cassation judges specialised in a field of law. Within the chambers, a panel of three or five judges resolves each case. Not all of these cassation chambers, however, are of civil matters. Both France and Italy have some chambers specialised in criminal matters instead.

France and Italy grant a broad access to their courts of cassation.¹⁶⁴ In practice, these chambers absorb almost all of this incoming caseload. As a result of that broad access, therefore, the cassation chambers are the courts of last resort with the *normal* final word, as previously defined.

ii. *Cassation plenary sessions*

Chapter III will provide a more elaborated explanation of what the *plenary sessions* or *cassation plenum* are.¹⁶⁵ For the purposes of this introduction, it is enough to describe them as a coordination device developed by the courts of cassation to resolve the possible contradictions between the chambers' interpretation criteria. If the contradiction arises on contracts, torts or land disputes between private parties, the plenary session is considered as of civil matters too.

In that sense, the plenary sessions are also courts of last resort for certain types of disputes. Particularly, only cases that involve a contradiction criteria among the chambers may reach these plenary sessions.¹⁶⁶ As a result, the plenary sessions resolve a minor fraction of the total court of cassation caseload.¹⁶⁷ While the cassation chambers have the *normal* final word (the chambers are the court of last resort 'in practice'), the plenary sessions have the *exceptional* final word, becoming the court of last resort 'in theory.'

¹⁶² *infra* Chap. III.B.7 (ii).

¹⁶³ *infra* Chap. III.B.6 (ii).

¹⁶⁴ *infra* Chap. III.B.5 (ii).

¹⁶⁵ *infra* Chap. IV.B.

¹⁶⁶ *infra* Chap. IV.B.1 (i,ii,iii); Chap. IV.B.2 (i,ii,iii).

¹⁶⁷ *infra* Chap. IV.C.7 (i,ii).

5. Intermediate appellate court

The *intermediate appellate court* will be the denomination reserved for courts located at the second level of the judicial pyramid.¹⁶⁸ Their task is to resolve the recourse lodged against the judgments delivered by first instance courts. In that sense, these appellate courts are above the first level courts but, at the same time, below the third level supreme court or court of cassation. For that reason, the denomination for these appellate courts includes the adjective *intermediate*.

All four jurisdictions under study have intermediate appellate courts according to this definition. The intermediate appellate courts of the US federal system (*United States Courts of Appeals*) and England (*The Court of Appeal*), however, have an important difference in comparison with those of France (*Cour d'Appel*) and Italy (*Corte d'Appello*). Due to the restricted access to the US and UK supreme courts, the intermediate appellate courts of the first two jurisdictions are the court of last resort *in practice* because the access to intermediate appeal has either no permission requirements (US Courts of Appeals)¹⁶⁹ or its permission requirement is considerably less restrictive than the one of the supreme court (English Court of Appeal).¹⁷⁰ The 'normal' final-word power in the US and England, thus, is not at the supreme courts but at the intermediate appellate courts instead.¹⁷¹ Accordingly, this study does include the intermediate appellate courts in the US and England because they can also be seen as 'courts of last resort' in at least one of the two senses defined earlier.¹⁷²

France and Italy, quite the contrary, do grant a broad access to their third court level.¹⁷³ As a result of this broad access to the courts of cassation, the French and Italian intermediate appellate courts do not have the final-word power, neither in exceptional nor in normal terms. Therefore, the intermediate appellate courts in France and Italy are not proper 'courts of last resort' in either of the two senses.¹⁷⁴ Consequently, this study excludes the French and Italian intermediate appellate courts from its object of study.

6. Trial court

Since the legal concept of 'trial court' becomes problematic at a comparative level, particularly for civil law jurisdictions as we shall see, let us begin with a basic definition that can be used as common ground. *Black's Law Dictionary* provides a

¹⁶⁸ See also GARNER 2009, p. 406.

¹⁶⁹ *infra* Chap. V.C.8 (i).

¹⁷⁰ *infra* Chap. V.C.8 (ii).

¹⁷¹ This will be further elaborated at *infra* Chap. V.B.

¹⁷² *infra* Chap. I.E.1 (iii).

¹⁷³ *infra* Chap. III.C.5 (ii).

¹⁷⁴ Instead, they are seen as a second degree of full jurisdiction, *infra* Chap. II.D.1 (iii); Chap. II.D.2 (iii).

definition of *trial court* in a broad sense: 'A court of original jurisdiction where the evidence is first received and considered.'¹⁷⁵ The definition has only two elements: the original jurisdiction and the first evidence. The reader must bear in mind, however, that the definition omits whether that evidence was produced in an oral or written form, in a concentrated trial or a deconcentrated set of hearings. This omission in *Black's* definition appears as justified because, nowadays, the US and English (real) trial courts are less dominated by the stereotypical oral and concentrated trial.¹⁷⁶ This comparative study will use *Black's* broad definition – focusing on the reception and consideration of the evidence, particularly – *but regardless of the hierarchical level at which that court is located*. Therefore, a 'trial court' could be located at the first, second or third level of the judicial pyramid.¹⁷⁷

In the US, for example, the proper trial courts are located at the lower hierarchy level only, in the first instance courts.¹⁷⁸ The US intermediate appellate courts, quite the contrary, are not considered higher (re)trial courts.¹⁷⁹ Still, a 'second' trial is possible in the US. This second trial, nonetheless, is not at a 'higher' court because the new trial on evidence will be conducted in the same court (with a different jury) or a different court of the same level.¹⁸⁰

In France and Italy there is also a first and second opportunity to consider the facts and evidence. The French and Italian legal language, however, does not use the exact concept of first and second 'trial court' to point at them. The reason is that civil law jurisdictions historically followed the written and deconcentrated Romano-canonical model,¹⁸¹ in which there were no concentrated and oral 'trial' in a common law fashion.¹⁸² The codes of the nineteenth and twentieth centuries, however, abandoned important aspects of the written and deconcentrated Romano-canonical original model.¹⁸³ Therefore, the more oral and concentrated civil procedures in continental Europe nowadays are closer to the current common law (real) trial courts less dominated by the stereotypical trial.

¹⁷⁵ GARNER 2009, p. 411.

¹⁷⁶ In fact, their civil procedures without trial at all, neither by judge nor by jury, went down to 1.8 per cent in the US (GALANTER 2004, p. 459-570); and England follows a similar trend (DINGWALL & CLOATRE 2006, p. 51-70).

¹⁷⁷ Alternative denominations were discarded because either they do not reflect properly the idea that the review of facts can be located in courts at different hierarchical levels – *e.g.*, 'court of first instance', this type of court does not only review facts (*e.g.*, 'court of facts'); or the wording is unknown in the English legal language – *e.g.*, 'court of instance'.

¹⁷⁸ Also known as 'district courts' at a federal level; FLETCHET & SCHEPPARD 2005, p. 6.

¹⁷⁹ They do not retry the case as the trial courts did; HAZARD & TARUFFO 1993, p. 178; for England, ZUCKERMAN 2013, p. 1113.

¹⁸⁰ DAMAŠKA 1986, p. 58-59.

¹⁸¹ VAN CAENEGEM 1971, p. 16-20.

¹⁸² MERRYMAN & PÉREZ-PERDOMO 2007, p. 112-113; GLENDON, CAROZZA & PICKER 2008, p. 97. UFF 2002, p. 309; FLETCHER & SCHEPPARD 2005, p. 502; KOTZ 2003, p. 72; among many others.

¹⁸³ VAN RHEE 2005, p. 3-23.

Using *Black's* broad definition avoids that problem. Let us remember that *Black's* definition omits whether the evidence was produced in such oral and concentrated trial. If we adhere strictly to *Black's* definition – in which trial court is a court that considers the evidence regardless of the format – the French and Italian legal language uses the concept of 'degree of jurisdiction' (*degré de juridiction* in French or *grado di giurisdizione* in Italian), instead of 'trial court'. Their technical definition of degree of jurisdiction also points at courts that, besides the application of the law, consider questions of fact and evidence altogether.¹⁸⁴

Similar to the US, France and Italy also have a second opportunity to review the evidence; however, they do not call it 'second trial', but 'second degree of jurisdiction'.¹⁸⁵ Unlike in the US, this French and Italian second degree of jurisdiction to review the evidence is not at the same level of the first instance court, but in hierarchically superior 'courts of appeal'. In *Black's* broad definition, nonetheless, the difference between a US 'second trial court', on the one hand, and the French and Italian 'second degree of jurisdiction', on the other, is not in the review of facts because both, the US second trial court and the French and Italian courts of appeal, indeed review the evidence. The real difference between 'second trial' and 'second degree of jurisdiction' is the hierarchy location at which that evidence review is performed. Because this study will use the concept of 'trial court' regardless of the court hierarchical location, the French and Italian first and second degrees of jurisdiction can be considered as lower and higher 'trial courts' in *Black's* broad definition which does not require a concentrated and oral evidence hearing. With that clarification in mind, this study will use the concept of 'trial court' to describe the ideal model for the dispute-resolution function.¹⁸⁶

7. Recourse

The procedure that triggers the review by the court of last resort receives different denominations in the local legal language: *writ of certiorari* in the US; *appeal* in England; *pourvoi en cassation* in France; and *ricorso per cassazione* in Italy. According to GEEROMS, such procedural terms – *i.e.*, *appeal*, *cassation*, or even the German *Revision* – should not be translated due to their important differences.¹⁸⁷ This study will follow the suggestion of GEEROMS to a certain extent. When referring to the procedure of a particular jurisdiction, the name in the local language will be maintained.

¹⁸⁴ CORNU 1987, p. 244 (France); DEL GIUDICE 2008, p. 382 (Italy).

¹⁸⁵ Or 'second-first instance,' JOLOWICZ 1999, p. 9; in that sense, cassation is not a proper 'third degree' of jurisdiction in the French and Italian legal language, because it does not review the facts, *infra* Chap II.B.1 (ii) (d).

¹⁸⁶ *infra* Chap. II.C.4.

¹⁸⁷ GEEROMS 2002, p. 201-228.

Conducting comparative studies, however, does require a common denomination. In the US and the UK, the word ‘appeal’ is frequently used in their legal literature. Using the word ‘appeal’ as a common denomination, however, would create comparative misunderstandings for French and Italian readers. In the legal literature of France and Italy, the ‘appeal’ (*appel, appello*) is reserved for the review of both facts and law. ‘Cassation’, quite the contrary, is reserved there for the review of the law exclusively. Therefore, cassation is not seen as a proper ‘appeal’ according to the French and Italian perspectives.

This study will opt for *recourse* as a common denomination.¹⁸⁸ The use of that word is not frequent in the legal bibliography in English.¹⁸⁹ Still, the concept of ‘recourse’ seems to be the best option to avoid the comparative misunderstanding previously described. This concept will be defined as the procedure according to which the judgment of a case delivered by one court can be modified by a second court,¹⁹⁰ regardless of the second court’s location in the hierarchy, scope of review, style of judgment or procedural track. ‘Recourse’ defined in these terms will be used when pointing to the four jurisdictions in general, as a common denomination; while the original denomination of the recourse – *i.e., writ of certiorari, appeal, pourvoi en cassation or ricorso per cassazione* – will be preferred when pointing to a particular jurisdiction.

We need to bear in mind that a recourse *stricto sensu* is not the only way to trigger the functioning of a court of last resort. In France, for example, the lower courts may formulate preliminary questions (*avis*) to the *Cour de cassation*.¹⁹¹ The French Preliminary Question is not a proper recourse, because no judgment has been delivered by the lower court yet. The so-called ‘cassation in the interest of the law’,¹⁹² as another example, is not a proper recourse either, because the cassation court reviews the case due to its public importance but will not modify the impugned judgment in particular. The object of this study, however, is the *functioning* of the courts of last resort. Therefore, every procedure which triggers the functioning of the court of last resort will be analysed here, regardless of whether it is considered a ‘recourse’ *stricto sensu* or not.

¹⁸⁸ *cfr.*, GARNER 2009, p. 1389.

¹⁸⁹ An exception, JOLOWICZ & VAN RHEE 1999.

¹⁹⁰ A review by the same court will be named ‘reconsideration’ instead of ‘recourse’, properly speaking.

¹⁹¹ *infra* Chap. IV.B.1 (iii).

¹⁹² *infra* Chap. IV.B.2 (ii).

8. Preliminary screening (access filter)

The so-called ‘access filters’ to the courts of last resort have received particular attention from comparative civil procedure studies.¹⁹³ Indeed, these access filters are an important attribute in the functioning of the courts of last resort.¹⁹⁴ The courts of last resort in the four jurisdictions under study have in common an *initial stage in their proceedings, characterised by simplified conditions for rejecting cases*.¹⁹⁵ The comparative misunderstanding, however, is whether the local actors will call this initial stage an ‘access filter’ or ‘restriction of access’ properly speaking. For the US and English legal actors it is not problematic to call the writ of certiorari or the permission to appeal, respectively, restrictive access filters. The French and Italian legal actors, however, will not use the concept ‘access filter’ even if their courts of cassation indeed exhibit an initial stage as previously defined.¹⁹⁶ Therefore, at the first steps of this study it became apparent that the concept ‘access filters’ is problematic for comparative purposes and, because of that, the more neutral denomination of ‘preliminary screening’ will be preferred.

This *preliminary screening* consists of simplified conditions for rejection because some of the decision-making guarantees that characterise the ordinary procedure of the court of last resort are, to some extent, restricted in the initial stage. For example, the ordinary procedure decides the dispute through a fully reasoned judgment. At the preliminary screening, quite the contrary, a case could be rejected through a non- or concisely-reasoned judgment instead.¹⁹⁷ Another example is the size of the panel. The ordinary procedure is characterised by a larger panel that resolves the case – *e.g.*, five or more judges. But in the preliminary screening, on the other hand, the early rejection may be decided by a reduced panel of just three judges. A final example is the oral hearing. Usually, the ordinary procedure contemplates an opportunity for the parties to present oral arguments. At the preliminary screening, however, dispute early rejection may omit the parties’ oral arguments. In that scenario, the preliminary screening will be conducted based on written submissions exclusively. Therefore, the reader must bear in mind that the conclusions of this study about ‘preliminary screening’, as previously defined, are contrastable with the literature on ‘access filters.’

¹⁹³ TARUFFO 2001B; SILVESTRI 2001; AMRANI MEKKI 2014; DRAGO, FAIVARQUE-COSSON & GORE 2015; FERRARIS 2015; NORKUS 2015, among others.

¹⁹⁴ *infra* Chap. III.B.5; Chap. IV.C.8; Chap. V.C.8.

¹⁹⁵ *infra* Chap. III.B.5 (i,ii).

¹⁹⁶ *infra* Chap. III.B.5 (ii).

¹⁹⁷ FERRAND 2015, p. 186-188; NORKUS 2015, p. 6; in general, GALIC 2014B, p. 159-174.

F. Jurisdictions

This study covers four jurisdictions: the US, England, France and Italy.¹⁹⁸ Comparative law authors usually suggest that the convenient number of jurisdictions to conduct comparative studies is between two and three.¹⁹⁹ From that perspective, including four jurisdictions in this study may seem ambitious.²⁰⁰ These jurisdictions, however, can be grouped in two legal families.²⁰¹ Based on the classification of ZWEIGERT & KÖTZ, the US and England belong to the common law tradition, the Anglo-American family particularly.²⁰² France and Italy belong to the civil law tradition, particularly to the Romanistic family.²⁰³ Significant differences remain even among jurisdictions that belong to the same legal family. Still, the common historical roots of each pair of jurisdictions simplify the comparative analysis.²⁰⁴ Therefore, even if a comparison covering four jurisdictions may seem ambitious at first sight, the shared legal families among them make this study feasible.²⁰⁵

1. The United States of America

The US is the first jurisdiction under study from the Anglo-American legal family. The US combines systems of courts at a federal and state level. This study will focus on the federal level only. Therefore, the courts analysed here are the US Supreme Court and the Federal Courts of Appeals.

¹⁹⁸ This study does not deal with other well-studied jurisdictions. On the civil law side, for example, Germany is not included. After the reform of 2001 in Germany, the horizontal similarities in access filters between the German *Bundesgerichtshof*, on the one hand, and the UK Supreme Court, on the other, have been well analysed in the comparative literature (TARUFFO 2011A, p. 30-31; GROSS 2012, p. 30; GARLIC 2014, p. 8; FERRARIS 2015, p. 6-7). Therefore, it appears more useful to concentrate attention here on civil law jurisdictions, such as France and Italy, that still appear as (horizontal) opposites to the common law jurisdictions. That said, expanding the diagonal perspective to Germany is the first line of further research suggested at the end of this study. See *infra* Chap. VI.C.1.

¹⁹⁹ *e.g.*, DANNEMANN 2006, p. 409-411; still, for comparative study on supreme courts covering six jurisdictions, GIANNINI 2016.

²⁰⁰ An example of another comparative study which covers four jurisdictions too is LUNDMARK 2012 (Germany, England and Wales, Sweden, and the US).

²⁰¹ On legal families or systems, DAVID & BRIERLEY 1978; GLENN 2006, p. 421-440; ÖRÜCÜ 2007, p. 169-187.

²⁰² On the Anglo-American legal family, ZWEIGERT & KÖTZ 1998, p. 180-275.

²⁰³ On the Romanistic legal family, ZWEIGERT & KÖTZ 1998, p. 74-131.

²⁰⁴ BOGDAN 2013, p. 71 ('Knowledge of the similarities between legal systems makes it much easier to study foreign law.').

²⁰⁵ Other comparative authors, however, may group these jurisdictions in a different manner or even criticise the very task of grouping jurisdictions in legal families or traditions. See, for example, LEGRAND 2003, HUSA 2004, GLENN 2006, among others.

The US has become a key player in the international context. For that reason, this jurisdiction receives a significant level of attention from comparative studies not only in law but also in other different fields. From a legal point of view, however, the US exhibits a remarkable level of 'exceptionalism',²⁰⁶ which makes it a hard case for comparative purposes. For example, unlike the other three courts of last resort under study, the US Supreme Court has a strong power of constitutional review of legislation.²⁰⁷ Some authors may argue that this constitutional review renders the US Supreme Court inadequate for comparison with courts of cassation, which do not deal with constitutional review, but only with civil and criminal matters. Instead, these authors suggest focusing our comparative exercises on contrasting the US Supreme Court with the specialised constitutional courts of the civil law jurisdictions.²⁰⁸

Including hard cases, such as the US Supreme Court, could be a methodological advantage. According to BENNET & CHECKEL, a hypothesis could be generalised if it succeeded in explaining a hard case too.²⁰⁹ Therefore, this study will include the US in order to take methodological advantage of its exceptionalism. Particularly, the US Supreme Court is not only a constitutional court. It is also the court of last resort for criminal and civil matters at a federal level.²¹⁰ This combined jurisdiction of the US Supreme Court will explain several differences with courts of cassation. Still, because the US Supreme Court has competences in civil matters too, it is pertinent to include it in this study.²¹¹

2. England and Wales

England is the second jurisdiction under study from the Anglo-American legal family. Certainly, England is an important jurisdiction for this family, because it is the origin of the common law.²¹² From England, this legal tradition spread to other jurisdictions such as Australia, Canada, Hong Kong and the United States. England, being part of the United Kingdom, is also a key player in the international context, particularly in Europe.²¹³ Therefore, several jurisdictions, not

²⁰⁶ Origins of the US exceptionalism in law, KESSLER 2007; in general, MURRAY 2013. On the US exceptionalism of civil procedure law in particular, MARCUS 2005, 2014C.

²⁰⁷ SCHWARTZ 1993, p. 21 ff.; *infra* Chap. II.D.2 (iii).

²⁰⁸ For example, ROGOWSKI & GAWRON 2016; FINCK 1997, p. 125-157; GUARNIERI & PEDERZOLI 2002, p. 134-149.

²⁰⁹ BENNETT & CHECKEL 2015, p. 13; for example, PARISE 2017 including Louisiana.

²¹⁰ STONE SWEET 2013, p. 817 ('The US Supreme Court is the highest court of appeal for almost all legal disputes in the American [US] legal order, whatever type.').

²¹¹ Also in favour of the comparison between the US Supreme Court and the courts of cassation, CAPPELLETTI 1989, p. 142 ('The [US] Supreme Court, therefore, should be compared not to the special constitutional courts, but rather to the highest courts of appeal on the continent.').

²¹² In general, HOGUE 1986.

²¹³ A current example is the withdrawal of the UK from the EU (*Brexit*), OLIVER 2016.

only those coming from the common law tradition, pay attention to the evolution of English law. An example is the Woolf reform of 1999, notably the introduction of case management powers, which is the object of numerous comparative studies.²¹⁴

As regards English civil procedure, four clarifications are necessary. First, the jurisdiction of England encompasses Wales. Therefore, the conclusions of English law apply to Wales too. Second, the court of last resort for civil disputes arising in England is the new UK Supreme Court (previously the Appellate Committee of the House of Lords). This court, however, is the last resort not only for England but also for the other parts of the United Kingdom. Accordingly, the UK Supreme Court has jurisdiction to resolve civil disputes from Wales, Scotland and Northern Ireland. Consequently, the conclusions of this study on the UK Supreme Court can be useful for Wales, Scotland and Northern Ireland too. Third, the court structures and procedures of the countries that comprise the United Kingdom are diverse. Each country within the kingdom – England, Wales, Scotland and Northern Ireland – has a relative autonomy that defines them. Even if the four countries converge at the apex in a single and common UK Supreme Court, at the lower levels of their court system, the structure and procedures differ to the point that makes it unpractical to compare them all together. Consequently, this study focuses not on all four jurisdictions that comprise the United Kingdom but on England particularly. Fourth, at the intermediate appellate court level, only the English Court of Appeal and the High Court will be studied. Because this study does not cover the UK in general but England in particular, the intermediate appellate courts of Scotland,²¹⁵ and Northern Ireland,²¹⁶ are beyond its scope. As regards the intermediate level in Wales, the conclusions of the English Court of Appeal and the High Court are applicable because, as mentioned, they share jurisdiction.

3. France

France is the first jurisdiction under study here from the Romanistic legal family. In a study of courts of cassation, such as this, the inclusion of France may not require further justification. The French *Tribunal de Cassation*, later renamed *Cour de cassation*, was the original version of this type of court.²¹⁷ Other jurisdictions of the same legal family follow, to a greater or lesser extent, the French example for designing their own courts of last resort. Examples of jurisdictions following the French cassation (usually combining elements of other types such as the German *Revision*) are the Netherlands,²¹⁸ Spain,²¹⁹ Chile²²⁰ and Italy, which will be

²¹⁴ VAN RHEE 2008; VAN RHEE & FU 2014; SORABJI 2014B.

²¹⁵ For the courts in Scotland, GLOAG & HENDERSON 2007, p. 43 ff.

²¹⁶ For the courts in Northern Ireland, DICKSON 2013B, p. 77 ff.

²¹⁷ TARUFFO 1998, p. 103.

²¹⁸ VERKERK & VAN RHEE 2017, p. 79.

explained shortly. Therefore, including the French *Cour de cassation* in this comparative study may be useful not only for France but also for other jurisdictions following the French cassation example.

4. Italy

Italy is the second jurisdiction from the Romanistic legal family in this study. In fact, it is one of the jurisdictions that closely follows the example of France. The Italian *Suprema Corte di Cassazione* resembles the French *Cour de Cassation* to a substantial degree. Still, studying Italy right after France is not redundant, because of their different performances. Compared to France, the Italian experience exhibits serious problems of backlog and case overload of their court of cassation.²²¹ Therefore, the interesting question is, Why does Italy have a worse performance than France if they share a similar type of court of last resort? When comparing the French and Italian courts of cassation side by side, this study will reveal certain differences in the details that may provide a clue to answering that question.

G. Structure

This study is divided into two parts. Part One is devoted to the horizontal perspective, that is to say, the comparison of the courts of last resort which are at the same third level in each jurisdiction (Chap. II and III). In Part Two, instead, the perspective changes from the horizontal to the diagonal. Accordingly, in Part Two the contrast will be made between courts that are at different levels of each judicial pyramid (Chap. IV and V). It is, therefore, important that the reader bear in mind that the points of reference change in the course of this study. The courts will be compared in the following combinations:

- | | | |
|---|-------------------------------------|-------------------------------|
| Part One: <i>Horizontal Perspective</i> | | |
| ○ Chap. II | 3 rd vs. 3 rd | <i>Courts Functions.</i> |
| ○ Chap. III | 3 rd vs. 3 rd | <i>Courts of Last Resort.</i> |
| Part Two: <i>Diagonal Perspective</i> | | |
| ○ Chap. IV | 3 rd vs. 4 th | <i>Courts of Precedents.</i> |
| ○ Chap. V | 2 nd vs. 3 rd | <i>Courts of Error.</i> |

Even if the hierarchical levels of the pairs of courts change, the chapters compare the same set of eight functional attributes mentioned in the methodology section.²²²

²¹⁹ DE BENITO 2017, p. 106.

²²⁰ BRAVO-HURTADO 2017, p. 151-152.

²²¹ TARUFFO 2011A, p. 31; SILVESTRI 2017, p. 237-239.

²²² *infra* Chap. I.D.1; as a reminder, scope of review, effects of the judgment, publication of the decision, style of the opinions, composition of the panel, the total size of the court, the number of cases, and preliminary screening.

These attributes are specially interconnected, and the chapters will tend to analyse them in the same order. Due to their interconnection, however, sometimes the order needs to change. In Chapter V, for example, the reforms on the publication of judgments in the US played a predominant role, and the exposure attribute will be analysed earlier than in the previous Chapters III and IV. These slight changes in the order, however, will not affect the overall framework of comparison. Each chapter ends with summary tables that visualize the comparative results. Table I.3 shows the structure of this study, which will be detailed later on.

Table I.3 : *Introduction* – Structure

TITLE	PART	CHAP	FUNCTION	LEVEL	CONCLUSION
<i>Courts Functions</i>	One	II	Manifest	3/3	Differences
<i>Courts of Last Resort</i>	One	III	Latent	3/3	Differences
<i>Courts of Precedents</i>	Two	IV	Latent	3/4	Similarities
<i>Courts of Error</i>	Two	V	Latent	2/3	Similarities

CONCLUSION

1. Part One

Following this Chapter I *Introduction* – in which the research question,²²³ methodology²²⁴ and key concepts are defined²²⁵ – Part One starts with Chapter II on *Courts Functions*. The role of Chapter II is to introduce the reader to the general framework of analysis. The general notion of judicial function and the current comparative debate about the courts of last resort are presented.²²⁶ The chapter then elaborates four ideal models of courts based on the also four functions previously identified.²²⁷ The chapter concludes with the analysis of the self-understanding or manifest functions attributed to these courts of last resort for

²²³ *supra* Chap. I.C.

²²⁴ *supra* Chap. I.D.

²²⁵ *supra* Chap. I.E.

²²⁶ *infra* Chap. II.B.

²²⁷ *infra* Chap. II.C.

civil matters in each one of the four jurisdictions under study.²²⁸ The purpose of the subsequent chapters, instead, is to identify not the manifest but the latent functions.

Chapter III on *Courts of Last Resort* develops the horizontal perspective, that is to say, the 3rd vs. 3rd level comparison of the four jurisdictions. The purpose of the chapter is to reveal the relation between the eight specific attributes of these horizontal courts and the four judicial functions.²²⁹ The chapter concludes with the differences or ‘asymmetries’ that can be found from such a horizontal perspective. These differences are, to a substantial degree, consistent with the also different manifest functions identified in Chapter II for these four jurisdictions: judicial lawmaking (US and England) or error-monitoring (France and Italy).²³⁰

2. Part Two

Part Two of this study starts with Chapter IV on *Courts of Precedents*. The chapter is the first one to introduce the diagonal perspective that is novel in this study. The chapter explains what the fourth level in France and Italy is – *i.e.*, the plenary session in a court of cassation – and describes its procedures.²³¹ Later on, the same eight attributes analysed horizontally in Chapter III are analysed again here but now diagonally, particularly from the 3rd vs. 4th level perspective.²³² The chapter concludes emphasising the similarities or ‘symmetries’ between these diagonal pairs of courts in the four jurisdictions. At a latent level, therefore, these new similarities are coincident with the judicial lawmaking role in a court of precedents model.²³³

Chapter V on *Courts of Error* continues the analysis from a diagonal perspective but at a lower level (2nd vs. 3rd) than the previous chapter. The chapter starts by explaining why the intermediate appellate courts of the US and England could be considered courts of last resort in practice, and it describes their appeal procedure.²³⁴ Afterwards, the eight attributes are compared diagonally once again.²³⁵ The chapter concludes by highlighting the symmetries found between the US and English intermediate appellate courts and the respective chambers of the cassation courts in France and Italy. These similarities are consistent, at a latent

²²⁸ *infra* Chap. II.D.

²²⁹ *infra* Chap. III.B.

²³⁰ *infra* Chap. III.C.

²³¹ *infra* Chap. IV.B.

²³² *infra* Chap. IV.C.

²³³ *infra* Chap. IV.D.

²³⁴ *infra* Chap. V.B.

²³⁵ *infra* Chap. V.C.

level, with the court of error model instead, in which the primary function is not judicial lawmaking but monitoring lower courts' errors.²³⁶

Chapter VI closes this study with the *Conclusion*. The summary tables at the end of each one of the previous chapters²³⁷ liberate Chapter VI from repeating part of that task. Instead, the *Conclusion* focuses on the impact that the diagonal symmetry thesis has. First, the chapter answers the research questions one by one.²³⁸ Later, the *Conclusion* discusses the consequences for the reform of the courts' procedures (policy recommendations),²³⁹ the comparative study of courts (further lines of research)²⁴⁰ and the redefinition of legal identities (closing).²⁴¹

3. Reading plan

This study covers four jurisdictions, which are paired in three combinations, and analyses eight attributes in each one of them.²⁴² A reader interested in all of these jurisdictions, combinations and attributes will find it interesting to explore the entire book. Several efforts were implemented to facilitate its reading.

(a) Each chapter concludes with summary tables. Therefore, a reader who wants a quick overview of the study may consult the comparative tables at the end of each chapter (*infra* Chap. II.E; Chap. III.C; Chap. IV.D; Chap. V.D). Besides the description of the plan of this thesis at the beginning of this *Introduction*,²⁴³ the core answers to the research questions will be presented in the final Chapter VI *Conclusion*, as well.²⁴⁴

(b) Each section has been written with the aim of being a self-sufficient unit, especially from Chapter III onwards. The sections devoted to the comparison of each attribute include a brief summary of the previous discussion on the subject. This has the advantage that a reader looking for the comparison on a certain attribute only may refer directly to the respective section and obtain a relatively complete picture of the current and previous discussion on it. A reader who, quite the contrary, peruses the entire book will find some repetitions as a result of this approach of self-sufficient units, especially in Part II referring to Part I. Rather than an inconvenience, that reader may appreciate these repetitions as beneficial reminders of the numerous interconnected discussions which may otherwise be

²³⁶ *infra* Chap. V.D.

²³⁷ *infra* Chap. II.E; Chap. III.C; Chap. IV.D; and Chap. V.D.

²³⁸ *infra* Chap. VI.A.B.C.D.

²³⁹ *infra* Chap. VI.E.

²⁴⁰ *infra* Chap. VI.F.

²⁴¹ *infra* Chap. VI.G.

²⁴² *supra* Chap. I.D.1.

²⁴³ *supra* Chap. I.B.

²⁴⁴ *supra* Chap. VI.A,B,C,D.

difficult to keep in mind altogether over the course of the entire book, particularly in regard to the contrast between the horizontal and diagonal perspective.

(c) The study has numerous internal cross references. Every statement which has been previously discussed, or will be readdressed again later, has a footnote indicating its location ('supra' or 'infra'). Therefore, if a particular statement catches the interest of the reader, he or she may navigate easily through the book using these internal cross references.

(d) A reader who is familiar with the current main ideas about the courts of last resort from a comparative perspective – *i.e.*, the distinction between private and public purposes, the differences between the US Supreme Court and the French Court of Cassation, for example – may focus on Chapters IV and V. The first Chapters II and III readdress, from a more nuanced approach, the current discussion on the courts of last resort functions and the differences (from a horizontal perspective) between the US and UK supreme courts and the French and Italian courts of cassation. The later Chapters IV and V, in turn, put forward the diagonal symmetry, which is novel in the discussion about the courts of last resort.

(e) A reader with an even more advanced specialisation will find in Chapter V a detailed analysis of a comparison that he or she may be aware of but only from a general perspective. This last chapter is devoted to demonstrating the particular similarities between the chambers of the cassation courts in France and Italy, on the one hand, and the intermediate appellate courts in the US and England on the other. Few authors have suggested this similarity, but even they only in general terms,²⁴⁵ and a specialist may be aware of these previous generalisations. Therefore, such a specialised reader may consult Chapter V to observe how this general similarity, identified by others only at a broad level, has expression in several court attributes in detail. Nonetheless, if such a specialised reader is not looking for further elaboration on that general similarity, he or she may concentrate attention on Chapter IV instead. That chapter on *Courts of Precedents* from a diagonal perspective demonstrates in detail another similarity which has not been elaborated by previous studies. Therefore, the advanced specialist will find the most innovative conclusions in Chapter IV.

(f) A reader may not be interested in the comparison of the eight attributes, but in one or two in particular. For that reader, the study can be approached in a different reading plan, by following the path of that attribute only. The following Table I.4 summarises this alternative reading plan centred in each attribute.

²⁴⁵ JOLOWICZ 2000 p. 299; GEEROMS 2004, p. 278-279; MAK 2013, p. 59.

Table I.4 : *Introduction* - Alternative reading plan

COURT Attribute	<i>Courts of Last Resort</i> 3 rd vs. 3 rd	<i>Courts of Precedents</i> 3 rd vs. 4 th	<i>Courts of Error</i> 2 nd vs. 3 rd
Review :	III.B.1	IV.C.1	V.C.1.
Effects :	III.B.2	IV.C.2	V.C.3
Exposure :	III.B.3	IV.C.3	V.C.2
Opinions :	III.B.8	IV.C.6	V.C.4
Cases :	III.B.4	IV.C.7	V.C.7
Panel :	III.B.6	IV.C.4	V.C.5
Size :	III.B.7	IV.C.5	V.C.6
Screening :	III.B.5	IV.C.8	V.C.8

CHAPTER I

PART ONE: HORIZONTAL PERSPECTIVE
CHAPTER II: COURTS FUNCTIONS

TABLE OF CONTENTS

CHAPTER II: COURTS FUNCTIONS.....	53
A. Introduction	54
B. On Functions	55
1. Diversity and functions	55
2. Current classifications.....	56
3. Criticism.....	57
4. Judicial functions and the Rule of Law	59
5. Finding the right courts to compare	62
6. Manifest versus latent functions.....	64
C. Models of Courts	66
1. Trial court.....	68
2. Court of error.....	71
3. Court of precedents	73
4. Constitutional court.....	76
D. Manifest Functions.....	79
1. United States of America	80
2. England	86
3. France	92
4. Italy.....	97
E. Summary table	101

A. Introduction

The purpose of Chapter II is to provide a conceptual framework with which to analyse the courts of last resort in civil matters of different jurisdictions. This framework is elaborated based on the idea of judicial functions. In simple terms, the courts of last resort are studied from the point of view of the roles, objectives, purposes or goals that they aim to perform.¹ In the words of JOLOWICZ, the question of Chapter II is the ‘What for?’ or ‘Why?’ of these courts.² The following Chapters III, IV and V will answer the ‘How?’ instead. Accordingly, the forthcoming chapters will apply the conceptual framework about functions of this Chapter II to compare the specific attributes of courts of last resort in the jurisdictions under study.

The clarification of these judicial functions is particularly relevant for comparative studies.³ Based on the functionalist method of comparative law, promoted by ZWEIGERT & KÖTZ, legal institutions can be properly compared across jurisdictions as long as they share similar functions.⁴ If the legal institutions of two jurisdictions do not share the same functions, these authors argue, they should not be compared in the first place.⁵ Therefore, the possibility of comparing courts of last resort depends on how the study defines these functions (and how it defines the courts).⁶ For that reason, the elaboration of a clear framework on court functions appears as the first methodological step in this research.

The rest of the chapter is structured in four parts. After this introduction (A), the first part (B) discusses the notion of judicial function in general, and how this notion can be used to analyse courts of last resort. The second part (C) elaborates four ideal models of courts based on the corresponding four judicial functions identified in the previous part. The third part (D) identifies how the authors of the US, England, France and Italy describe the functions of their courts of last resort. The chapter concludes with a summary table (E) that gives a comparative overview of how the judicial functions of the courts of last resort are conceived in the four jurisdictions under study.

¹ On the comparative study of the goals of civil procedure, UZELAC 2014A.

² JOLOWICZ 1998, p. 37.

³ *infra* Chap I.D.2.

⁴ For their general description of the functionalist method in comparative law, see ZWEIGERT & KÖTZ 1998, p. 32-47 (Chapter 3).

⁵ ZWEIGERT & KÖTZ 1998, p. 34 (‘Incomparables cannot be usefully compared, and in law the only things which are comparable are those which fulfil the same function.’).

⁶ See again, COTTERRELL 1992, p. 205.

B. On Functions

1. Diversity and functions

In civil matters, courts of last resort are extremely different between jurisdictions.⁷ The supreme courts of the US and the UK tend to be small,⁸ no more than a dozen judges who hear a small number of cases,⁹ giving judgments with high impact on future disputes.¹⁰ The courts of cassation in France and Italy, instead, appear as the exact opposite: they are big courts,¹¹ with hundreds of judges hearing thousands of cases,¹² but whose judgments normally have effect only in the case at hand.¹³ Why are these courts of last resort remarkably different?

Intuitively, the first thing that comes to mind when observing this diversity is that it should be related to a broader phenomenon which explains it. WIJFFELS, for example, says:

The present-day diversity of higher courts is, however, also the product of distinct national legal cultures. Thus, the filtration of cases [preliminary screening] allowed to be dealt with at the highest levels of the judiciary is not simply the result of procedural restrictions and costs, but also an issue of how, and to what extent, a supreme court [courts of last resort] is expected, in the general tradition and culture of a national legal system, to contribute to legal policies. Those differences explain why the social and political position of the supreme court judges, along with the caseload and even the style of the judgments, may vary widely from one European country to another.¹⁴

‘National legal culture’, ‘expected contribution to the legal policies’ and ‘social and political position’ are some examples, among many, of the broad notions that are invoked to explain the diversity of courts of last resort. Among these comprehensive explanations, this study will concentrate on the idea of ‘function’.

⁷ JOLOWICZ 1998, p. 38 ([T]hese reports reveal a bewildering variety of judicial institutions which are to be treated as Supreme Courts [courts of last resort]. There are, at a national level, federal courts, state courts and courts of countries with a unitary jurisdiction; there are courts of cassation, courts of appeals and courts of revision; there are courts which have some original jurisdiction or second tier appellate jurisdictions; there are courts whose regular jurisdiction includes the review of the constitutionality of legislation while other legal systems have separate “free standing” Constitutional Courts or allow no judicial review of primary legislation at all.).

⁸ *infra* Chap. III.B.7 (i).

⁹ *infra* Chap. III.B.4 (i).

¹⁰ *infra* Chap. III.B.2 (i).

¹¹ *infra* Chap. III.B.7 (ii).

¹² *infra* Chap. III.B.4 (ii).

¹³ *infra* Chap. III.B.2 (ii).

¹⁴ WIJFFELS 2013A, p. 31.

Therefore, the question here is: Can the differences between courts of last resort be explained based on their functions?

Intuitively, it seems right that the higher or lower level of diversity among courts of last resort should be to some extent correlated with the more or less different functions that they aim at performing. If these courts are similar, probably they aim at performing similar functions too. If, quite the contrary, the courts of last resort are different, maybe it is because their functions are different as well. However, the identification of these general functions (meant to explain the diversity) is, in reality, a back and forth exercise. The general function of the court is identified based on its specific attributes – such as the procedure, organisation, caseload, among others – and, at the same time, these specific attributes are explained based on the court’s general function.¹⁵ At this early stage of the study, the intuitive relation between specific attributes and the court of last resort’s general function can only be considered a working hypothesis. It will not be discarded in advance, but it cannot be taken for granted either. The real task here is to test how explanatory the idea of function is for comparing the diversities (or similarities) between courts of last resort.

2. Current classifications

In the literature on procedural law of courts of last resort, and appeals in general, several definitions can be found about their functions (also named as roles, purposes or goals). These functions have usually been described as two opposite extremes. In England, Lord WOOLF distinguished between the private and public purpose of appeals.¹⁶ Nowadays, the public and private purposes have become the mainstream distinction in comparative law studies on courts of last resort.¹⁷ BLAKE & DREWRY separated the role of review from the role of supervision.¹⁸ In France, CADIET described the *mission disciplinaire* and *mission normative* of cassation.¹⁹ Following CALAMANDREI’s doctrine, Italian scholars address the category between the *ius litigatoris* and the *ius constitutionis* in cassation.²⁰ One of the latest

¹⁵ COTTERRELL 1992, p. 73 (‘Each kind of enquiry needs each other. The method of functional analysis implies the need for a continual shuttling between detailed study of relationships between particular narrowly defined social phenomena and the broadest overall view of the manner in which and the extent to which large-scale patterns of social arrangements are integrated into the complex unity of society.’).

¹⁶ WOOLF 1996, p. 153.

¹⁷ Among many others, JOLOWICZ 1998; TARUFFO 1998; GARLIC 2014; NORKUS 2015; FERRARIS 2015, p. 6-7.

¹⁸ BLAKE & DREWRY 2004, p. 226-227.

¹⁹ CADIET 2012B, p. 58.

²⁰ TARUFFO 1991, p. 66-67.

classifications was made by MITIDIERO, distinguishing between courts of interpretation and courts of precedents.²¹

To a large extent, these dualities point in the same direction, but with different wording. On the one hand, there is a *particularistic approach*, in which the court of last resort is meant to check many cases one-by-one (private purpose, review, *mission disciplinaire, ius litigatoris* and court of interpretation). On the other hand, there is a *generalist approach*, according to which the court of last resort's intervention is reserved to the few most important cases that have some sort of transcendence, cases whose judgment will have high impact on future disputes (public purpose, supervision, *mission normative, ius constitutionis* and court of precedents). Scholars have aimed at explaining the differences between jurisdictions, or within their own jurisdiction, based on these dualities. According to these classifications, courts of last resort can be one of two types, and some others may fall somewhere in the middle. On the one hand, there are courts that come closer to the generalist approach – e.g., the US and UK supreme courts. And, on the other hand, there are courts of last resort characterised by the particularistic approach – e.g., French and Italian courts of cassation.²²

3. Criticism

(a) There are at least five problems with the current classifications of the procedural law literature. A first is that the reduction of the comparative diversity to a duality seems to be an unjustified simplification. There could be not just two opposite extremes, but three, four or even more.²³ Therefore, classifications based on dualities will tend to obscure other jurisdictions that do not fit properly into, nor be properly of, the two categories. Other jurisdictions will be blurred as occupying some sort of middle ground.²⁴ Dual classifications could be sufficient when only two jurisdictions are under comparison. But in a study in which not two but four jurisdictions are compared, such as this one, a dual classification needs to be replaced by a framework that allows more diversity.

(b) A second problem arises when the current classifications are applied to courts of cassation – such as the French and Italian ones – as a single structure. Legal scholars use one of these labels for the cassation courts as a whole. However, the

²¹ MITIDIERO 2015, p. 201-218.

²² For example, JOLOWICZ 1998, p. 39-42. TARUFFO 2009, p. 93, MITIDEIRO 2013, p. 32.

²³ Examples of authors who have tried not just a double but triple classification are JOLOWICZ 1999, p. 2-3 (distinguishing between Cassation, Revision, Appeal); and TARUFFO 2009, p. 93-106 (distinguishing between Anglo-American, German and Franco-Italian models). These triple models will be discussed later on in *infra* Chap. II.C.

²⁴ Criticism was raised against the classical dual distinction in comparative civil procedure between adversarial vs. inquisitorial. 'In fact a purely adversarial process is no more capable of existing in the real world than a purely inquisitorial one.' JOLOWICZ 2003, p. 281-295. Also TARUFFO 2001A, p. 345-360.

French and Italian courts of cassation are not a single structure, but a more complex set of organs. It could be that these different organs, even within the same courthouse building, are meant to perform different functions. Particularly, within the courts of cassation under study the ordinary chambers and the plenary sessions can be clearly identified as separate, but related, structures.²⁵ Therefore, when legal scholars use only one label for these courts of cassation, they paint with a broad brush something that deserves nuance. As this study demonstrates, the clear separation between chambers and plenum is what will allow us to untangle the apparently contradictory functions of the courts of cassation, and identify the diagonal convergence between jurisdictions.

(c) Another problem is that the current classifications on functions are mainly applied to analyse the court of last resort in a sort of vacuum. However, the courts of last resort do not stand alone. The functioning of the court of last resort interacts with the other courts in the judiciary. A court of last resort may not have a certain function, not because that function is not important in that jurisdiction, but because the same function is already performed by another court.²⁶ Therefore, a framework on functions should not be elaborated for the courts of last resort particularly, but the framework should be general to the extent that could be used to understand the functions of the other courts in the jurisdiction, as well.

(d) A fourth problem is that the understanding on court functions, whether the court of last resort or other courts, cannot be separated from society's general functions.²⁷ The current classifications are weak in showing this broader societal connection. Procedural law on appeals is, so to speak, over specialised. Legal scholars focus on the higher courts only, missing the broad picture about the role of the judicial system, and the law itself, for the society.²⁸ Therefore, our framework should be better at showing the relation between the courts' particular tasks within the functioning of society as a whole.

(e) The fifth problem is that comparative law authors usually do not provide a major prelude as to what they understand with the concept of function. But this concept cannot be taken for granted.²⁹ The question about the functions of social

²⁵ The differences between the cassation chambers and the plenary session will be discussed in depth in *infra* Chap. IV.

²⁶ In England, for example, authors state that the UK Supreme Court [previously the House of Lords] is not in charge of the error-monitoring function – the role of 'review,' in their terms – because that role is already performed by the lower Court of Appeal. BLAKE & DREWRY 2004, p. 226-227. See *infra* Chap. II.D.2 (ii).

²⁷ On society's functions, *infra* Chap. II.B.4.

²⁸ For a broad sociological approach to courts, see COTTERRELL 1992, p. 205-245 (Chapter 7); DELPEUCH, DUMOULIN & GALAMBERT 2014, p. 75-104, 175-204 (Chapters 3 and 6); BLACK 1993.

²⁹ Usually, procedural law authors use, without distinguishing between the two, the notion of 'purpose' and 'function'. According to the sociology of law literature, however, these two concepts should not be confused. COTTERRELL 1992, p. 72 ('[Jurisprudential] writings tend to confuse what law does with what it is thought it to do. They tend to confuse the concept of

institutions – the economy, politics, education and the courts of law, for example – has been the subject of a major debate in sociology, particularly since the work of DURKHEIM in the nineteenth century,³⁰ and PARSONS in the twentieth century.³¹ Also, the comparative law methodology, according to which the comparison should be made based on the ‘function’ of social institutions, is under serious criticism nowadays.³² A complete analysis of the debate on the functions in sociology and comparative law exceeds the scope of this study. However, some preliminary clarifications about these issues deserve to be made before continuing with the comparison of courts of last resort.

4. Judicial functions and the Rule of Law

The concept of ‘function’ gave birth to the functionalist tradition in sociology.³³ The function of social institutions has been explained based on a comparison with the human body.³⁴ Society is the human body and the social institutions are its different biological organs. In order to survive, the human body has to satisfy several needs. The function of each organ is to satisfy these needs and, by doing so, contribute with the other organs to the survival of the body as a whole.³⁵ The function of a certain social institution is to take care of a particular need that, together with the other social institutions, preserves the continuity of society.³⁶ Accordingly, the understanding of social institutions’ functions first needs to address the underlying social needs.³⁷ The courts of last resort are also social institutions and, therefore, to understand their function the study needs to start by identifying the general social needs that are meant to be satisfied by the law through the court system.³⁸

function and purpose ... The function of the Statute, in sociological terms, is, however, a very different matter, not dependent on the will of its creators [purpose] but on its present contribution to the maintenance of existing social and economic institutions. So the function of the law may have no relation at all to the original purpose for which the Statute was passed. [emphasis in the original]).

³⁰ DURKHEIM 1997; on Durkheim’s functionalism, POPE 1975, p. 361-379.

³¹ His main books are PARSONS 1949, PARSON 1951, and PARSON & SHILS 1951. For his particular approach to the law, see PARSONS 1962. For a recent introduction to PARSON’S ideas in general, see SEGRE 2012; and particularly on law, see TREVIÑO 2008.

³² See again, FRANKENBERG 1985, p. 411-456; MICHAELS 2006, p. 339-382; REIMANN 2012, p. 30. Also at *supra* Chap. I.D.2.

³³ GIDDENS *et al.* 2014, p. 18-19.

³⁴ RADCLIFFE-BROWN 1935, p. 394; for example, DURKHEIM 1933/1997, p. 11.

³⁵ RADCLIFFE-BROWN 1935, p. 395.

³⁶ GIDDENS *et al.* 2014, p. 18 (‘[A]nalizing the function of some aspect of society, such as religion, means showing its part in the continued existence and health of society.’).

³⁷ As regard the division of labour, for example, DURKHEIM says: ‘Thus to ask what is the function of the division of labour is to investigate the need to which corresponds.’; DURKHEIM 1933/1997, p. 11; on comparative civil procedure, CAPPELLETTI 1994, p. 16-18.

³⁸ RENNER 1949, p. 75 (‘[T]he organic character of the legal order is the fact that the totality of the legal institutions existing at a given time must fulfil all general functions. This means

The first and most important need of society is to preserve itself, to assure its continuity. In RENNER's words, '[A]ll legal institutions taken as a whole fulfil one function which comprises all others, that of the preservation of the species.'³⁹ That preservation depends on, among other things, the capability to maintain the integration between the members of society.⁴⁰ In order to keep society's integrity, it is necessary to regulate the behaviour of its members (social control).⁴¹ The function of the law and the court system – among other social institutions like family or schools – is to provide such integration through regulation.⁴² That is what we call the Rule of Law,⁴³ a system of rights and obligations according to which private and public agents should conduct their behaviour.⁴⁴ To enforce it, the courts need to perform more specific judicial functions.

i. Dispute resolution

First, the law will raise disagreements about its specific content or whether people comply with it. Thus, the Rule of Law requires access to a peaceful arena, before an independent and impartial judge, in which people can resolve their particular

that the law is an organized whole determined by the needs of society.'). Functionalism is not the only sociological approach to courts. Other perspectives are, for example, system theory, LUHMANN 2008, p. 274-304 (Chapter 7); discourse theory, HABERMAS 1996, p. 194-237 (Chapter 5); or the 'pure' sociology, BLACK 2010.

³⁹ RENNER 1949, p. 70.

⁴⁰ RENNER 1949, p. 71 ('Legal institutions designed to regulate the order of labour and power and the coordination of individuals have an organising function in that they integrate the individual into the whole.').

⁴¹ For an introductory view on social control in general, CHRISS 2013. For a more in-depth analysis on social control and deviance in behaviour, see INDERBITZIN, BATES & GAINNEY 2013.

⁴² FRIEDMAN 1975, p. 18 ('Another basic function of the legal system is *social control* – essentially, the enforcement of the rules of right conduct.'). Also, DEFLEM 2008, p. 6-7. On law as a tool for social control, see the now classic POUND 1942. For different perspectives on social control and law, see KAMENKA & TAY 1980. For a more recent relation between law and social integration, HABERMAS 1996, p. 66-81.

⁴³ In general on the history of the Rule of Law, see TAMANAHA 2004, p. 1-90. On the original liberal English view on the Rule of Law, DICEY 1979, p. 100 ('[E]very man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Thus no one is above the law, and all are subject to the same law administered by the same courts.'). On the original German conception of *Rechtsstaat*, see BÖCKENFÖRDE 1991, p. 47-70. On the relation between Rule of Law and Democracy, HABERMAS 2008, p. 12-20. On HABERMAS' ideas on the Rule of Law, BAYNES 1995, p. 201-232. For an application of HABERMAS' ideas on civil appeals, NÚÑEZ OJEDA 2008. Finally, on the relevance of the Rule of Law for economic development, TREBILCOCK & DANIELS 2008.

⁴⁴ However, some sociologists argue that the Rule of Law may not be an actual description of how the legal system works but just a discourse on legitimation of its functioning. For example, COTTERRELL 1992, p. 160 ('[T]he rule of law is more important as legitimating ideology than as a practice of equality before the law.'). Also BLACK 1993, p. 57 ('[A]s the "rule of law" refers to the universalistic application of legal rules to human affairs, its is now possible – 20 years later – to specify when these conditions exist: never.').

conflicts about those rights and obligations.⁴⁵ The structure of courts and procedures is meant to provide this peaceful arena for the legal combat between the parties.⁴⁶

ii. Error-monitoring

Secondly, judges are fallible.⁴⁷ Therefore, we need a device of quality control, aimed to identify and amend their mistakes.⁴⁸ The system of appeals and higher courts is meant to perform this error-correction role. As a result, the decision-making ends by being coordinated – and, therefore, the Rule of Law uniformly applied to all citizens – because the judgments which depart from the predefined legal criteria are corrected.⁴⁹

iii. Judicial lawmaking

Third, those predefined legal criteria need to be known and foreseeable (legal certainty).⁵⁰ The Rule of Law will be violated if the decision criteria remain indeterminate and unpredictable.⁵¹ Therefore, a subsequent organ will be needed to correct the ambiguities that might remain when applying those general concepts of the legislation in particular cases.

iv. Political counterweight

Finally, the public organs in charge of creating and executing the law need to be subject to an order as well. The Rule of Law also applies to state officials.⁵² To

⁴⁵ TAMANAHA 2004, p. 119 ('[T]he rule of law formal legality ... also includes the availability of a fair hearing within the judicial process.'). BINGHAM 2011, p. 85 ('It would seem to be an obvious implication of the principle that everyone is bound by and entitled to the protection of the law that people should be able, in the last resort, to go to court to have their civil rights and claims determined.').

⁴⁶ FRIEDMAN 1975, p. 18 ('Another, slightly less global function [of the legal system] is the *settlement of disputes*. Conflicts arise in every society. A basic legal function is to offer a machinery and a place where people can go to resolve their conflicts and settle their disputes.').

⁴⁷ UZELAC & VAN RHEE 2014, p. 3 ('As the popular wisdom confirms, even the judges can sometimes be wrong.').

⁴⁸ UZELAC & VAN RHEE 2014, p. 3 ('An element common to all legal systems is the wish to minimise errors in adjudication.').

⁴⁹ SHAPIRO 1980, p. 629 ('A second conventional image of appeal is essentially lateral. Appellate courts are assigned responsibility for ensuring uniformity among subordinate courts. Most of the literature on appeals courts focuses on these functions of correcting error and imposing uniformity.').

⁵⁰ COTTERRELL 1992, p. 158 ('The doctrine of the rule of law demands that law consist of known and predictable rules.').

⁵¹ TAMANAHA 2004, p. 90.

⁵² TAMANAHA 2004, p. 114 ('The broadest understanding of the rule of law, a thread that has run for over 2,000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law.'); HABERMAS 1996, p. 240-241.

secure this, a system of courts is needed, independent from those other public organs, which enforces the Rule of Law against them.⁵³

5. Finding the right courts to compare

From a functionalist approach to comparative law, the task is to identify the specific courts that are meant to perform one or more of the previous four judicial functions of the Rule of Law. Let us remember that, according to ZWEIGERT & KOTZ, only the legal institutions that perform the same function are properly comparable.⁵⁴ However, to identify the courts that perform the same function is far from obvious. The location, organisation and names of the courts are deceiving.⁵⁵ Comparative studies have a risk of being distorted because the courts that perform the same function can be named differently from one jurisdiction to another; more than one court may perform the same function; the organ that performs the same function can be hidden within a large structure; or the same function can be performed by courts located at different levels of each jurisdiction. In order to show examples of these comparative obstacles, which will be explained in detail in the forthcoming chapters, some conclusions of the diagonal symmetry need to be revealed in advance.

- a) *One court may perform not one, but two functions if they are compatible.* This is the situation of the 3rd court level in the US and England. Both are judicial lawmaking courts. But the attributes of a judicial lawmaking court are, to some extent, compatible with the political counterweight function too.⁵⁶ That is why the UK Supreme Court, despite the denial of any constitutional role, seems to have a latent deviation to become a political counterweight in the future.⁵⁷
- b) *If a court aims to perform incompatible functions, it will be internally divided into two structures.* This is the situation of the 3rd court level in France and Italy. These courts of cassation are internally divided into ordinary chambers and plenary sessions. Chambers and plenary sessions perform functions that

⁵³ A fifth judicial function could be delineated: law enforcement. Even if rights and duties are properly defined, it could be that private or public actors do not behave according to the law. To achieve the respect of the law in practice, the society needs enforcement organs assisted by the State coercion to apply sanctions. This fifth function is not further analysed in this study because legal systems do not assign law enforcement task to their courts of last resort themselves. Instead, law enforcement is usually entrusted to the first-instance courts, through bailiffs (US) or *huissier de justice* (France). For a comparative approach on civil enforcement, VAN RHEE & UZELAC 2010.

⁵⁴ ZWEIGERT & KÖTZ 1998, p. 34.

⁵⁵ COTTERRELL 1992, p. 206-207 (“The concepts of “judge” and “court” raise problems of sociological specification ... [these concepts] tend to be shaped by political preconceptions. Definitions of ‘court’ to be generalizations from “common sense” assumptions about institutions recognised as courts in particular Western societies.”).

⁵⁶ *infra* Chap. VI.C.4 (iv).

⁵⁷ *infra* Chap. II.D.3 (iii); Chap. III.B.1 (iii).

require incompatible attributes: error-monitoring and judicial lawmaking, respectively.⁵⁸ In this sense, the distinctive judicial lawmaking function of the plenary sessions may pass unnoticed within the large structure of the court of cassation.

- c) *The same function can be performed by courts located at different levels of each jurisdiction.* The error-monitoring function is located at the 2nd court level in the US and England (intermediate appellate courts) and at the 3rd level in France and Italy (cassation chambers).⁵⁹
- d) *Courts that have different names (and locations) in reality perform the same function.* The judicial lawmaking, for example, in the US and England is performed by their ‘supreme courts’ (3rd level). While in France the equivalent judicial lawmaking role is developed by what they call the ‘plenary sessions’ of the court of cassation (a hidden 4th level).⁶⁰
- e) *Courts that have the same name in reality may perform different functions.* That is the case of the ‘court of appeal’ in the US and England, on the one hand, and the French *Cour d’Appel* and Italian *Corte d’Appello*, on the other. In the US and England, the intermediate appellate courts have an error-monitoring function; while in France and Italy the *Cour d’Appel* and the *Corte d’Appello* are a second degree of jurisdiction, besides the first instance judge, for a full review of the dispute-resolution function.⁶¹
- f) *Some jurisdictions might assign the same function to more than one court.* An example of this is the 1st and 2nd court levels in France and Italy. There, the judges of first instance and the courts of appeal to a large extent repeat the same function (dispute resolution) because the intermediate appellate courts are seen as a second degree of jurisdiction with full review,⁶² a higher ‘second trial court’ as defined in Chapter I.⁶³

At first sight, this panorama seems chaotic. Chaotic to the extent that it may raise scepticism about the bare possibility of conducting a functionalist comparison of courts between these jurisdictions.⁶⁴ The purpose of this study, however, is to clarify that panorama. The simplicity of the diagonal symmetry thesis – that certain courts in France and Italy perform the same functions as certain courts in the US and the UK, but at one higher level – helps to put order in this apparent

⁵⁸ *infra* Chap. IV.D.

⁵⁹ *infra* Chap. V.D.

⁶⁰ *infra* Chap. IV.D.

⁶¹ *infra* Chap. II.D.3 (iii); Chap. II.D.4 (iii).

⁶² JOLOWICZ 1999, p. 9; see again, *infra* Chap. II.D.3 (iii); Chap. II.D.4 (iii).

⁶³ *supra* Chap. I.E.6.

⁶⁴ As an expression of this initial scepticism, JOLOWICZ 1998, p. 38 (‘How can an intelligible, let alone a useful, study be made of the role of so many different institutions?’).

chaos of courts and functions. The main contribution of this study can be seen as finding just which courts are the right ones to compare.⁶⁵

6. Manifest versus latent functions

One last point on the concept of function needs clarification before starting the particular analysis of the courts of last resort. In the functionalist tradition of sociology, a basic distinction is made between manifest and latent functions.⁶⁶ *Manifest* functions are the roles, purposes or goals that the participants of certain social activity explicitly claim that their activity pursues. *Latent* functions, instead, are those functions that might pass unnoticed by their own participants, but that the social activity performs nonetheless.⁶⁷ For example, a tribe can have a long tradition of performing a special dance at the end of the year. According to the members of the tribe, the function of that traditional dance is to ask the gods for rain for the next harvest season. That is the manifest function. But to an outside observer, it may be clear that the annual dance also performs another function, at a latent level, which is to maintain cohesion within the tribal group.⁶⁸

When analysing the functions of courts of last resort it is important to keep this distinction in mind. In the same way, a court may perform certain functions at a manifest level and some others at a latent level.⁶⁹ Manifest and latent functions are not, in principle, contradictory. The same social institution can perform two or more functions at the same time, as long as they are compatible. For example, as we shall see, the court's attributes for judicial lawmaking have the potential, to some extent, to be used as a political counterweight too.⁷⁰ Also, litigants can take advantage of the attributes of an error-monitoring court in order to divert it into repeating the mere dispute-resolution function. Accordingly, these courts of last resort may claim to pursue only one function at a manifest level, but the setup of the court attributes allows the performance of other latent functions, as well. The problem arises when two or more functions (at a manifest or latent level) require incompatible court attributes. The main example of that incompatibility is the pretended combination between error-monitoring and judicial lawmaking. As we will see, these two functions require different specific court attributes which are contradictory to combine in practice.⁷¹

⁶⁵ The pair of courts which are, in VACKLE's words, unified and plural simultaneously, VALCKE 2004, p. 740-741.

⁶⁶ GIDDENS *et al.* 2014, p. 19. For a criticism on this distinction, HELM 1971, p. 51-60.

⁶⁷ Other ways to phrase this distinction are the concept of purpose (manifest function) and function strictly speaking (latent function). See again, COTTERRELL 1992, p. 72.

⁶⁸ The example comes from MERTON 1968, p. 118-121.

⁶⁹ A similar distinction in GARLIC 2014, p. 8-10 and TARUFFO 1998, p. 104-107, between intended (manifest) and achieved or actual (latent) functions.

⁷⁰ *infra* Chap. VI.C.4 (iv).

⁷¹ *infra* Chap. VI.C.4 (i) (a); Also, GALIC 2014, p. 5-6.

As a result of this compatibility or incompatibility between the court attributes required by different judicial functions, the courts of last resort may exhibit latent deviations.⁷² These deviations can have two directions: moving away from a manifest function or moving closer to a latent function. First, a deviation moving ‘away from a manifest function’ means that the court *does not have* the specific attributes that correspond to a judicial function which is manifestly *included* in the court’s roles. Deviations moving away from a manifest function are present when a jurisdiction aims at the court of last resort performing two judicial functions whose court-specific attributes are *incompatible*. Therefore, when the court opts for the specific attributes of one judicial function, to some extent it compromises the performance of the other (incompatible) judicial function. For example, error-monitoring and judicial lawmaking require incompatible court attributes.⁷³ Therefore, if the same court claims at a manifest level to perform both error-monitoring and judicial lawmaking functions – such as the French and Italian courts of cassation do⁷⁴ – its specific attributes could show a latent deviation moving away from one of these two incompatible manifest functions. The French and Italian cassation chambers, continuing with the example, have the court attributes for the error-monitoring function,⁷⁵ and, by doing so, become incompatible with the proper attributes for judicial lawmaking.⁷⁶ Due to this incompatibility, these cassation chambers latently deviate away from the judicial lawmaking function, otherwise manifestly affirmed.⁷⁷ In sum, a deviation moving away from a manifest function implies that a certain function is affirmed at a manifest level, but at the latent level of the specific attributes the same function is denied.

Second, there could be a deviation moving ‘closer to a latent function’. This means that the court *does have* specific attributes corresponding to a function which is manifestly *excluded*. Deviations moving closer to a latent function are present when a jurisdiction aims at the court of last resort performing a (first) judicial function but manifestly denies a second function whose court-specific attributes are *compatible* with the first function. Therefore, when the court opts for the specific attributes of the first function, at the same time the court becomes equipped to perform the second (denied) function too. For example, judicial lawmaking and political counterweight require court attributes which are compatible to an important extent.⁷⁸ Therefore, if the same court claims, at a manifest level, to perform a judicial lawmaking function but, at the same time, denies any political counterweight function – such as the UK Supreme Court does⁷⁹ – its specific

⁷² *infra* Chap. VI.C.4.

⁷³ *infra* Chap. VI.C.1 (ii,iii).

⁷⁴ *infra* Chap. II.D.3 (i,ii); Chap. II.D.4 (i,ii).

⁷⁵ *infra* Chap. VI.C.3 (i).

⁷⁶ *infra* Chap. VI.B.2 (ii).

⁷⁷ *infra* Chap. VI.C.4 (i,ii).

⁷⁸ *infra* Chap. VI.C.1 (i,ii).

⁷⁹ *infra* Chap. II.D.2 (i,iii).

attributes could show a deviation moving closer to the latter (latent) function. The UK Supreme Court, continuing with the example, has the specific attributes for judicial lawmaking,⁸⁰ and, by doing so, becomes partially compatible with a political counterweight function too (as we shall see next in Chapter III). Due to its attributes' compatibility, the UK Supreme Court latently deviates, moving closer to the political counterweight function, otherwise manifestly denied.⁸¹ In sum, a deviation towards a latent function implies that a certain function is denied at a manifest level, but at the latent level of the specific attributes the same function is affirmed. Figure II.1 summarises the deviations, as previously explained, that may result from having a single or double manifest function which require compatible or incompatible court attributes.

Figure II.1 : *Courts functions - Latent deviations*

		MANIFEST FUNCTIONS	
		Single	Double
ATTRIBUTES COMPATIBILITY	No	<i>no deviation</i>	<i>deviation away manifest function</i>
	Yes	<i>deviation closer latent function</i>	<i>no deviation</i>

C. Models of Courts

Different functions are meant to give birth to distinctive 'models' of courts. Models are abstract designs or ideal types of structures and procedures, a tool frequently used in comparative studies.⁸² Each model aims to identify the core features that are needed to perform certain functions effectively. However, these models remain as simplified idealisations, and no jurisdiction fits perfectly into them.⁸³ Therefore, on a model-based approach, real jurisdictions appear as imperfect examples.

⁸⁰ *infra* Chap. VI.C.3 (iv).

⁸¹ *infra* Chap. VI.C.4 (iv).

⁸² In general, the use of ideal types (in German, *Idealtypus*) in the social sciences comes from Max Weber's sociology of religion, ZALESKI 2010, p. 319-325. A particular example of ideal types in the comparison of justice systems is DAMAŠKA 1986.

⁸³ DAMAŠKA 1986, p. 241 (admitting that existing court systems appear as mixtures of his ideal types).

In the comparative literature several efforts at modelling courts of last resort exist. For example, in the *Il Vertice Ambiguo* TARUFFO distinguishes between two extremes: third instance and supreme court.⁸⁴ In his last works, TARUFFO opted for a triple distinction based on the Anglo-American, German and French-Italian models.⁸⁵ SHAPIRO also elaborated two models of appellate courts which cluster the differences between a court of cassation and a common law supreme court.⁸⁶ JOLOWICZ originally identified three models of recourse of last resort: appeal, cassation and *amparo*.⁸⁷ Later on, he changed the triple distinction to cassation, revision and third appeal.⁸⁸

These sets of models are different because the authors emphasise certain aspects over others, within the legal landscape of the moment. For that reason, the design of models needs to change over time. The evolution of comparative law causes certain models to lose relevance in favour of other models.⁸⁹ The convergence of legal systems can make models based in opposite extremes look like outdated exaggerations. For example, JOLOWICZ acknowledges that – despite his differentiation between cassation, revision and appeal – nowadays jurisdictions are less different than his models of courts of last resort suggest.⁹⁰

This study will use its own set of ideal models of courts. Each model will be designed to combine the specific court attributes that each judicial function requires. Accordingly, the study distinguishes between four models of courts,⁹¹ corresponding to the aforementioned four judicial functions of the Rule of Law: trial court (dispute resolution), court of error (error-monitoring), court of precedents (judicial lawmaking) and constitutional court (political counterweight). Based on the dualities in which court of last resort functions are currently classified,⁹² the first two (trial court and court of error) have a particularistic approach. The courts providing full dispute resolution and the ones monitoring the errors of the former share a one-by-one methodology. The last two (court of precedents and constitutional court) have a generalist approach instead. The courts acting as judicial lawmaking and political counterweight organs imply a focus on the most important disputes with general impact. Even if each pair of court models

⁸⁴ TARUFFO 1991, p. 158-159.

⁸⁵ TARUFFO 2009, p. 93-106.

⁸⁶ SHAPIRO 1980, p. 654.

⁸⁷ JOLOWICZ 2000, p. 299-327. Another exercise of modelling can be found in MITIDIERO 2013, p. 32 ff. distinguishing between ‘superior’ and ‘supreme’ courts.

⁸⁸ JOLOWICZ 1999, p. 2-3. A criticism on the cassation/revision/appeal distinction for comparative purposes, GALIC 2014, p. 2-4.

⁸⁹ Following the end of the Cold War and the fall of the Soviet Union, scholarly interest in the ‘socialist model’ focused on China. Today, instead, comparative exercises tend to include Islam and China due to the increasing interaction between these systems and Western societies. For example, HEAD 2011.

⁹⁰ JOLOWICZ 1999, p. 2-3.

⁹¹ Another example of four models of courts is FERRARIS 2015, p. 4-6.

⁹² *supra* Chap. II.B.2.

have that aspect in common, important differences are found between models that share the particularistic or generalist approach.

This set of court models identifies four different types of courts in order to allow more diversity than the current dual classifications. Also, this set of models is of ‘courts’ in general, and not of courts of last resort only. That clarification is important to prevent criticism against the current procedural law dual classifications. This set of court models is designed to be applicable to different jurisdictions, regardless of whether a certain function is locally assigned to the court of last resort or to another type of court, and regardless of the local name of the court. A model designed not just for courts of last resort can show how their functions relate to the other courts of the jurisdiction.

1. Trial court

The Rule of Law requires access to a general arena for legal conflicts.⁹³ People and corporations will have disagreements about the rights and obligations to which they are entitled. In order to avoid the stronger enforcing its interests by its own hand against the weaker, an institutional setup is needed within which to debate and adjudicate in a peaceful manner.⁹⁴ To provide such a litigation arena is the judicial function of the *trial court* model.⁹⁵

In this first ideal model, the final goal is social peace through the resolution of the conflict.⁹⁶ This requires that the arena of litigation be open to deal with every possible complaint that each party may have. This is what SHAPIRO called the ‘catharsis’ role.⁹⁷ In that sense, this model is litigants-oriented, to provide an answer to their interests and concerns is the main goal. The litigants’ mere

⁹³ See again, BINGHAM 2011, p. 85; TAMANAHA 2004, p. 119.

⁹⁴ In COUTURE’s now classic view: ‘Primitive man’s reaction to injustice appears in the form of vengeance ... The first impulse of a rudimentary soul is to do justice by his own hands. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted by authorities.- A civil action, in final analysis, then, is civilization’s substitute to vengeance.’ COUTURE 1950, p. 7.

⁹⁵ The reason for this denomination, *supra* Chap. I.E.6. In DAMAŠKA’s terms, this is the conflict-solving type of procedure: ‘The arrangements that pit the disputants against each other in a courtroom contest now become attractive as a peaceful substitute for a violent encounter between those who acknowledge no common ground. In the end, the fundamental structural principle upon which the procedural edifice of the reactive state is erected this becomes the idea that proceedings are a contest of two sides.’ DAMAŠKA 1986, p. 79, 98 ff.

⁹⁶ DAMAŠKA 1986, p. 98 (‘In the reactive [*laissez faire*] state the legal process takes the shape of a forensic contest. This contest must somehow be regulated: unregulated, like war without rules of combat, it would provoke reprisals, spinning of additional conflict rather than containing or absorbing the existing one.’).

⁹⁷ SHAPIRO 1980, p. 629 (‘Alternatively, appeal is viewed as providing the loser at trial with certain psychic benefits, such as catharsis.’).

dissatisfaction is enough to trigger the review.⁹⁸ As a consequence, here the court has to be willing to receive all the legal actions and defences, with their respective evidence in support, which the parties want to present. Therefore, in this model the court will decide on the points on which there is disagreement between the parties (law, facts or procedure), but only those on which there is an actual discrepancy. Quite the contrary, the issues on which the litigants agree, or at least there is no contradiction, will be the only matters excluded from attention in a trial court model, because there is no conflict to resolve.⁹⁹

Because the dispute-resolution function just aims at the social peace of private conflicts, in the trial court model a solution mutually agreed by the parties, achieved through facilitating negotiation, will prevail.¹⁰⁰ A settlement of the dispute can be more easily accepted by the parties than a judgment imposed by a judge.¹⁰¹ For the same reason of pacifying private conflicts, it is possible to delegate large portions of the dispute resolution to private arbitrators or mediators.¹⁰² Still, jurisdictions provide at least one public court to perform this function: the first instance courts.¹⁰³ These first instance courts can have different structures and procedures depending on whether the dispute involves a large or small value claim.¹⁰⁴

The difference between jurisdictions lies in how many more court levels, besides the first instance, are contemplated to repeat the dispute-resolution function. How many levels of trial courts should exist? In common law jurisdiction such as the US and England, there is only one court level performing this dispute-resolution function, the first instance trial courts.¹⁰⁵ The intermediate appellate courts, immediately above them, are not meant to repeat the first instance trial court

⁹⁸ FERRARI 2012, p. 259 ('Nearly all civil justice systems know appeals as means to enable the parties disappointed with an earlier decision to get a review of the same by a higher court.').

⁹⁹ DAMAŠKA 1986, p. 111 ('[S]ince the procedural aim is dispute resolution, the parameters of the dispute should be set by the disputants. The plaintiff or the prosecutor chooses what to allege, and the defendant, what to contest and what to admit: what is not contested should not be made an object of proof. True, the judge may have good reasons to look at facts other than those in dispute between the parties, but in doing so he would become "inquisitive", on his own and no longer limited to resolving the controversy.').

¹⁰⁰ DAMAŠKA 1986, p. 79 ('If the disputants reach an out-of-court settlement of their difficulty, the legal proceedings lose their underlying animus and come to an end; agreement between former litigants overrides prior judicial rulings.').

¹⁰¹ In China, for example, PEREENBOOM & SCANLON 2005, p. 40-41; CHAN 2012, p. 56.

¹⁰² PAULSSON 2013, p. 2 ('The argument for arbitration begins with respect for private arrangements ... The philosophical premise [of arbitration] is that people are free to arrange their private affairs as they see fit.').

¹⁰³ Failing to do so would infringe the right to a court. See *Golder v. UK* A 18 (1975); 1 EHRR 524 PC.; HARRIS *et al.* 2009, p. 398-402.

¹⁰⁴ For a comparative overview of these small claim courts, see WHELAN 1990.

¹⁰⁵ For the US, HAZARD & TARUFFO 1993, p. 178; for England, ZUCKERMAN 2013, p. 1113.

function (they are not a proper second first instance)¹⁰⁶ but just to monitor the errors of the lower trial courts.¹⁰⁷ In the cassation jurisdictions such as France and Italy, quite the contrary, the intermediate appellate courts are courts not just monitoring errors, as in the previous common law jurisdictions. Instead, they are seen as ‘second degree of jurisdiction,’ which means a full review of the dispute on law, facts and procedure.¹⁰⁸ In the French and Italian legal literature, their jurisdictions are described as a system of not just a single but a double degree of jurisdiction.¹⁰⁹ Therefore, the intermediate appellate courts of France and Italy do repeat the dispute-resolution function of the first instance courts.¹¹⁰

At the same time, French and Italian scholars emphasise that their legal systems are of double degree but not of triple degree. They usually stress that the court of cassation is not a proper third degree of jurisdiction – it is not a third ‘trial court,’ in *Black’s* broad definition¹¹¹ – because the facts of the dispute are not under review.¹¹² This means that their court of cassation is meant to perform a different function than their intermediate appellate courts and first instance courts. In France and Italy, the intermediate appellate courts repeat the dispute resolution function by a full review including the facts and evidence;¹¹³ while the cassation court monitors the lower courts’ errors only on points of law.¹¹⁴

Italian legal actors, however, fear that their court of cassation has become, in practice, a third degree of jurisdiction, a third trial court in our concept.¹¹⁵ That is the relevant aspect of the model for this study. To what extent does not only the first and second court levels, but also the third level court of last resort function as

¹⁰⁶ In the US, the possibility of a ‘second trial’ exists but at the same court level, DAMAŠKA 1986, p. 58-59; *supra* Chap. I.E.6.

¹⁰⁷ For the US, WHEELER 2004 p. 257; for England, BLAKE & DREWRY 2004, p. 226-227.

¹⁰⁸ For France, CORNU 1987, p. 244; for Italy, DEL GIUDICE 2008, p. 382.

¹⁰⁹ GRIVART DE KERSTRAT 1999, p. 116; AMRANI MEKKI 2011, p. 20.

¹¹⁰ SHAPIRO 1980, p. 646-647 (‘In civil law nations such as France and Italy the two forms of appeal [*de novo* or on the record] interact with the structure of the intermediate appellate court arrangements in ways that influence the general functions of appeal. In both countries the first appellate level (the court of appeals) is regional and proceeds by appeal *de novo* ... Distinctions between the trial and appeal were barely drawn, at least to the eyes of the common law observer. Indeed, the trial was not viewed as concluded until the last appellate authority had reviewed the entire record.’).

¹¹¹ GARNER 2009, p. 411; *supra* Chap. I.E.6.

¹¹² In France, BORÉ & BORÉ 2015, p. 240; in Italy the review on facts is not allowed either as a general rule, unless there is a procedural mistake in which the lower court did not take into account relevant facts alleged by the parties. Art. 360, n° 4. *Codice di Procedura Civile*. SILVESTRI 2017, p. 234. More in *infra* Chap. III.B (ii).

¹¹³ COFFIN 1995, p. 20 (‘[In the civil law] appellate court not only are to review issues of law but may reconsider evidence and may even receive additional evidence ...’).

¹¹⁴ COFFIN 1995, p. 21 (‘A dissatisfied litigant [in the civil law] has the right to seek further review limited to questions of law. The mode of such review is called recourse in cassation, which brings the case before the Supreme Court of Cassation.’). On France, BORÉ & BORÉ 2015, p. 239; and Italy, TAFFARI 2015, p. 37.

¹¹⁵ TARUFFO 1991, p. 159-160; SILVESTRI 2017, p. 237-239.

a trial court model for repeating the dispute-resolution function, as well? Nowadays it seems an apparent consensus between these common law and cassation jurisdictions under study that the court of last resort *should not be* a third trial court in a broad sense. Quite the contrary, it is a shared criticism that, if the court of last resort acts as a trial court model, reviewing all the aspects of every dispute, that court has distorted its functioning.¹¹⁶ To provide an additional ordinary instance of dispute resolution is not seen as a legitimate function of the courts of last resort, but as their malfunctioning. By analysing their specific attributes in the next chapters, this study will determine whether that malfunctioning exists.

2. Court of error

Trial courts can commit mistakes¹¹⁷ affecting equality before the law because some cases will be decided with a correct legal criterion and others with an incorrect one. Therefore, the Rule of Law depends on the fact that the court system should normally decide in a correct manner.¹¹⁸ Still, if a trial court can commit mistakes, the Rule of Law requires the contemplation of measures to minimise those errors.¹¹⁹ In the second ideal model, the *court of error* is meant to be a surveillance device. This means that the court is in charge of controlling the lower courts' behaviour.¹²⁰ Here, the higher court must be structured as an inspection agency, monitoring errors.¹²¹ Therefore, it needs to be efficient for supervising and correcting the inferior courts' mistakes. In this sense, the court of error is a model of policing. By performing these tasks, a deterrence effect is expected. The proper functioning of the court of error should discourage the lower courts from any misconduct.¹²²

¹¹⁶ TARUFFO 2012, p. 125-129.

¹¹⁷ KODEK, p. 36 ('If judges were infallible, there would be no need for appeals.').

¹¹⁸ UZELAC & VAN RHEE 2014, p. 3 ('[T]he public confidence in the justice system depends on our belief that decisions made in the judicial process are reasonably correct and accurate.').

¹¹⁹ Appeals are not the only way to minimise mistakes. Appeals are an *ex post* mechanism for error-correction. But there is also the *ex ante* device to prevent error – for example, improving the working conditions of the trial courts, CABRILLO & FITZPATRICK 2008, p. 66; DAMAŠKA 1986, p. 59.

¹²⁰ SHAPIRO 1981, p. 39 ('[A]ppeals is essentially a device for exercising centralized supervision over local judicial officers.'). BARENDRECHT, BOLT & HOON 2006, p. 14-15.

¹²¹ HAZARD & TARUFFO 1993, p. 183 ('[A]ppellate review is a means of monitoring the performance of the first-instance courts, making them continually aware that their performance is under scrutiny by the higher judicial authority. This is the supervisory function.').

¹²² FERRARI 2012, p. 259 ('[T]he mere existence of the appeals process should encourage the first instance judge to put more effort into achieving the judgment with the highest possible quality ...'); DRAHOZAL 1998, p. 492.

In actual fact, it is impossible that a court of last resort, or any other appellate court, can check all the cases of the judicial system.¹²³ However, in a model of a court of error it is not necessary to watch over them all at once. The relevant aspect is that, potentially, any mistake can be inspected by this judicial police. Therefore, inferior court judges will never be certain, in advance, about which of their judgments will end up reviewed by the court of error.¹²⁴ But what they do know for certain is that some of them will. This permanent awareness of a potential review by the court of error, and not its actual review case-by-case, is what should incentivise the lower courts to make uniform their criteria according to the higher court's interpretations.¹²⁵

In general, the recourse to the higher courts (appeal in a broad sense)¹²⁶ are meant to perform this error-monitoring function.¹²⁷ In the US and England, as we observed, the intermediate appellate courts operate to check and amend the mistakes made by the first instance judge.¹²⁸ However, intermediate appellate courts, when reviewing the first instance decisions, can also commit errors themselves. A problem of redundancy emerges (*quis custodiet ipsos custodes*). Who will correct the error if the error-monitoring court commits a mistake too? In the US and England the answer is, in principle, no one. Their supreme courts are not meant to repeat the error-monitoring function.¹²⁹ In their culture, judges enjoy a high level of social prestige.¹³⁰ It seems that this judicial prestige makes them trust

¹²³ COTTERRELL 1992, p. 214 ('Increasing caseload pressure in the trial courts at the base of the judicial hierarchies, coupled with escalating cost of judicial proceedings and complaints of delay in civil and criminal cases, helps to promote administrative efficiency ... [A]ppellate courts are much more concerned with disputes of various kinds, yet the fact that they actually hear and decide a tiny proportion of the total of cases heard by court in any particular [*sic*].').

¹²⁴ SHAPIRO 1981, p. 50 ('[T]he appeal case ... is a partially random sample. The distribution of cases appealed is not determined by either the goals of the administrative subordinate [first instance judge] or his superior [intermediate appellate court] but by the non-administrative motivations of individual litigants.').

¹²⁵ In the political science literature, this is known as the principal-agent effect of the judicial hierarchies; see SONGER, SEGAL & CAMERON 1994, p. 673-696.

¹²⁶ *supra* Chap. I.E.7.

¹²⁷ KODEK 2014, p. 36 ('What ever appellate proceedings look like in practice, it is quite clear that the purpose of appeals is to ensure the "rectitude" of the decision, i.e. the "correctness" of the outcome of the proceeding.'). Also the literature on law and economics emphasises this error-correcting role of appeals; see SHAVELL 1995, p. 379-462; KORNHAUSER 2012, p. 19-51; *cf.*, OLDFATHER 2010, who argues that the function of appeal is not correcting errors but to provide an arena for what he calls 'second-order' disputes.

¹²⁸ In the US, for example, CARRINGTON 1987, p. 416 ('[The] legal system required an appellate system for one reason: The perceived role of the appellate court was to correct error of the trial court in applying the law to the facts. No one though appellate courts necessary or useful in making law or policy.').

¹²⁹ LE SUEUR 2004, p. 273 ('[T]he principal function of a top-level court in common law systems: it ought to be concerned not with error correction ...').

¹³⁰ ZWEIGERT & KÖTZ 1998, p. 210 ('All judges, even the Circuit judges, are chosen from among the group of successful and well-regarded barristers. This ensures that the higher courts are

that two court levels are sufficient guarantee of a correct judgment. For example, two English authors show this trust in a rhetorical question: '[G]iven that we have perfectly respectable first-tier appeal courts, do we need a second appeal at all?'.¹³¹ For that reason, in their jurisdiction the error-monitoring function could be performed by the intermediate appellate court alone.¹³²

In France and Italy, quite the contrary, judges do not enjoy such high social recognition.¹³³ In that opposite context, it could be hypothesised,¹³⁴ two court levels may not appear sufficient to guarantee enough rectitude of the decision. With a lower esteem for judges' capabilities, not just one, but two or more opportunities for error-correction will be demanded.¹³⁵ That could be why in jurisdictions such as France and Italy, as we will see, the third level court of cassation has been understood less as an exceptional court of general precedents and more as a frequent court for particular errors.¹³⁶

3. Court of precedents

A basic requirement of the Rule of Law is the production of clear regulation.¹³⁷ In order to keep societies in order, it is necessary to have legal rules which can be used as uniform decision criteria when resolving conflicts.¹³⁸ In present-day democracies, the role of creating such rules is entrusted to the legislature to an important degree. In cassation jurisdictions such as France and Italy, the main lawmaking function takes place in the Parliament at a first stage.¹³⁹ In common law jurisdictions such as the US and England, nowadays the legislation enacted by the Parliament can be as important as the case law.¹⁴⁰ However, the statutes which

manned by judges who are extremely competent and very experienced in practice, able to command the respect of the whole legal profession.')

¹³¹ DREWRY & BLOM-COOPER 1998, p. 114.

¹³² Chapter V is devoted to a detailed analysis of the common law intermediate appellate courts as courts of error.

¹³³ COTTERRELL 1992, p. 231 ('Yet continental judges ...[have a] relatively limited prestige as compared with their English counterparts ...'). On the explanation and consequences of this difference in status between civil law and common law judges, see MERRYMAN & PÉREZ-PERDOMO 2007, p. 34-38.

¹³⁴ The corroboration of this hypothesis requires a further socio-legal study, *infra* Chap. VI.F.3.

¹³⁵ In a similar direction, BARENDRECHT, BOLT & HOON 2006, p. 14.

¹³⁶ *infra* Chap. VI.C.4. (i,ii).

¹³⁷ RAZ 2009, p. 214 ('[The law] must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.')

¹³⁸ HAYEK also stressed the Rule of Law for individual liberty. HAYEK 1944, p. 76.

¹³⁹ GLENDON, CAROZZA & PICKER 2008, p. 129 ('[P]arliamentary legislation is today the principal source of law in civil law countries.')

¹⁴⁰ HEAD 2010, p. 441 ('[T]oday legislation and case-law act as largely co-equal sources of law in common law systems.')

parliaments create are written down in general and abstract terms in order to be equally applicable to the entire population.¹⁴¹

As a side effect of their generality, those legal statutes may produce problems when applied to particular circumstances. The legislation usually uses open clauses which admit to being interpreted in more than one way by the courts.¹⁴² In order to solve this problem, the legislature's work has to be complemented. That supplementary function needs to be performed by a different organ, a court which is more in touch with the particularities of each type of dispute.¹⁴³ Such contact with the disputes, which the legislature lacks, gives the courts a better perspective to identify and solve the problems of interpretation which general statutes create when applied to real litigation.

That is the judicial function of a *court of precedents* model. Its task is to intervene not in every particular dispute, but to take a stand in exemplary cases in which a general problem of interpretation arises.¹⁴⁴ The way in which the court solves these interpretation problems is by a judicial precedent that operates as an interpretation guideline.¹⁴⁵ That is to say, the decision of the court, which is delivered in the context of a particular conflict, is meant to be followed not only in the current case but also in future similar disputes, by the entire court system.¹⁴⁶ This implies that in this model the court has, to some extent, lawmaking power.¹⁴⁷ However, it would be misleading to believe that the lawmaking power of a court of precedents model is equivalent to that of the legislature. Here the legislation remains a superior or equally important normative source, but a source whose interpretation could be equivocal and needs further specification.¹⁴⁸ Unlike a constitutional court

¹⁴¹ TAMANAHA 2004, p. 66 ('Generality requires that the law be set out in advance in abstract terms not aimed at any particular individual.'). Also, HAYEK 1955, p. 34-37.

¹⁴² In legal philosophy this is known as the 'open texture' of the law, HART 1958/2012, p. 124-136; and the subsequent discussion with FULLER 1958, p. 630-672. On HART's notion of open texture, BIX 1991, p. 51-72.

¹⁴³ SILVESTRI 2001, p. 112 ('*Il legislatore si serve necessariamente di formule vaghe ed ambigue che, in quanto tali, si prestano ad una molteplicità di interpretazioni. Al giudice spetta il compito di sciogliere l'ambiguità e di ridurre la vaghezza dell'enunciato normativo, scegliendo una tra le possibili interpretazione della norma generale ed astratta e creando quindi una norma individuale, ossia quella destinata a regolare la fattispecie oggetto di decisione.*').

¹⁴⁴ BRAVO-HURTADO 2014, p. 326.

¹⁴⁵ HAZARD & TARUFFO 1993, p. 183 ('[T]he decisions of appellate courts expound and reformulate the law, thus providing specific legal guidance concerning similar transactions in the future.'): TARUFFO 2001B, p. 96.

¹⁴⁶ This level of influence on future cases, however, is not an all-or-nothing distinction, but a matter of degree in comparative perspective, as demonstrated by MACCORMICK & SUMMERS 1997B, p. 531-532.

¹⁴⁷ HAZARD & TARUFFO 1993, p. 184 ('Judicial creativity – judicial legislation – is natural to law itself ... Such creativity – "judicial lawmaking" – is the task of the supreme court.'). BARAK 2002A, p. 1206 ('The function of a supreme court, in the states as well as in the federal system [of the US], thus more closely approximate those of a legislative, facing forward as lawgivers.');

¹⁴⁸ MITIDIERO 2015, p. 203-204.

– which, as we shall see, can properly deliver judgments which are hierarchically above legislation when it is unconstitutional – the judgments of a court of precedents acts only in the margins, in hard cases where the specific clauses of a legal statute could remain ambiguous or uncertain. A court of precedents does not annul legislation, but gives a more precise content.¹⁴⁹ In this sense, the court of precedents exercises a *supplementary* lawmaking function.¹⁵⁰

In general, the model of court of precedents is first associated with common law jurisdictions of the US and England.¹⁵¹ The judge-made law which characterises them was built on a judiciary understood precisely as courts of precedents. However, civil law jurisdictions – such as France and Italy, among others – are nowadays more open to such judicial lawmaking functions, as well.¹⁵² Contemporary legislation is becoming more abundant, specialised and less systematic (decodification).¹⁵³ In that context, problems of interpretation between statutes may arise.¹⁵⁴ Therefore, jurisdictions like France or Italy also need courts which assume the responsibility of solving those problems of general interpretation and legal certainty.¹⁵⁵ In more explicit or implicit ways, as we shall see, some type of court of precedents will be implemented – *e.g.*, the cassation plenary sessions.¹⁵⁶

¹⁴⁹ MITIDIERO 2015, p. 214-215 ('The interpretation process [by the court of precedents] culminates in ... the narrowing of the normative framework; its production gives new data to the legal system ... fixing a normative meaning that was previously mistaken.').

¹⁵⁰ BARAK 2002a, p. 1205 ('[The] law determination [made by the courts] does not involve, in most cases, any creation. The law is known and determined ... However, there are hard cases. In such cases law is uncertain. There is more than one meaning to be given to the legal text. In such cases, law declaration [by the courts] also involves law creation.').

¹⁵¹ BRAVO-HURTADO 2014, p. 326 ('While the common law found another way, seeking uniformity through recourse to a supreme court that understands its work as taking a stand on doctrinal disputes that occur only in certain exemplary cases, while the solutions serve as general guidelines for other cases.').

¹⁵² MERRYMAN & PÉREZ-PERDOMO 2007, p. 154; MACCORMICK & SUMMERS 1997B, p. 531-535; BRAVO-HURTADO 2013, p. 549-576 (Chile); PARISE 2016, p. 151-190 (Argentina).

¹⁵³ MERRYMAN & PEREZ-PERDOMO 2007, p. 152-154. On decodification, IRTI 1979; GLENN 1998, p. 768-769; MORETEAU & PARISE 2009, p. 1103-1162.

¹⁵⁴ MERRYMAN & PÉREZ-PERDOMO 2007, p. 152 ('[O]ne function of a carefully drafted, substantially coherent civil code was to provide certainty in the law. It is apparent that that much special legislation impairs the quest for that kind of certainty.').

¹⁵⁵ ROBERTS 2007, p. 356 ('National legal systems differ in the extent to which judicial law-making is formally acknowledged. Whether or not they embrace a formal system of precedents on the common law model, however, all appellate tribunals in mature legal systems contribute to the development of domestic law through their judgments in contested cases.').

¹⁵⁶ *infra* Chapt. VI.D.2; in general, Chap IV.

4. Constitutional court

The Rule of Law requires that not only private agents, but also public organs have to be subject to the legal order.¹⁵⁷ To perform this function, an independent system of courts is needed to control whether these public organs – either the executive or the legislature – behave according to the Rule of Law as well.¹⁵⁸ Accordingly, these courts are in charge of ‘judicial review’ *vis-à-vis* the executive and legislative branches.¹⁵⁹ This institution means that the judicature is entitled to scrutinise the conformity of the public organs’ decision with higher norms.¹⁶⁰ When such power is exercised, the act of the authority under scrutiny may end invalidated.¹⁶¹ By doing so, the courts act as a control against the abuse of power of the other organs of the state.¹⁶²

Still, the control of the Rule of Law on the executive is different than the control on the legislature. On the executive, controlling the Rule of Law requires a judicial review on whether the administrative organs behave according to the legislation.¹⁶³ Against the executive, therefore, the courts exercising judicial review on administrative acts do not need to apply a legal source of a different hierarchical level than the ordinary courts, which apply legislation too. Because their judicial functions are similar in that aspect, further research could explore whether the three previous models made for the ordinary courts – *i.e.*, trial court, court of error and court of precedents – are also present in the court system applying judicial review against the executive (either the ordinary courts or specialised administrative courts).

When it comes to the legislature instead of the executive, however, the same judicial review based on legislation is insufficient for the Rule of Law. How to enforce the legislation of the Rule of Law against the same organ which creates that

¹⁵⁷ ROGOWSKI & GAWRON 2016, p. 1 ([C]onstitutions and their judicial enforcement are crucial achievements in establishing both autonomous legal orders and democratic political orders based on the notions of checks and balances of the central powers, the rule of law, and inalienable individual rights.’). See again, TAMANAHA 2004, p. 114.

¹⁵⁸ On the European Continent, this idea that the control of public organs, particularly the constitution against the legislature, should be in charge of an independent court comes from KELSEN 1931/2008; and his debate with SCHMITT 1931/1996. For a translation into English, VINX 2015; Also FAVOREAU & MASTOR 2011, p. 19-20.

¹⁵⁹ On judicial review in comparative perspective, CAPPELLETTI 1971.

¹⁶⁰ HERINGA & KIIVER 2012, p. 159.

¹⁶¹ Another definition of judicial review, GUARNIERI & PEDERZOLI 2002, p. 134 ([T]he power of judicial (or constitutional) review: to review a law passed by a majoritarian institution, make a binding decision on its conformity to the constitution, and therefore either validate or nullify.’). Case law definitions of judicial review in the UK are different because judicial review is limited to administrative acts, FORDHAM 2012, p. 3 ff.; UK judicial review in comparative perspective, VAN DE SCHYFF 2011.

¹⁶² HARDING, LEYLAND & GROPPI 2009, p. 27.

¹⁶³ HERINGA & KIIVER 2012, p. 159 (The judge with judicial review power ‘may check whether an administrative decision by a public authority complies with the authorizing general legislation.’).

legislation? In turn, the judicial review of the legislature requires checking the validity of the legislation based on a norm of an even higher hierarchy – *i.e.*, international treaty or political constitution – than the norms that the one’s own legislature can create. At a domestic level, which is the object of this study,¹⁶⁴ the main source of judicial review of legislation is, thus, the constitutional review.¹⁶⁵

The constitutional review of legislation requires a distinctive ideal model, the *constitutional court*, different from the previous three. The strong judicial review of legislation is, therefore, the distinctive characteristic of the constitutional court model.¹⁶⁶ The court of precedents, for instance, has a lawmaking function limited to supplement ambiguities and gaps of legislation.¹⁶⁷ The constitutional review, on the other hand, implies a much more powerful lawmaking function because the court can annul a piece of legislation even if it has no ambiguities or gaps at all. In that sense, the constitutional court model not only has supplementary but also a ‘negative’ lawmaking function because it can define what pieces of legislation *will not* apply in the future.¹⁶⁸

With negative lawmaking in its hands, this model of court could become as powerful as the parliament because the former can block the legislative decisions of the latter. Therefore, the parliament will need to take into consideration, beforehand, the judges’ views about what is constitutionally allowed and what is not.¹⁶⁹ In other words, the distinctive aspect of the constitutional court model is that it exercises a political counterweight function against the lawmaker itself. This ‘political’ nature of the constitutional court,¹⁷⁰ as we shall see, will define most of its specific attributes.

¹⁶⁴ *infra* Chap. I.E.1 (v).

¹⁶⁵ FINCK 1992, p. 123 (‘Judicial review is the mean by which a court determines the acceptability of a given law or other official action on grounds of compatibility with constitutional forms.’).

¹⁶⁶ FAVOREAU & MASTOR 2011, p. 24-27.

¹⁶⁷ *supra* Chap. II.C.3.

¹⁶⁸ The idea of the negative legislator comes from KELSEN’s original formulation. However, it has been contested by many authors. For example, GUARNIERI & PEDERZOLI 2002, p. 145-146 (‘... all constitutional courts do not bind themselves to what KELSEN described as “negatively legislating”. Their task is not only to answer yes or no to a constitutional complaint: the decision-making procedures courts have established also [*sic*] allow them to participate actively in the policy process.’). In detail on the positive legislator, see the comparative study coordinated by BREWER-CARIAS 2011.

¹⁶⁹ For example in France, especially with the *a priori* control of constitutionality, GUARNIERI & PEDERZOLI 2002, p. 145 (‘The mere possibility, if not the open threat, that a law will be referred to the *Conseil Constitutionnel* has forced the parliamentary majority to pay much more attention to legal implications when drafting bills in order to head off potential constitutional challenges.’).

¹⁷⁰ STONE SWEET 2013, p. 822-823 (‘CCs [constitutional courts] are given functions that would be viewed as too “political,” or constitutionally important ...’).

Constitutional review, understood in this way, marks a distinction between the jurisdictions under study. The US has a decentralised system.¹⁷¹ This means that, in principle, all the different levels of ordinary courts – with competence not only in constitutional law but also in criminal and civil matters in a broad sense – may exercise constitutional review power.¹⁷² Among them, their ordinary court of last resort at the federal level, the US Supreme Court, plays a predominant role in the constitutional review of legislation.¹⁷³ In that sense, their supreme court is the most important constitutional court model in the US.

In France and Italy, quite the contrary, ordinary courts lack constitutional review power.¹⁷⁴ Their ordinary courts of last resort for civil procedure, the courts of cassation, are not entitled to check the constitutionality of legislation.¹⁷⁵ Their power tends to be restricted to the legal (but not constitutional) review of particular disputes in civil, criminal and labour matters. Due to a different understanding of the separation of powers doctrine, among other reasons, France and Italy have a centralised system instead.¹⁷⁶ The monopoly of constitutional review of legislation has been given to specialised courts – *Conseil Constitutionnel* and *Corte Costituzionale*, respectively – which stand outside of the ordinary court system.¹⁷⁷ In France and Italy, therefore, the constitutional court model is located in these specialised and separate courts.

In the case of England, finally, there is no proper constitutional review of legislation because of the principle of parliamentary sovereignty.¹⁷⁸ In its place, the Human Rights Act introduced a weak or improper constitutional review because the UK Supreme Court has no power to invalidate legislation, but just to recommend modifications to the Parliament due to a declaration of incompatibility between an Act and the Human Rights Act.¹⁷⁹ Without a strong or proper

¹⁷¹ JACKSON & TUSHNET 2006, p. 465.

¹⁷² MAK 2013, p. 60; in general, on judicial review in the common law in general, WALUCHOW 2009.

¹⁷³ BAUM 2010, p. 156; on judicial activism through judicial review in these jurisdictions, see respectively, TUSHNET 2007, p. 415-436; ROACH 2007, p. 69-120; WHEELER & WILLIAMS 2007, p. 19-68.

¹⁷⁴ GUARNIERI & PEDERZOLI 2002, p. 146 ('In comparison to their American [US] counterparts, ordinary judges on the continent play a lesser role in the constitutional review of legislation, since this function tends to be the monopoly of special courts.').

¹⁷⁵ *infra* Chap. III.D.1 (i).

¹⁷⁶ FINCK 1992 125-126 ('The centralized system of judicial review, favoured by civil law countries, confines the power to determine the constitutionality of legislation to a single judicial organ. The countries preferring this system tend to adhere more rigidly to the doctrine of separation of powers ...').

¹⁷⁷ GUARNIERI & PEDERZOLI 2002, p. 137; STONE SWEET 2013, p. 817 ff.; CAPPELLETTI 1970, p. 1038 ff.; this is the case with regard to Spain (GÓMEZ FERNÁNDEZ 2007) and Germany (COLLINGS 2015), among others.

¹⁷⁸ DICKSON 2007, p. 363 ('The House [of Lords, now Supreme Court] operates in a State where the dominant constitutional principle is Parliamentary sovereignty, where there can be no a priori or a posteriori judicial review of the constitutionality of primary legislation ...').

¹⁷⁹ GLEDHILL 2015, p. 518 ff.

constitutional review power of legislation, thus, the UK Supreme Court does not correspond to a constitutional court model as defined here. Still, some sort of judicial review of legislation, based not on its constitutionality but on its accordance with EU law, is performed at an internal level by the UK Supreme Court,¹⁸⁰ and at an external level by the European Court of Justice and the European Court of Human Rights.¹⁸¹

The object of this study is limited to civil procedure.¹⁸² Therefore, the constitutional review will not be analysed in more detail.¹⁸³ However, some authors may suggest that the lack of constitutional review power of legislation at the French and Italian courts of cassation makes them not comparable with courts which do have it, such as the US Supreme Court. As mentioned in Chapter I,¹⁸⁴ however, the US Supreme Court has jurisdiction not only in constitutional matters, but it is the recourse of last resort in civil matters, as well.¹⁸⁵ From the perspective of that common denominator – that all these courts are the last resort in civil matters but not necessarily in civil matters only – the US and UK supreme courts and French and Italian courts of cassation will be compared in this study.¹⁸⁶

D. Manifest Functions

In the previous section, four ideal models of courts were discussed based on the corresponding four judicial functions that could be entrusted to the courts of last resort¹⁸⁷ based on the social needs of the Rule of Law. First, there is a trial court model devoted to providing a peaceful arena for full debate between parties (dispute resolution).¹⁸⁸ Second, there is a court of error which acts as a surveillance

¹⁸⁰ DARBYSHIRE 2011, p. 359; ANDREWS 2012, p. 109.

¹⁸¹ STONE SWEET & BRUNELL 2004, p. 68-71.

¹⁸² *infra* Chap. I.E.2.

¹⁸³ Comparative studies in constitutional law have been devoted to this function. They contrast the common law ordinary supreme court, mainly the US example, with the civil law separate constitutional courts, usually the German Federal Constitutional Court (*Bundesverfassungsgericht*). For a deeper analysis, I refer to that literature. ROGOWSKI & GAWRON 2016; KAU 2007.

¹⁸⁴ *infra* Chap. I.F.1.

¹⁸⁵ However, among the federal law issues, the proportion of disputes on pure private law matters can be minor in its total caseload. SUMMER 1991, p. 408.

¹⁸⁶ Besides CAPPELLETTI 1989, p. 142, the same comparability between common law supreme courts and civil law cassation courts is suggested by ZWEIGERT & KÖTZ: 'We shall concentrate here on the Court of Cassation, the highest French court in civil and criminal matters, which deserves special attention, since it differs in characteristic respects [*sic*] from the comparable supreme courts of the Anglo-American and German legal families.' [emphasis added] ZWEIGERT & KÖTZ 1998, p. 120.

¹⁸⁷ Let us remember that the fifth function of law enforcement is not included here since the enforcement officials of the first instance courts, instead of the court of last resort itself, are entrusted with this role, *infra* Chap. II.A.4 (*iv*).

¹⁸⁸ *supra* Chap. II.C.1.

device to minimise, on a one-by-one basis, the deviations of the lower courts from the correct legal criteria (error-monitoring).¹⁸⁹ Third, there is a court of precedents with the task of solving general interpretation problems, providing more or less binding guidelines (judicial lawmaking).¹⁹⁰ Finally, there is a constitutional court with the power of constitutional review of legislation (political counterweight).¹⁹¹ Remembering the functions and models is relevant here because now our attention will turn to the way in which each jurisdiction conceives these functions. In other words, this section will observe how the local legal actors describe the *manifest* functions of their courts of last resort, and categorise their descriptions based on the previous four ideal models and judicial functions.

In order to identify these manifest functions, the study analyses the way in which the national participants themselves describe the role, purpose or mission of their court of last resort. Special attention will be paid to how such functions are formulated by the legislators, legal scholars and by the court of last resort judges.¹⁹² After a brief description of the origins of the different courts of last resort and their current structure for civil procedure, this section will discuss how the four judicial functions and ideal models are accepted or rejected by local legal actors at the court of last resort level in each of the jurisdictions. To identify the manifest function in such a way will be useful to analyse, in Chapter III, whether the actual configuration of the court of last resort's attributes is appropriate for its manifest functions, or if some other latent function can be performed under the same attributes configuration.

1. United States of America

The court of last resort for civil matters at the federal level in the US is called the *Supreme Court of the United States*.¹⁹³ It was created under provision of the US Constitution of 1787 and by authority of the Judiciary Act of 1789.¹⁹⁴ Originally, it had six members,¹⁹⁵ whose duties included riding circuit, which required the justices to travel around the country to hold court in assigned judicial districts.¹⁹⁶

¹⁸⁹ *supra* Chap. II.C.2.

¹⁹⁰ *supra* Chap. II.C.3.

¹⁹¹ *supra* Chap. II.C.4.

¹⁹² TARUFFO 1998, p. 104 ('We may define the "intended [manifest]" of a supreme court the functions that are ascribed to this court by the law that creates it and regulates its functioning, and by the legal science that interprets and rationalizes the law').

¹⁹³ The regulation of its organisation and functioning is in the *US Constitution*, Art. 3, Section 1. Also in the *US Code*, Title 28, Part One, Chapter 1, §§ 1-6. Its institutional website is: www.supremecourt.gov.

¹⁹⁴ On the origins of the US Supreme Court, see HOFFER, HOFFER & HULL 2007 p. 15-50 (Chapters 1 and 2); also SURRENCY 2002, 327 ff.

¹⁹⁵ BAUM 2010, p. 11 ('The Judiciary Act of 1789 provided for six justices'); SURRENCY 2002, p. 336.

¹⁹⁶ HOFFER, HOFFER & HULL 2007 p. 33.

Over time its size increased to the current nine justices,¹⁹⁷ working as a full bench in every case (*en banc*),¹⁹⁸ and it became permanently settled in Washington, DC.¹⁹⁹

Besides some other specific competences,²⁰⁰ nowadays the main recourse of last resort in civil procedure before the US Supreme Court is named ‘writ of certiorari,’²⁰¹ which could be used for criminal matters too. Currently, the US Supreme Court receives around 8,000 petitions for certiorari review per year.²⁰² However, only a small fraction, of around one hundred cases, pass that preliminary screening and are judged on the merits.²⁰³ Unlike the other jurisdictions under study, the US Supreme Court is a court of last resort *not only* for criminal and civil matters at the federal level. Since *Marbury v. Madison* (1803), the US Supreme Court is a court with the power of constitutional judicial review on the executive and the legislature.²⁰⁴ This judicial review power has made the US Supreme Court the court of last resort for constitutional matters, as well.²⁰⁵

i. Court of precedents

First, US judges and scholars emphasise that the role of the US Supreme Court is to solve problems of conflicting interpretation which may arise in the (federal) law. For example, the legal scholar WHEELER states:

The [Supreme] Court’s role is to provide national judicial resolution of federal legal questions that are unsettled because of conflicting interpretations in lower appellate courts or because of the lack of resolution by the Court or the Congress.²⁰⁶

In an even more emphatic way, former justice of the US Supreme Court O’CONNOR defines the role of the Supreme Court in the same direction:

One of the Supreme Court’s most important functions – and perhaps the most important function – is to oversee the system-wide elaboration of federal law, with an eye toward creating and preserving uniformity of interpretation.²⁰⁷

¹⁹⁷ BAUM 2010, p. 11-12.

¹⁹⁸ WHEELER 2004, 254.

¹⁹⁹ SCHWARTZ 1993, p. 32.

²⁰⁰ HALL, ELY & GROSSMAN 2005, p. 47-48.

²⁰¹ Regulated in the *Rules of the Supreme Court of the United States*, Rule 10 to 16. On the writ of certiorari in general, TIRIO 2000; its origins, SURRENCY 2002, p. 344-348.

²⁰² WHEELER 2004, p. 248.

²⁰³ WHEELER 2004, p. 248; in detail, *infra* Chap. III.B.4 (i).

²⁰⁴ On the origins of *Marbury v. Madison*, NELSON 2000.

²⁰⁵ ROGOWSKI & GAWRON 2016, p. 2 (‘[T]he U.S. Supreme Court is at the top of federal judicial system and has appellate jurisdiction in all cases arising from federal courts. However, the Supreme Court is also the highest constitutional court in the United States.’).

²⁰⁶ WHEELER 2004, p. 253.

²⁰⁷ O’CONNOR 1984, p. 5.

These two quotes clearly point out that one of the manifest functions of the US Supreme Court is to operate as a court of precedents. Its role, therefore, is to provide general guidelines in only a few disputes in which an important problem of interpretation arises. This role is meant to be reinforced by the total discretion of the writ of certiorari. From the perspective of judges and scholars, a discretionary device to control its docket and select cases is strictly necessary for the function of clarification of the case law.²⁰⁸ The US is a federal system, therefore the uniformity of interpretation role of the US Supreme Court is not with regard to the entire legal system but just focused on federal law, for which the US Constitution is the main source.²⁰⁹

ii. *Court of error*

From the US perspective, the function of the Supreme Court as a court of precedents is meant to guarantee – as in the French and Italian courts of cassation²¹⁰ – the equality of citizens in the application of the law. In fact, this goal has even been incised on the architrave over the main entrance of the Supreme Court building (Equal Justice Under Law). From the French and Italian perspective, as we shall see, the principle of legal equality requires that the court of cassation perform both as a court of precedents and as a court of error, at the same time.²¹¹ In the US approach, quite the contrary, the function of a court of error is not assigned to the Supreme Court, even if equality before the law is also its final concern. In WHEELER's opinion, '[T]he [Supreme] Court's function is not to correct errors in individual cases except in the course of exercising its national law-declaring role.'²¹² Therefore, the manifest error-monitoring function of a court of error is denied to the US Supreme Court.

However, it would be misleading to think that the error-monitoring function is not guaranteed in the US court system. Unlike in France and Italy, where the manifest functions of the courts of cassation aim to combine judicial lawmaking with the error-monitoring,²¹³ in the US this last function is not assigned to the court of last resort itself. Instead, the task of monitoring errors is delegated to a different set of

²⁰⁸ O'CONNOR 1984, p. 5 ('It is precisely of the importance of this unifying function that the jurisdiction of the Supreme Court of the United States has been made ever more discretionary over the years.');

RICHMAN & REYNOLDS 2013, p. 3 ('Instead, the newly created *certiorari* jurisdiction of the Supreme Court was supposed to give that Court the time to serve as the primary expositor of the federal law.').

²⁰⁹ CHEMERINSKY 2002, p. 37 ff.

²¹⁰ *infra* Chap. II.D.3 (ii); Chap. II.D.4 (ii).

²¹¹ *infra* Chap. II.D.3 (i,ii); Chap. II.D.4 (i,ii).

²¹² WHEELER 2004, p. 253. Also, PROVINE 1980, p. 12 ('The belief that the Supreme Court should not function primarily as an appellate court for correcting lower court errors constitutes an important element in the modern Court's conception of itself.').

²¹³ *infra* Chap. II.D.3 (i,ii); Chap. II.D.4 (i,ii).

courts.²¹⁴ The US Supreme Court can be focused only on its performance as a court of precedents because the role of a court of error, which is also necessary to guarantee equality before the law, is entrusted to the intermediate appellate courts.²¹⁵ This distribution of roles between the US Supreme Court and the Federal Courts of Appeals is explained by RICHMAN & REYNOLDS as follows:

By making the Supreme Court's jurisdiction largely discretionary, the Congress [Judge's Bill, 1925] sought to free it from the burden of handling routine matters of error correction. The idea was that the [Supreme] Court would then be able to focus on matters of constitutional law and the exposition of the federal law generally. The day-to-day judicial business of the federal appellate courts – supervising the work of the district courts – could then be entrusted to the circuit [appellate] judges. Thus, the primary role of the circuit [appellate] judges was to supervise the dispute resolution in the trial courts and not to expound the law ... Thus, the circuit courts [of appeal] were created to serve the modest end of policing the trial courts. Law-making was not their task.²¹⁶

Therefore, the US approach would disagree with the French and Italian perspectives, according to which the role of a court of error and a court of precedents should be combined within the same court of last resort.²¹⁷ Instead, the US approach suggests that the error-monitoring and judicial lawmaking functions should be separate, in a proper coordination between intermediate appellate courts and the court of last resort.²¹⁸

iii. *Constitutional court*

As mentioned, early in US history a political counterweight function was given to the Supreme Court. This function can be traced back to *Marbury v. Madison*, in which the Supreme Court assumed the power of judicial review on the constitutionality of acts of the legislature or the executive.²¹⁹ Since then, the US Supreme Court has consolidated its manifest function as a political counterweight to the branches of political power. Chief Justice REHNQUIST was eloquent in this constitutional profile:

²¹⁴ WHEELER 2004, p. 257 ('The [US] Supreme Court relies on the court of appeals to correct errors, freeing it to decide a small number of cases each year that it believes present issues that most need national judicial resolution.').

²¹⁵ SHAPIRO 1980, p. 632-633 ('Intermediate appellate courts correct the individual injustices that occur in the trial courts. The {US} Supreme Court reserves its time for making new law; any notion of appeal as a correction is highly attenuated. '); HAZARD & TARUFFO 1993, p. 183 ('The task of supervising trial court adjudication is performed primarily by the intermediate appellate courts ...').

²¹⁶ RICHMAN & REYNOLDS 2013, p. 2-3.

²¹⁷ *supra* Chap. II.D.3 (ii) and Chap. II.D.4 (ii).

²¹⁸ WHEELER 2004, p. 257 ('Because the court of appeals provide litigants that review-for-error function, they free the [US] Supreme Court to devote its energies almost exclusively to establishing national judicial policy.').

²¹⁹ In detail on judicial review and *Marbury v. Madison*, see CLINTON 1989.

It's relatively simple to describe in one or two sentences the role of the Supreme Court of the United States in our nation's system of government. Congress and the president enact laws, the presidents execute the law, and the Supreme Court decides cases arising under such laws or under the Constitution. In a case properly brought before it, the Court must decide whether or not a particular challenged law violates the Constitution, or whether or not an individual claiming injury by the government has had his constitutional rights violated.²²⁰

Therefore, besides acting as a court of precedents, the US Supreme Court also has a manifest function to operate as a model of constitutional court.²²¹ Observers of the Supreme Court usually focus their attention on its interpretation of the US Constitution.²²² This gives the impression that its function as a court of constitutional review of legislative or executive acts may even predominate over its function as a court of precedents of the ordinary federal law. According to BAUM, however, the US Supreme Court also devotes much of its energy to the adjudication of questions of federal law,²²³ in which it acts more as a court of precedents instead.²²⁴ Therefore, the manifest function of the US Supreme Court is also a combination of judicial functions, but a different combination than in France and Italy. The US Supreme Court manifest functions are, at the same time, judicial lawmaking and political counterweight (but not error-monitoring).

iv. Trial court

Before the creation of the Federal Courts of Appeals (1891),²²⁵ the US Supreme Court was an appellate court entitled to a full review on the trial court's evaluation of evidence and application of the law.²²⁶ In its early beginnings, the US Supreme Court did not have any preliminary screening to exclude cases at an early stage and, therefore, received disputes mostly of a private relevance.²²⁷ Its task was

²²⁰ REHNQUIST 2002, p. 267; NOWAK & ROTUNDA 2004, p. 1.

²²¹ FERRERES COMELLA 2011, p. 265 ('The Supreme Court of the United States, for instance, is sometimes taken [*sic*] to be a "constitutional court" in many respects, given the significant percentage of constitutional cases that it decides every year.');

²²² BAUM 2010, p. 156 ('Observers of the [US Supreme] Court tend to focus on its interpretations of the Constitution ...').

²²³ BAUM 2010, p. 157 ('However, the Court devotes much of its collective energy to statutory interpretation, adjudication disputes about the meaning of federal law.').

²²⁴ This is clear in the different effects of their constitutional and statutory precedents, *infra* Chap. III.B.2 (i).

²²⁵ RICHMAN & REYNOLDS 2013, p. 2.

²²⁶ REHNQUIST 2002, p. 236 ('[I]n these early days [the task of the US Supreme Court] was to do what any other appellate court traditionally does: make sure that the trial was fairly conducted, that the judge correctly applied the law, and that the evidence supported the result reached by the lower court.').

²²⁷ HOFFER, HOFFER & HULL 2007, p. 31 ('[The Judiciary Act of 1789] provided the means by which suits in lower federal courts could be appealed to the High Court. In many of these, the High Court had no choice but to hear the appeal. Thus much of the business of the first

understood as the highest court in the land, in charge of making sure that justice was rendered to every litigant.²²⁸ During that initial period, therefore, the US Supreme Court had a manifest dispute-resolution function.

Those days of the initial period, in REHNQUIST's words, are long gone.²²⁹ A century after the Supreme Court's establishment, several measures were taken to reduce its caseload burden and change its function. The first was the creation of the Federal Courts of Appeals (1891), which would take control of an important part of the appellate caseload.²³⁰ Later on (1925), the Judiciary Act was amended, providing the Supreme Court with a discretionary preliminary screening to decide which cases to review (the writ of certiorari).²³¹ Finally, several reforms were introduced to eliminate those matters which the Supreme Court was obliged to review due to an appeal as of right (mandatory jurisdiction).²³² The result of the series of reforms is that today the US Supreme Court has an almost entirely discretionary jurisdiction.²³³ Only a minor portion of cases that have outstanding relevance will be reviewed by it.²³⁴ This restrictive preliminary screening makes the US Supreme Court incompatible with the model of trial court which requires the opposite approach, an openness to every possible dispute.

In the US, the dispute-resolution function of the first instance trial courts is not repeated at the level of the intermediate appellate courts either.²³⁵ As we have seen,²³⁶ the US Federal Courts of Appeals are not viewed as a second and higher trial court model, but as a device for the error-monitoring of the lower courts instead.²³⁷ This is different from what we find in France and Italy, as we shall see, where both first instance and intermediate appellate courts are meant to repeat the dispute-resolution function of a trial court model in a broad sense.²³⁸ Unlike in France and Italy, therefore, the dispute-resolution function is assigned only to the first instance level of trial courts in the US.

[US Supreme] Court involved private actions rather than matters of a real public importance or the interpretation of the Constitution.').

228 REHNQUIST 2002, p. 235-236 ('Many would say that the task of the "highest court in the land" is to make sure that justice is done to every litigant ... The [US] Supreme Court once played a role in the federal system corresponding fairly closely to that description ...').

229 REHNQUIST 2002, p. 236.

230 CARRINGTON 1987, p. 414.

231 HOFFER, HOFFER & HULL 2007, p. 220.

232 WHEELER 2004, p. 243-244.

233 PROVINE 1980, p. 10-13.

234 PERRY 1991, p. 22 ('The [US] Supreme Court has virtually complete discretion over which cases to hear, and proportionally it chooses very few indeed.').

235 HAZARD & TARUFFO 1993, p. 178 ('[US Federal] Appellate courts do not wish to "retry the case" ...').

236 *supra* Chap. I.E.6; Chap. II.C.1.

237 RICHMAN & REYNOLDS 2013, p. 3.

238 *infra* Chap. II.D.3. (iii); Chap. II.D.4. (iii); *supra* Chap. I.E.6.

2. England

The court of last resort for civil and criminal cases which arise in England is now called *The [UK] Supreme Court*.²³⁹ This new UK Supreme Court also has jurisdiction in civil matters in Wales, Northern Ireland and Scotland.²⁴⁰ It was created in 2009,²⁴¹ but the new UK Supreme Court continues most of the judicial functions which were previously assigned to the House of Lords, particularly to the Lords of Appeal in Ordinary (the Law Lords).²⁴² The reform from a judicial House of Lords to a proper Supreme Court was meant to solve the problems of the separation of powers and judicial independence in the UK.²⁴³ Together with the House of Commons, the House of Lords is involved in the legislative process.²⁴⁴ Therefore, the judicial functions of the House of Lords implied that there was no complete institutional separation between the legislative and judicial powers.²⁴⁵ As a result, a Constitutional Reform Act was enacted in 2005, according to which the judicial functions of the House of Lords, and also the tasks of the Judicial Committee of the Privy Council, were transferred to a new and separate Supreme Court, with its own independent building.²⁴⁶ From that time on, the judges of the UK Supreme Court are not allowed to sit or vote in Parliament, unlike the previous Law Lords.²⁴⁷

²³⁹ ANDREWS 2013, p. 454-455; The regulation of its organisation and functioning is in the *Constitutional Reform Act* of 2005, Part 3, Art. 23-60. Its institutional website is: www.supremecourt.uk.

²⁴⁰ INGMAN 2004, p. 13.

²⁴¹ On the origins of the new UK Supreme Court, see LE SUEUR 2004A, p. 3-20.

²⁴² NEUBERGER 2009, p. 9 ('[T]he creation of the new Court was not intended to make any changes in the powers of the UK's top court. They were to be neither increased nor decreased: the [UK] Supreme Court is to have the entire jurisdiction that the judicial House of Lords had prior to October 2009.'). In detail on the history of the previous House of Lords and its judicial role, see BLOM-COOPER, DICKSON & DREWRY 2009.

²⁴³ One of the first to suggest this solution was STEYN 2002, p. 382-396. Commenting on the first proposal, HYRE 2004, p. 423-473, WOODHOUSE 2004, p. 134-155, and the alternatives HALE 2004, p. 36-54. Finally, a Continental perspective on the UK reform in BELL 2004, p. 156-168.

²⁴⁴ GLENDON, CAROZZA & PICKER 2008, p. 206-207 ('The House of Lords while discussed here in its judicial capacity in the end cannot be divorced from the fact that it is also a legislative body.').

²⁴⁵ MASTERMAN 2010, p. 18 ('While the fact that the executive branch is drawn from the legislative is possibly the most obvious violation of the institutional separation [of powers], it is by no means the only overlap of personnel. Until the coming into force of Part 3 of the Constitutional Reform Act (CRA) 2005, members of the judiciary – the Lords of Appeal in Ordinary – continued to exercise their judicial function from within the Upper House of the legislature. The Law Lords possessed the same rights to sit and vote in the legislative business of the House as other members, and exercise their judicial role sitting as a committee of the House of Lords.').

²⁴⁶ LE SUEUR 2004A, p. 6. On the Constitutional Reform Act of 2005 in general, OLIVER 2006; BRAZIER 2008; BOGDANOR 2005, p. 75-98. A previous discussion on what to do with the House of Lords, FORMAN 2002, p. 207-226 (Chapter 10).

²⁴⁷ ANDREWS 2017, p. 40 ('The new court's Justices are disqualified from sitting or voting in the Parliamentary debates of the House of Lords.'). On the new relation between the UK

The recourse of last resort in civil procedure before the UK Supreme Court is called ‘appeal’.²⁴⁸ This appeal is not as of right, but requires permission (previously called ‘leave’) granted by the lower court or the UK Supreme Court itself.²⁴⁹ The caseload of the UK Supreme Court is more reduced than that of the US Supreme Court. It receives around 400 applications for permission to appeal, from which around 60 cases are judged on the merits in a normal year.²⁵⁰ Despite its reduced caseload, the UK Supreme Court is slightly bigger than its US counterpart. It has twelve judges, an equal number as in the previous House of Lords,²⁵¹ who work not as a full bench but in changing combinations of five or seven judges.²⁵² Unlike the French and Italian courts of cassation, however, these teams are not stable during a particular time period. Instead, different combinations of judges comprise the UK Supreme Court panel from one case to another.²⁵³ The President of the Court decides the composition of the panel, depending on the specialisation of each judge and the kind of legal problems that the appeal raises.²⁵⁴

i. Court of precedents

In the other jurisdictions under study, the manifest function of the courts of last resort is double. In France and Italy, it is a combination between error-monitoring and judicial lawmaking.²⁵⁵ In the US it is a combination between judicial lawmaking and political counterweight.²⁵⁶ This marks an initial difference with England, where the manifest function of the UK Supreme Court is not defined as a combination of two, but as just one single manifest function. For example, according to the legal scholar ANDREWS:

Supreme Court and judicial independence, see NEUDORF 2012, p. 25-43. About the UK Supreme Court’s early years, PHILLIPS 2012, p. 9-12.

²⁴⁸ Appeals in general are now regulated in the *Civil Procedure Rules*, Part 52 *Appeals*. But the specific regulations on appeal at the UK Supreme Court are in the *Rules of the Supreme Court 2009* and its fourteen *Practice Directions (1-14)*. On the general appeals of civil matters in England, see LEABEATER *et al.* 2014; BURTON 2013.

²⁴⁹ ZUCKERNANN 2013, p. 1139-1140.

²⁵⁰ *infra* Chap. III.B.4 (i).

²⁵¹ DICKSON 2013A, p. 9 (‘The Constitutional Reform Act 2005 provides for a maximum of 12 [UK] Supreme Court Justices to be in office at any one time, the same number as allowed for Lords of Appeal in Ordinary since 1994.’).

²⁵² BURROWS 2013, p. 305-309. LE SUEUR & CORNES 2001, p. 133.

²⁵³ *infra* Chap. III.B.6 (i).

²⁵⁴ LE SUEUR & CORNES 2001, p. 134 (‘A third advantage of the current listing arrangements is that they enable the [...] fields of expertise of a panel to be fine-tuned.’). However, important criticism arises due to the lack of transparency in the compositions of the panels. For example, WOODHOUSE 2007, p. 165 (‘[Judge reports] could contain additional information, such as the criteria used to determine the membership of the [UK] Supreme Court’s panels ... Such information could help to prevent damaging accusations that the selection of a panel was manipulated in a particular case to ensure a certain outcome.’); LE SUEUR & CORNES 2001, p. 34-35.

²⁵⁵ *infra* Chap. II.D.3 (ii); Chap. II.D.4 (ii).

²⁵⁶ *supra* Chap. II.D.1. (iii).

The [UK] Supreme Court's function is to examine points of important law, that is, matters of significance to the *development* and *clarification* of the law.²⁵⁷

During the times of the House of Lords, the same function of development and clarification of the law was described as 'supervision' altogether. According to DREWRY & BLOM-COOPER:

[The House of Lords supervision was] the process of laying down fresh precedents and statutory interpretations and updating old ones for the guidance of lower courts [*i.e.*, development] ... It also consist in resolving legal problems of a particularly high order, both of difficulty and of a public importance, that arise in that important minority of "hard" cases that require judicial attention of the highest order [*i.e.*, clarification].²⁵⁸

Based on the models of courts, this manifest function corresponds clearly to a court of precedents of a judicial lawmaking function. The idea that the UK Supreme Court's function is *clarification* of the law implies, *a contrario sensu*, that the interpretation may have problems of contradictions or ambiguities that need to be clarified.²⁵⁹ The role of *development* also refers to another type of case law problem, in which the decision criteria can be outdated and need to evolve.²⁶⁰ Therefore, the UK Supreme Court is in charge of resolving interpretation disputes by providing general guidelines meant to be followed by the rest of the court system. In fact, the Supreme Court guidelines exercise such influence that they count as binding precedents on the particular country of the kingdom where the case comes from and, at least, have a strong persuasive force for the other countries of the UK.²⁶¹ However, the distinctive aspect in the definition of the manifest function of the UK Supreme Court as a court of precedents is that, as we shall see, this role is considered by English judges and scholars as to some extent incompatible with the other three models of courts and their judicial functions.

ii. Court of error

First, the performance of such a judicial lawmaking function limits the UK Supreme Court's capability to act as a court of error. In the words of Judge BINGHAM:

In its role as a Supreme Court, the House [of Lords, now 'UK Supreme Court'] must necessarily concentrate its attention on a relatively small

²⁵⁷ ANDREWS 2017, p. 38 [emphasis added].

²⁵⁸ DREWRY & BLOM-COOPER 2009, p. 51-52.

²⁵⁹ DREWRY & BLOM-COOPER 2009, p. 52.

²⁶⁰ LE SUEUR & CORNES 2001, p. 44-45 ('Judges on the top court have the prestige and authority to move the law on, by ensuring that the meaning given to statutory provisions, or the rules of the common law, broadly reflects the changing values and needs of society.').

²⁶¹ INGMAN 2004, p. 14. For example, if the UK Supreme Court resolves a case that comes from England, in England the UK Supreme Court's decision will be binding, while in Scotland it will not be strictly binding, but have a strong persuasive force.

number of cases recognised as raising legal questions of general public importance. *It cannot seek to correct errors in the application of settled law, even where such [errors] are shown to exist.*²⁶²

The English understanding as regards the possibility of combining judicial functions at the court of last resort (UK Supreme Court) is the opposite of that in France and Italy. In the French and Italian courts of cassation, the functions of error-monitoring and judicial lawmaking are seen as inseparable or combined, while in the UK Supreme Court the manifest function of error-monitoring seems to be abandoned at the court of last resort level, in favour of emphasising the judicial lawmaking function instead.²⁶³ In a similar way as in the US, in the UK the judicial system assigns the error-monitoring function to the intermediate appellate courts, liberating the UK Supreme Court from repeating that function. BLAKE & DREWRY explain this distribution of judicial functions based on the distinction between the purposes of *review* (error-monitoring) and *supervision* (judicial lawmaking):

Appeals serve two separate but related purposes. The first is best termed review. This is the means of correcting mistakes at first instance and creating some kind of continuity, consistency and certainty in the administration of justice [*i.e.*, error-monitoring] ... The second [purpose] is termed supervision. This is the process of laying down fresh precedents and updating old ones for the guidance of the lower courts in the hierarchy [*i.e.*, judicial lawmaking]. This highlights the most important distinction – or, at least, a major difference of emphasis – between the respective function of the Court of Appeal and the House of Lords. The Law Lords primarily acted as a supervisory court [*i.e.*, court of precedents] ... The role of the Court of Appeal is mainly one of review [*i.e.*, court of error].²⁶⁴

According to BLAKE & DREWRY's perspective, the House of Lords, now UK Supreme Court, is in charge of the judicial lawmaking function (*i.e.*, 'supervision' in their terms) but not of the error-monitoring task; it is not a 'review', in their terms. The error-monitoring function (*i.e.*, review) is assigned instead to the English intermediate appellate courts – *i.e.*, Court of Appeal and now the High Court too.²⁶⁵

²⁶² *Regina v. Secretary of State For Trade and Industry Ex Parte Eastaway* [2000] 1 All ER 27 (HL) [emphasis added]; in the same direction of denying an error-monitoring function of the UK Supreme Court, see ZUCKERMAN 2013, p. 875; BLACKSTONE 2004, p. 1139-1140.

²⁶³ LE SUEUR & CORNES 2001, p. 40.

²⁶⁴ BLAKE & DREWRY 2004, p. 226-227.

²⁶⁵ *infra* Chap. V.B.2 (i).

iii. *Constitutional court*

The proper constitutional court model which has a strong political counterweight function against the legislature is incompatible with the UK political system.²⁶⁶ Basically, the possibilities to have judicial review of legislation are limited in the UK because there is no codified constitution in the first place.²⁶⁷ Moreover, a judicial review power to annul legislation during the times of the House of Lords would have been seen as a violation of the supremacy of Parliament.²⁶⁸ This rejection of the constitutional review of legislation, at least at a manifest level, continued during the creation of the new UK Supreme Court. In Judge NEUBERGER's perspective:

So there was plainly no intention to create [with the new UK Supreme Court] a Constitutional Court; that is to say, one that can carry out a constitutional judicial review of legislative action, as opposed to executive action. So, it is not intended that the new court should be able to strike down legislation on the ground of unconstitutionality.²⁶⁹

This denial of the UK Supreme Court as a constitutional court is reinforced by the self-perception of the UK Supreme Court judges as 'a-political', when compared to their US colleagues.²⁷⁰ However, in a similar way as *Marbury v. Madison* shifted the US Supreme Court profile towards a constitutional function, some English scholars claim that the UK Supreme Court may take on an incipient constitutional function, as well.²⁷¹ Judge NEUBERGER argues that someday the UK Supreme Court could have its own version of *Marbury v. Madison*.²⁷² But that day has not yet come, in his opinion. In this sense, the function of the UK Supreme Court is, presently, as a strict court of precedents at a manifest level, but not a constitutional court. However, authors are aware that the definition of the manifest function will have

²⁶⁶ GUARNIERI & PEDERZOLI 2002, p. 136 ('There is no constitutional review of legislation in the United Kingdom because of the principle of parliamentary supremacy and the lack of a written constitution.').

²⁶⁷ DARBYSHIRE 2015, p. 1 ('Unlike other top courts, the UK's Supreme Court does not review the constitutionality of legislation, partly because the UK is one of only four countries in the developed world without a written constitution so there is no single codified instrument against which to measure law's constitutionality and indeed no concept of "unconstitutional", in the UK.');

on the UK non-codified constitution, LEYLAND 2016, p. 25.

²⁶⁸ BLOM-COOPER, DICKSON & DREWRY 2009, p. 393 ('English courts are barred to do so [review of constitutionality of legislation] as a result of the sovereignty of the Parliament.').

On the current debates on Parliamentary Sovereignty, GOLDSWORTHY 2010.

²⁶⁹ NEUBERGER 2009, p. 9.

²⁷⁰ DARBYSHIRE 2011, p. 400-402; GOLDSTEIN 1998, p. 289. Against this a-political view of the UK Supreme Court, GRIFFITH 1997, p. 292-295.

²⁷¹ SORABJI 2014A, p. 3-4; DARBYSHIRE 2015, p. 1-2; GIBSON-MORGAN 2014, p. 96 ff.

²⁷² NEUBERGER 2009, p. 11 ('In the light of this climate, I have expressed the concern that one unintended consequence of the Supreme Court's creation might be the eventual emergence of a constitutional court; that it would in time consider that it had, like other Supreme Courts, had [*sic*] the power to review the legality of law, to declare Acts of Parliament unconstitutional. Might we see a UK Supreme Court at some time in the future have its own *Marbury v. Madison* moment.');

also a political scientist argue this point, EDLIN 2013.

to be revisited in the future.²⁷³ The UK Human Rights Act (1998) implies, for some authors, the emergence of the English courts as an important constitutional player as well.²⁷⁴ The model of a constitutional court, even if today it is manifestly denied, has at least the potential to emerge at a latent level in the UK.²⁷⁵

iv. Trial court

Finally, to understand the UK Supreme Court as an ordinary trial court seems nowadays unthinkable. In 1934, eight years after the introduction of certiorari in the US, the UK passed the Administration of Justice (Appeal) Act according to which leave to appeal would be required with respect to the House of Lords.²⁷⁶ The leave to appeal, now called permission, operates as a restrictive preliminary screening process.²⁷⁷ Therefore, with the introduction of leave to appeal early in the twentieth century, access to the House of Lords was restricted in the UK, and excluding from the House of Lords the function of pure dispute resolution which requires, quite the contrary, a broad access to the courts.

Additionally, as observed, the Appellate Committee of the House of Lords, besides its judicial role, was an organ institutionally inserted in the legislature structure.²⁷⁸ In that context, the appeal process during the times of the House of Lords could appear less connected with the particular dispute resolution of private interests and more engaged in the general lawmaking function instead.²⁷⁹ Even though the

²⁷³ SORABJI 2014A, p. 3-4.

²⁷⁴ BLOM-COOPER, DICKSON & DREWRY 2009, p. 394-397; SORABJI 2014A, p. 3 ('nascent movement' in the UK towards a power to strike down legislation as in the US); also foreign observers conclude the same, GUARNIERI & PEDERZOLI 2002, p. 136; *cfr.* DICKSON 2013A, p. 377 ('[T]he reluctance of the top court [UK Supreme Court] to trespass on Parliament's patch has been very marked in the years to date since the commencement of the 1998 Act and there is little reason to believe that this attitude is likely to change in the years to come.').

²⁷⁵ DARBYSHIRE 2015, p. 12 ('The Court does not currently have the power to judicially review statutes of the UK Parliament, because of Parliamentary supremacy. It is not, however, stupidly far-fetched to think that it might have such power in the future.'). In fact, a foreign observer argues that the real reason for the creation of the UK Supreme Court was not judicial independence but moving the UK towards a constitutionally limited political order, WEBER 2004, p. 55-72.

²⁷⁶ BLOM-COOPER, DICKSON & DREWRY 2009, p. 52.

²⁷⁷ BLOM-COOPER, DICKSON & DREWRY 2009, p. 52 ('[L]osing parties in the Court of Appeals do, fair routinely, ask for leave to go to the Lords ... in the overwhelming majority of cases the answer is bound to be no.').

²⁷⁸ In detail on the parliamentary role of the House of Lords, see DICKSON & CHARMICHAEL 1998, p. 3-106 (Chapters 1 to 5).

²⁷⁹ Not only the Appellate Committee was physically situated within the House of Lords, but also the Law Lords could join freely any of the Parliament sessions. HOPE 2009, p. 167 ('It was understood from the beginning that Lords of Appeal in Ordinary were to be entitled, after taking the oath, to participate in all the works of the House [of Lords] irrespective of their subject matter. It was left to each individual, as in the case of any other member, to decide how little or how much use to make of that opportunity.').

Constitutional Reform Act of 2005 created a new UK Supreme Court separate from the legislature,²⁸⁰ this did not imply that their court of last resort would now move closer to the dispute-resolution function. The creation of the new UK Supreme Court was not intended to increase nor decrease its powers.²⁸¹ Therefore, if the manifest function of a trial court model was not present during the times of the House of Lords, it should not be present in the new UK Supreme Court either.

The model of trial court is located in a similar way as in the US. In England, the proper trial court model is only the first instance judge, and the UK Supreme Court has no trial review powers.²⁸² Unlike in France and Italy,²⁸³ English civil justice is not a system of a double degree of jurisdiction. The English intermediate appellate court is not a repetition of the dispute-resolution function of the first instance trial court.²⁸⁴ As mentioned, the purpose of the English Court of Appeal is the ‘review’ of the trial courts, which means an error-monitoring function instead.²⁸⁵

3. France

In France, the court of last resort for civil matters is called the *Cour de cassation*.²⁸⁶ The first historical antecedents of cassation recourse can be found in the *Ancien Régime*. In that time, there was the possibility to challenge a judicial decision before the Council of the King, which would decide to confirm or annul the judgment.²⁸⁷ Still, a proper court of last resort, separate from the executive power, but not from the legislative power, was first created during the French Revolution. In 1790 the *Tribunal* (not a ‘*Cour*’ yet) *de cassation* was established as an organ located ‘next to the legislature’ (*auprès du Corp Législatif*).²⁸⁸ One expression of this dependence of this first *Tribunal de cassation* on the legislature was the *référé législatif*.²⁸⁹ According to the *référé* system, if legislation had an interpretation problem, the *Tribunal* would refer the case to the Parliament for an authoritative answer as to the correct interpretation.²⁹⁰ The *Tribunal de cassation*, however, did not last for long. Fourteen

²⁸⁰ See again, LE SUEUR 2004A, p. 6.

²⁸¹ NEUBERGER 2009, p. 9.

²⁸² SORABJI 2014A, p. 2.

²⁸³ *supra* Chap. II.D.3 (iii) and Chap. II.D.4 (iii).

²⁸⁴ ZUCKERMAN 2013, p. 1113 (‘An appeal is not meant to provide a second round of the adversarial process, in which the parties present their cases once more before the higher court. Instead, an appeal is confined to a scrutiny of the lower court’s decision.’).

²⁸⁵ BLAKE & DREWRY 2004, p. 226-227.

²⁸⁶ The regulation of its organisation and functioning is in the *Code de l’organisation judiciaire*, Art. 411 to 451-2. Its institutional website is: www.courdecassation.fr.

²⁸⁷ BORÉ & BORÉ 2015, p. 8-10; WEBER 2010A, p. 15-17; for a brief history in English of the French system before the Revolution, see WIJFFELS 2013B, p. 62-73. In French, see BOULET-SAUTEL 2000, p. 1-24.

²⁸⁸ WEBER 2010A, p. 17-19; BORÉ & BORÉ 2015, p. 10-12; a summary of the French *Tribunal* of cassation, HALPERIN 2000, p. 25-52; In detail, HALPERIN 1987.

²⁸⁹ On the origins of the *référé législatif*, ALVAZZI DEL FRATE 2008, p. 253-262.

²⁹⁰ BORÉ & BORÉ 2015, p. 10-11.

years after its creation (1804), the former *Tribunal* was renamed *Cour*.²⁹¹ But this was not only a change in the name. The new *Cour de cassation* became independent not only from the executive but also from the legislative power. The system of *référé législatif* was abolished.²⁹² From then on, the *Cour de cassation* itself would have the final-word power in the interpretation of French law for particular disputes.²⁹³

Nowadays, the *Cour de cassation* has around two hundred judges of different categories.²⁹⁴ The name of the main recourse for civil matters is called *pourvoi en cassation*.²⁹⁵ It hears approximately 20,000 *pourvois* in civil matters per year.²⁹⁶ To cope with this caseload, the *Cour de cassation* is divided into specialised chambers: three for civil matters, one for commercial cases, another devoted to social law and the last one for criminal matters.²⁹⁷ These chambers contain numerous teams of judges. Thus, the chambers do not work all together but divided into smaller units. Ordinarily, the *Cour de cassation* operates in panels of five judges or in a restricted composition of just three (*formations restreintes*).²⁹⁸

i. Court of error

French scholars and judges agree that the *Cour de cassation* today has a double manifest function. LAMANDA, former First Judge President, has said that the *pourvoi en cassation* performs two functions: a check on the legality of judgments, on the one hand, and harmonisation in the interpretation of the law, on the other.²⁹⁹ CADIET, an influential French scholar on procedural law, uses different wording to express a similar double idea. He distinguishes between two types of *missions* of the French Court of Cassation: *disciplinaire* and *normative*.³⁰⁰ The *mission disciplinaire* is explained as ensuring respect for the law.³⁰¹ Therefore, CADIET's *mission disciplinaire*, translated into LAMANDA's terms, consists in the first function of checking the legality of the judgments. This first manifest function is elaborated based on a certain disposition of the French Code of Civil Procedure:

²⁹¹ WEBER 2010A, p. 20.

²⁹² BORÉ & BORÉ 2015, p. 12.

²⁹³ For a brief history of the Court of Cassation in English, see WIJFFELS 2013C, p. 76-85. In French, LEMOSSE 2000, p. 53-88.

²⁹⁴ CADIET 2011A, p. 186-187.

²⁹⁵ The main source of the cassation procedure is the *Code de procédure civile*, Art. 604 to 639. On the cassation procedure in general, see BORÉ & BORÉ 2015; JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013; and WEBER *et al.* 2012.

²⁹⁶ COUR DE CASSATION 2012, p. 505 CADIET 2011A, p. 187. FERRAND 2017, p. 179-181.

²⁹⁷ BORÉ & BORÉ 2015, p. 58-60; WEBER 2010A, p. 65-67.

²⁹⁸ FERRAND 2017, p. 202. CADIET 2011A, p. 187-188.

²⁹⁹ LAMANDA 2010, p. 8 ('[P]our pouvoir remplir de front ces deux fonctions, l'harmonisation de l'interprétation de la loi et le contrôle de la légalité des jugements.').

³⁰⁰ Other authors repeating the same distinction, CHARRUAULT 2012, p. 23-25; FERRAND 2017, p. 189.

³⁰¹ CADIET 2012A, p. 58 ('[U]ne mission dite disciplinaire, qui consiste à veiller au respect de la loi.'). See also, CHARRUAULT 2012, p. 23-25; FERRAND 2017, p. 189.

The recourse [*pourvoi*] of cassation aims at quashing, by the Court of Cassation, the nonconformity of judgments as regards the rules of the law.³⁰²

When reading that disposition, legal scholars such as BORÉ & BORÉ affirm that the *Cour de cassation* functions as a ‘guardian’ against violations of the legal rules.³⁰³ In other words, the French court of last resort is meant to act as some sort of protector, which will defend us from the lower courts in their misapplication of the law, in order to guarantee equality before the law.³⁰⁴ Based on the four models, therefore, this first manifest function corresponds to a court of error, the surveillance device of the lower judges’ mistakes. Moreover, CADIET admits that the French *mission disciplinaire* needs, at the same time, ‘to know all the recourses that are filed before it, which produces a mass of cases that require a chain processing and a streamlining of procedures’.³⁰⁵ In this sense, the *mission disciplinaire* requires a particularistic, one-by-one approach when correcting mistakes, also proper of a court of error model.

ii. Court of precedents

CADIET’s *mission normative* is described, in general, as the goal of ensuring the unity of the law.³⁰⁶ In LAMANDA’S terms, the *mission normative* of the French court of last resort points to harmonisation in the interpretation of the law. Unlike the *mission disciplinaire*, the *mission normative* is not explicitly stated in the regulation of the *Cour de cassation*. However, French legal actors do not ignore the importance of this second function.³⁰⁷ Judge WEBER, for example, emphasises that:

[O]ne of the fundamental missions of the Court of Cassation, during the last two centuries, is to ensure the unity of the law throughout the whole Republic.³⁰⁸

As we shall see, this second function is something different than a pure court of error model. When closely observed, the *mission normative* resembles, to some extent, a court of precedents. Due to local legal tradition, however, French scholars will be reluctant to admit that they have proper generally binding precedents as in

³⁰² Art. 604. *Code de procédure civile* (‘Le *pourvoi en cassation* tend à faire censurer par la *Cour de cassation* la non-conformité du jugement qu’il attaque aux règles de droit.’) [Author’s translation].

³⁰³ BORÉ & BORÉ 2015, p. 1, 13-14 (‘La *Cour de cassation* est la gardienne de l’égalité devant la loi.’).

³⁰⁴ WEBER 2010A, p. 11.

³⁰⁵ CADIET 2008, p. 30 [Author’s translation] (‘[L]a función jurisdiccional le impone ... la necesidad de conocer todos los recursos que ante ella se interpongan, lo que la enfrenta a una masa de expedientes que la obliga a un tratamiento en cadena y a una racionalización de sus procedimientos.’).

³⁰⁶ CADIET 2012A, p. 58 [Author’s translation] (‘[E]t une mission dite normative, qui a pour objet d’assurer l’unité du droit.’).

³⁰⁷ CADIET 2012A, p. 58.

³⁰⁸ WEBER 2010B, p. 2 (‘En effet, une des missions fondamentales de la *Cour de cassation*, depuis plus de deux siècles, est d’assurer l’unité du droit dans toute la République.’).

the common law.³⁰⁹ Still, the judicial lawmaking function becomes apparent in the details of CADIET's description on what the *mission normative* needs to be performed effectively. He admits that:

[T]he *mission normative* has no real meaning more than whether the *Cour de cassation* can perform a pedagogical task in its decisions, which means that it will have time to dictate judgments with extensive reasoning during a series of cases that have exemplary value.³¹⁰

As we can see, the court of error's particularistic approach, open to correct every judicial mistake, is abandoned in this *mission normative*. Instead, the *Cour de cassation* has to focus on a few relevant cases which can be used to guide – in a pedagogical task, according to CADIET's words – the decision of the other judges in the different levels of the French court system. This 'pedagogical task' based on a few exemplary disputes, instead of particular error-monitoring in a large number of cases, is indeed how a court of precedents model should operate.

Despite this clear distinction between the two judicial functions, French judges and scholars see them as interconnected. Judge CHARRUAULT says that they are inseparable (*indissociables*).³¹¹ When the *Cour de cassation* quashes several particular cases (*mission disciplinaire*), the groundings of its judgments should be used to guide future decision-making in the lower courts (*mission normative*).³¹² Based on our four ideal models, therefore, the manifest function of the *Cour de cassation* is a combination too: error-monitoring and judicial lawmaking, to be a court of error and a court of precedents at the same time.

French scholars, however, do recognise that the number of cassation judgments (*arrêts*) which are important for the clarification or development of legal interpretation (*i.e.*, judicial lawmaking) is only a minor portion.³¹³ Therefore, only a small proportion of the *Cour de cassation's* judgments actually may perform both functions at the same time. The vast majority of its caseload will be devoted to the *mission disciplinaire* or particularistic error-monitoring function only. In this sense, the model of a court of error, at least in a pure quantitative dimension, predominates over the model of a court of precedents.

iii. Trial court

French scholars and judges emphatically deny that the *Cour de cassation* can be an ordinary opportunity for dispute resolution. The *Cour de cassation*, they say, is not a third degree of full jurisdiction.³¹⁴ This denial is based on the French Code of the

³⁰⁹ BORÉ & BORÉ 2015, p. 1-2; TROPER & GRZEGORCZYK 1997, p. 115-119.

³¹⁰ CADIET 2008, p. 29 [Author's translation].

³¹¹ CHARRUAULT 2012, p. 24.

³¹² CADIET 2012A, p. 60.

³¹³ FERRAND 2017, p. 189.

³¹⁴ CADIET 2012A, p. 61 ('[L]a *Cour de cassation* n'est pas un troisième degré de pleine juridiction'); BORÉ & BORÉ 2015, p. 2. Instead of an ordinary dispute resolution court, French authors

Judicial Organisation, according to which the *Cour de cassation* does not judge the merits of the case.³¹⁵ The most important consequence of that disposition is that the pure questions of facts are excluded from the review in cassation.³¹⁶ In this sense, the manifest functions in France reject that the *Court de Cassation* can operate as a (third) trial court model.

In France, the dispute-resolution function is manifestly assigned to the two court levels that are below the *Cour de cassation*. Particularly, the first instance judges (*Tribunal d'instance* and *Tribunal de Grande Instance*) and the intermediate appellate courts (*Cour d'appel*) are both described as degrees of full jurisdiction.³¹⁷ The French system of a double degree of jurisdiction,³¹⁸ therefore, means that France contemplates not only one but two levels of trial court models in a broad sense.

iv. Constitutional court

Finally, from the French perspective, the *Cour de cassation* does not have the function of a political counterweight to the legislature. Quite the contrary, legal scholars usually state the complete subordination of the *Cour de cassation* to the application of the legislation and its regulations.³¹⁹ Thus, the manifest functions in France deny that the *Cour de cassation* can be a model of constitutional court as defined here. For that reason, French authors are dubious about calling their *Cour de cassation* a proper 'supreme court' as in the US, due to the lack of such constitutional review on legislation.³²⁰ The *Cour de cassation*, these authors say, is the court of last resort in ordinary law – such as criminal and civil matters – but not in constitutional affairs.³²¹

emphasise the extraordinary nature of cassation. WEBER 2010A, p. 62-63; BORÉ & BORÉ 2015, p. 6 ; COUCHEZ 2004, p. 35; *cfr.*, LUXEMBOURG 2006, p. 2358-2362.

³¹⁵ Code de l'organisation judiciaire, Art. L411-2: '*La Cour de cassation ne connaît pas du fond des affaires ...*'; MALINVAUD 2008, p 161.

³¹⁶ BORÉ & BORÉ 2015, p. 238-239; WEBER 2010A, p. 62; COUCHEZ 2004, p. 388.

³¹⁷ AMRANI MEKKI 2011, p. 22. ('*De cette question découle la conception de la voie d'appel comme voie d'achèvement du litige ou comme révision de la première décision et la construction de sa procédure.- L'appel est aujourd'hui conçu comme une voie d'achèvement du litige. Cette conception a été adoptée lors de la codification de procédure civile dans les années [19]70 ...*'); COUCHEZ 2004, p. 19.

³¹⁸ See again, AMRANI MEKKI 2011, p. 20; GRIVART DE KERSTRAT 1999, p. 116; MALINVAUD 2008, p. 161.

³¹⁹ BORÉ & BORÉ 2015, p. 252. The introduction in 2008 of the 'questions of constitutional priority' (abbreviated as 'QPC') does not grant to the Court of Cassation the power to annul legislation due to its unconstitutionality, but just the duty to refer the case to the *Coinseil Constitutionnel*. For more details, DUHAMEL & CARCASSONNE 2015.

³²⁰ BORÉ & BORÉ 2015, p. 3-4 ('*La Cour de cassation demeure-t-elle une Cour suprême? Pendant longtemps, cette question ne s'est pas posée. La Cour de cassation était, à l'evidence, notre Corte suprême judiciaire.- Mais la construction européenne a conduit certains à s'interroger sur la mainten de cette qualification.*').

³²¹ CADJET 2012C, p. 107 ('[L]e juge de cassation n'est pas une cour suprême au sens plein du terme. Ne méritent cette appellation que les juridictions de dernière instance qui, à l'instar de la Cour

The political counterweight function is assigned to different organs in France.³²² The judicial function of political counterweight to the executive branch is the charge of the administrative courts, which is a separate hierarchy of judges with its own court of last resort (*Conseil d'Etat*).³²³ And the political counterweight to the legislature is the function of the *Conseil Constitutionnel*, which is the constitutional court in France. Originally, the French constitutional review had the particularity that it acted only prior to the enactment of new legislation.³²⁴ But since the Constitutional Reform of 2008, the *Cour de cassation* and the *Conseil d'État* are allowed to refer cases to the *Conseil Constitutionnel* for the constitutional review of a certain statute, after its promulgation (*question prioritaire de constitutionnalité*).³²⁵ Similar to the UK Supreme Court, however, this *Cour de cassation* referral to the *Conseil Constitutionnel* does not constitute a proper constitutional review with the power to strike down legislation and, consequently, it is not enough to configure a constitutional court model in the *Cour de cassation* itself.

4. Italy

In Italy, the name for the court of last resort in civil matters is *Corte Suprema di Cassazione*.³²⁶ This court came into being as the result of a gradual process. Right after the unification of the Italian territories (1861) there was not one but five regional courts with cassation jurisdiction: in Florence, Naples, Palermo, Rome, and Turin.³²⁷ The regional court in Rome, the Italian Court of Cassation as known today, gained more competences over time. Since 1875, the decisions on conflicts of jurisdiction between the five regional courts will be resolved by the court in Rome. In 1888, the concentration of competences continued with the Rome court taking on a monopoly over criminal affairs for the entire kingdom. The concentration process culminated in 1923, when the remaining competences on civil matters were given to the court in Rome, and the other regional courts were abolished.³²⁸

suprême des États-Unis d'Amérique, ont le monopole du pouvoir de juger en dernière instance en qualité de juge ordinaire et de juge constitutionnel.').

³²² CADIET 2012A, p. 56.

³²³ On the *Conseil d'Etat* and its administrative role, see GONOD 2014.

³²⁴ On the *Conseil Constitutionnel* in English before the 2008 reform, see STONE SWEET 1992, p. 57-59.

³²⁵ HERINGA & KIIVER 2012, p. 160; MATHIEU 2011, p. 475-476; in detail, ROUSSILLON & ESPULGAS 2015.

³²⁶ The regulation of its organisation and functioning is in Art. 65 to 68, *Ordinamento Giudiziario* (RD 30-02-1941). Its institutional website is: www.cortedicassazione.it.

³²⁷ ALVAZZI DEL FRATE 2013, p. 59. For the previous history of the Italian courts of last resort, in English see ASCHERI 2013, p. 38-51; in Italian, MASTROBERTI & VINCI 2015.

³²⁸ On its origins, in English, ALVAZZI DEL FRATE 2013, p. 59; in Italian, PICARDI 2010, p. 51-68. The forthcoming history, TRIFONE 2010, p. 99-171.

Currently, the *Corte di Cassazione* has close to four hundred judges.³²⁹ This enormous court is divided into fourteen chambers (*Sezioni*). There are six chambers in civil matters.³³⁰ However, each chamber works in smaller units; the so-called *collegio giudicante* will normally be panels of five judges who are the ones that, in practice, hear each case.³³¹ The recourse of last resort in civil procedure is called *ricorso per cassazione*.³³²

i. Court of error

In Italy, the famous legal scholar of the first half of the twentieth century, CALAMANDREI, was the most influential in defining the function of the cassation court. Based on his ideas, the function of the *Corte di Cassazione* was explicitly defined in the law (*Ordinamento Giudiziario*). Its function is legally defined by Article 65 as follows:

The Supreme Court of Cassation, as the supreme organ of justice, ensures the exact observation and the uniform interpretation of the legislation (*legge*), the unity of the national law (*diritto oggettivo nazionale*) ...³³³

Similar as in France, in Italy scholars understand that their Court of Cassation performs a double function: *nomofilaquia* and *uniformità*.³³⁴ On the one hand, it ‘ensures the exact observation’ of the law.³³⁵ This is what they call ‘*nomofilaquia*’.³³⁶ This term does not seem to have an exact translation in English contained in one single word, but it could be thought of as ‘the guardianship of the law’.³³⁷ Scholars explain this first role as the protection of the law, the protection of its correct interpretation and application.³³⁸ The Italian *nomofilaquia*, thus, resembles the French *mission disciplinaire*. Both formulations involve the idea that the function of the court of last resort is checking the application of the law on a particularistic

³²⁹ SILVESTRI 2017, p. 238 (357 judges plus 37 law clerks who are considered judges too in Italy, for a total of 394). See *infra* Chap. III.B.7 (ii).

³³⁰ COCCIA 2015, p. 22.

³³¹ Art. 67. Royal Decree of 30 January 1941. n° 12. *Ordinamento giudiziario*: ‘La Corte di cassazione in ciascuna sezione giudica con il numero invariabile di cinque votanti ...’

³³² Regulated in the *Codice di Procedura Civile*, Book Two, Title III, Chapter 3, Art. 360 to 394. But there is also a rule in the Italian Constitution (Art. 111), which enshrines the general right to cassation, AMOROSO 2012, p. 10-12. On the Italian cassation procedure in general, see AMOROSO 2012; LEVITA 2015; RUSCIANO 2012; ACIERNO, CURZIO & GIUSTI 2015.

³³³ *Ordinamento Giudiziario*, Art. 65 [emphasis added]: ‘La corte suprema di cassazione, quale organo supremo della giustizia, assicura l’esatta osservanza e l’uniforme interpretazione della legge, l’unità, del diritto oggettivo nazionale, il rispetto dei limiti delle diverse giurisdizioni; regola i conflitti di competenza e di attribuzioni, ed adempie gli altri compiti ad essa conferiti dalla legge.’ On the translation of ‘*legge*’ and ‘*diritto oggettivo*’, DE FRANCHIS 1996, p. 925-926, 658-659.

³³⁴ COMOGLIO, FERRI & TARUFFO 2011, p. 708; see also, FERRARIS 2015, p. 150-152.

³³⁵ In Italy, the main source of law is legislation, LIVINGSTONE, MONATERI & PARISI 2015, p. 181-183.

³³⁶ COCCIA 2015, p. 17-18.

³³⁷ SILVESTRI 2017, p. 242.

³³⁸ COMOGLIO, FERRI & TARUFFO 2011, p. 708.

one-by-one basis, the correction of the lower courts' erroneous decisions. This protective function of the application of the law emulates the inspection agency, the judicial police, in which the *Corte di Cassazione* is meant to be the gendarme constantly monitoring the lower court judges' decisions.³³⁹ In that sense, Italian *nomofilaquia* is the manifest formulation of the error-monitoring function of a court of error model.

ii. *Court of precedents*

Based on the next notion of the same Article 65 – *i.e.*, 'ensures ... the uniform interpretation' of the law' – scholars define the second function of the Italian Court of cassation: *uniformità della giurisprudenza* (uniformity of the case law).³⁴⁰ Italian scholars define this other function as a broader role which goes beyond the current case.³⁴¹ The *uniformità* function means that the court of last resort itself, and every judge of the court system subject to its control, shall follow its constant and coherent directions in the interpretation of the law.³⁴² This idea can be traced back to CALAMANDREI's original conception, as well. In that author's view:

[T]he *Corte di Cassazione*, standing at the vertex and centre of the judicial system to resolve with its rulings the disagreements in the lower case law, attempts to achieve the goal of case law unification ...³⁴³

In this sense, the Italian second function of *uniformità* resembles the French *mission normative*. The idea behind these two formulations – the French *mission normative* and the Italian *uniformità* – seems to be equivalent, that the court of cassation should deliver interpretation guidelines meant to coordinate the decision-making criteria among the lower courts.³⁴⁴ Based on the four models, therefore, the Italian *uniformità* function resembles the idea of a court of precedents. The *uniformità* function also requires a court model in charge not of the particularistic one-by-one correction of errors but of a wider coordination device which operates when general interpretation problems arise. In fact, some scholars see in this norm the confirmation of some sort of judicial precedent, although not strictly binding, in the decisions of their cassation court.³⁴⁵

In a similar manner as their colleagues in France, Italian scholars and judges state that the two functions of the *Corte di Cassazione* need to be combined. The *Corte di Cassazione* itself subordinates these two functions to the achievement of legal

³³⁹ COCCIA 2015, p. 16-17.

³⁴⁰ On the translation of '*giurisprudenza*' as 'case law', *cfr.*, DE FRANCHIS 1996, p. 841.

³⁴¹ AMOROSO 2015, p. 52-54.

³⁴² COMOGLIO, FERRI & TARUFFO 2011, p. 708.

³⁴³ CALAMANDREI 1920, p. 77 [Author's translation] ('[L]a *Corte di Cassazione*, ponendosi come vertice e centro del ordinamento giudiziario a risolvere con la sua giurisprudenza i dissidi dell'*giurisprudenza inferiore*, mira a raggiungere lo scopo della unificazione giurisprudenziale.').

³⁴⁴ 'Weak precedents' as they call them, AMOROSO 2015, p. 54-55.

³⁴⁵ COMOGLIO, FERRI & TARUFFO 2011, p. 708; in detail, AMOROSO 2015, p. 19-22.

certainty.³⁴⁶ Legal scholars argue that *nomofilaquia* and *uniformità*, together, aim at the goal of ensuring the equality of all citizens before the law.³⁴⁷ Coming back to CALAMANDREI, cassation in Italy serves as the most important way to protect this principle:

[T]he canon of equality of all citizens in the State, established on the basis of the new legislation by the French Revolution, was one of the factors of the birth of the [French] *Tribunal de cassation* ... [Today the Italian] *Cassazione* is closely connected with this principle [of equality], and is even one of the few, if not the only, real remedy.³⁴⁸

According to the four models of courts, it can be concluded that Italy has a similar manifest double function as France. The necessity of the combination between the *nomofilaquia* and *uniformità* functions puts pressure on the *Corte di Cassazione* to be capable of performing as a court of error and as a court of precedents at the same time.

iii. Trial court

Italian scholars criticise that, in the actual practice of the *Corte di Cassazione*, these functions end up being distorted.³⁴⁹ Due to its immense workload, the *Corte di Cassazione* has been unable to keep a clear and consistent body of case law. But also this distortion leads to a change in the model of court. COMOGLIO, FERRI & TARUFFO acknowledge that the *Corte di Cassazione* has a tendency to behave as a judge on the merits, oriented towards guaranteeing ‘justice in the current case’.³⁵⁰ Unlike France, as we shall see, the *Corte di Cassazione* evolved into a broader review which includes not only the law but also questions of facts through direct or indirect ways.³⁵¹ Therefore, even if the manifest functions of the *Corte di Cassazione* are to operate as a court of error and of precedents, it has a pronounced latent deviation moving closer to repeating the mere dispute-resolution function. The *Corte di Cassazione* deviation towards a (third) trial court model is well known and admitted by Italian legal actors and, thus, hard to deny at a manifest level.

³⁴⁶ CORTE SUPREMA DI CASSAZIONE 2015a (‘One of the fundamental characteristics of [the Italian Court of Cassation’s] mission [is] essentially nomofilaxis and unity, aimed at assuring certainty in the interpretation of the law ...’ [*Una delle caratteristiche fondamentali della sua missione essenzialmente nomofilattica ed unificatrice, finalizzata ad assicurare la certezza nell’interpretazione della legg*]).

³⁴⁷ COMOGLIO, FERRI & TARUFFO 2011, p. 708-709.

³⁴⁸ CALAMANDREI 1920B, p. 63 (‘[I]l canone dell’uguaglianza di tutti i cittadini nello Stato, posto a base del nuovo ordinamento dalla Rivoluzione francese, sia stato uno dei coefficienti al sorgere del *Tribunal de cassation* ... [Today the Italian] *Cassazione* stia in profonda connessione con questo principio e ne costituisca anzi una delle poche, se non l’unica, reale sanzione.’) [Author’s translation].

³⁴⁹ TARUFFO, among others, has denounced this as a true ‘crisis of identity’, TARUFFO 1991, p. 158; SILVESTRI 2017, p. 239-240; FERRARIS 2015, p. 156-159.

³⁵⁰ COMOGLIO, FERRI & TARUFFO 2011, p. 709, 727-728; also, TARUFFO 1991, p. 104-105.

³⁵¹ *infra* Chap. III.B.1 (ii).

In a similar way as in France, in Italy the manifest dispute-resolution functions are assigned to the two court levels under the *Corte di Cassazione*. The Italian system is one of a double degree of jurisdiction, as well.³⁵² Therefore, both the Italian first instance courts (*Tribunale ordinario*) and the intermediate appellate courts (*Corte d'appello*) repeat the trial court model in a broad sense.

iv. Constitutional court

In Italy, the political counterweight against the legislature is not included in the manifest functions of the *Corte di Cassazione*. The reason is that Italy also has a variation of the centralised system of constitutional review.³⁵³ Therefore, the judicial review of legislation is not within the powers of the ordinary court of last resort for civil and criminal matters.³⁵⁴ In its place, the political counterweight function against the legislature is entrusted to a separate and specialised court, namely, the *Corte Costituzionale*.³⁵⁵ If the *Corte di Cassazione* receives a case of constitutional violation, it has to send the case to the *Corte Costituzionale*.³⁵⁶ Similar as in France, this mere referral to the Italian Constitutional Court does not constitute a proper constitutional review power capable to configure a constitutional court model in the *Corte di Cassazione* itself.³⁵⁷

E. Summary table

The general purpose of Chapter II was to provide a general framework about judicial functions and ideal models of courts, the framework that will be used in the forthcoming chapters to elaborate the horizontal and diagonal comparisons.³⁵⁸ Based on this framework of four functions and models, the chapter analysed the way in which local legal actors of each jurisdiction describe the current manifest functions of their courts of last resort.³⁵⁹ Table II.1 summarises these manifest functions as they were found in the four jurisdictions under study.

³⁵² JACKSON & TUSHNET 2006, p. 466; COMOGLIO, FERRI & TARUFFO 2011, p. 664-665.

³⁵³ FERRERES COMELLA 2011, p. 266-267;

³⁵⁴ LIVINGSTONE, MONATERI & PARISI 2015, p. 64.

³⁵⁵ On the Italian *Corte Costituzionale*, see LAMARQUE 2012; PEDERZOLI 2008.

³⁵⁶ The Italian Court of Cassation does not have the power to annul legislation. Instead, it has to send the case to the Constitutional Court. RORDORF 2015B, p. 549 ('*Al pari di ogni altro giudice ordinario, anche la Corte di cassazione è ovviamente tenuta ad investire la Corte costituzionale quando dubiti della conformità al dettato Costituzione di una norma che essa è chiamata ad applicare.*'). Also, GUARNIERI & PEDERZOLI 2002, p. 146.

³⁵⁷ Still, some authors argue that the roles of the Court of Cassation and the Constitutional Court can have conflicts of competences. AMOROSO 2013, p. 25-26.

³⁵⁸ *supra* Chap. II.A.

³⁵⁹ *supra* Chap. II.D.

Table II.1 : *Courts functions* – Manifest Functions

	US	ENGLAND	FRANCE	ITALY
POLITICAL COUNTERWEIGHT <i>Constitutional Court</i>	SUPREME COURT	Parliamentary Sovereignty	<i>Conseil Constitutionnel</i>	<i>Corte Costituzionale</i>
JUDICIAL LAWMAKING <i>Court of precedents</i>	SUPREME COURT	SUPREME COURT	CASSATION COURT	CASSATION COURT
ERROR-MONITORING <i>Court of Error</i>	Court of Appeals	Court of Appeal	CASSATION COURT	CASSATION COURT
DISPUTE RESOLUTION <i>Trial Court</i>	1 st Instance	1 st Instance	Court of Appeal 1 st Instance	Court of Appeal 1 st Instance

PART ONE: *HORIZONTAL PERSPECTIVE*
**CHAPTER III: COURTS OF LAST
RESORT**

CHAPTER III: COURTS OF LAST RESORT	103
A. Introduction	103
B. Horizontal comparison	107
1. Scope of review	108
2. Judgment effects	119
3. Exposure	128
4. Number of cases	133
5. Preliminary screening	142
6. Panel composition	153
7. Total size	163
8. Opinion style	171
C. Summary tables	183

A. Introduction

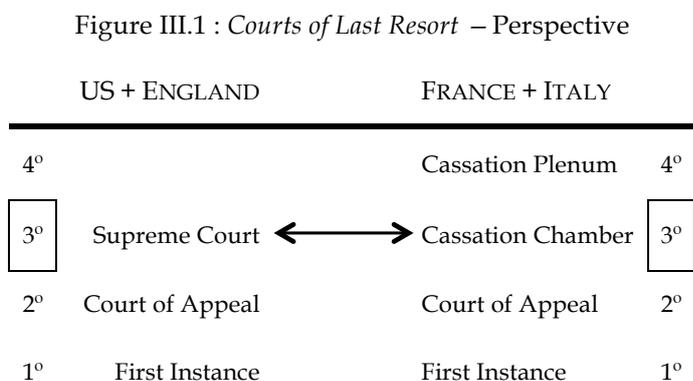
The previous chapter identified the manifest functions attributed to courts of last resort. The US Supreme Court understands itself as a mix between judicial lawmaking and political counterweight;¹ whereas in England, the manifest function of the UK Supreme Court is judicial lawmaking exclusively, but at a latent level a political counterweight function seems to be incipient.² The French

¹ *supra* Chap. II.D.1 (i,iii).

² *supra* Chap. II.D.2 (i,iii).

and Italian courts of cassation aim at being a combination: error-monitoring and judicial lawmaking at the same time.³

The object of Chapter III, instead, is to compare specific attributes between the supreme courts of the US and the UK,⁴ on the one hand, and the same attributes of the courts of cassation of France and Italy, on the other. However, the reader is reminded that in this Part One of the study the comparison is realised from a horizontal perspective. Therefore, these attributes and functions will be compared in respect of the courts that are at the same 3rd court level of each jurisdiction. That is to say, a comparison between the US and UK supreme courts *vis à vis* the *chambers*, not the plenary session,⁵ of the French and Italian courts of cassation. This reminder is relevant because the analysis on the different functions and specific attributes under comparison will change when shifting from a horizontal to a diagonal perspective in Part Two of this study.⁶ Figure III.1 represents the horizontal perspective from which the comparison in this chapter will be made.



This chapter and those that follow will analyse the same eight attributes. These attributes were chosen because they are key aspects of the courts of last resort institutional setup; as we shall see, the practical functioning of the court depends on them.⁷ The attributes are constructed based on the correlative eight questions. Each question will be addressed from a double perspective. What the court 'should' do means, on the one hand, the *ideal* configuration of that attribute according to the four models of courts and, on the other hand, the

³ *supra* Chap. II.D.3 (i,ii); Chap. II.D.4 (i,ii).

⁴ To avoid repeating that the supreme court of England is the court of last resort not only of England but of the whole United Kingdom, this chapter will refer to England as a jurisdiction but to the UK Supreme Court as its court of last resort.

⁵ On plenary sessions, *infra* Chap. IV.B.

⁶ *infra* Chap. IV; Chap. V.

⁷ Certainly, these attributes are not the only aspects of a court of last resort. Further research could be conducted to include attributes that were not analysed in depth here – such as judges' appointment, duration in office, the assistance of law clerks, among others. As we shall see throughout this book, however, these eight attributes demonstrated to be comprehensive enough in respect of the courts' functioning in order to reveal the patterns of symmetries and asymmetries under analysis in this study.

contrast between the ideal configuration and the *factual* configuration of the same attribute in the court of each jurisdiction according to their practices. The eight attributes under comparison are the following:

1. *Scope of review*.⁸ What kind of issues should the court of last resort review? For instance, should it review the facts and evidence in dispute, procedural missteps, the constitutionality of the legislation, any misapplication of the law or only case law interpretation problems?
2. *Judgment effects*.⁹ Should the court of last resort's judgments have effects on future cases? This is a complicated question that involves the very identity of the legal traditions.¹⁰ In the orthodox view, the common law jurisdictions, including the US and England, are drawn as a system of binding precedents.¹¹ Whereas the civil law jurisdictions, to which French and Italian cassation courts belong, are characterised as having a legal system in which previous judgments are not a formal source of law.¹² However, this question on the future effects that the judgments should have can also be answered in a more nuanced manner from the point of view of the ideal models and judicial functions of courts of last resort.
3. *Exposure*.¹³ How much public attention should the court of last resort's judgments receive? It would be against the European Convention on Human Rights that a court of last resort could deliver judgments that remain totally secret.¹⁴ According to the Strasbourg court's case law, however, it is enough that the court's decisions are made available at least for the parties in dispute.¹⁵ The question is to what extent the court should take steps in making its judgments accessible to a broader audience. Exposure is, so to speak, a proxy for the impact or relevance of the judgments for developing the case law. The higher the normative force of a judgment, the more exposure it will have.¹⁶
4. *Number of cases*.¹⁷ What is the adequate number of cases that the court of last resort should review? This is another question that depends on the expected judicial function. Every jurisdiction may agree that the court of last resort should not be overburdened with cases. But the number of cases that counts as the adequate caseload – not too many, but not too few either – will be different in relation to the function of the court of last resort.

⁸ *infra* Chap. III.B.1.

⁹ *infra* Chap. III.B.2.

¹⁰ For a comparative analysis on the use of precedents, MACORMICK & SUMMERS 1997A.

¹¹ SIEMS 2014, p. 46-47. In detail MERRYMAN & PÉREZ-PERDOMO 2007, p. 20-26.

¹² HEAD 2011, p. 163.

¹³ *infra* Chap. III.B.3.

¹⁴ European Convention on Human Rights, Art. 6 (1): 'Judgments shall be pronounced publicly ...'. See also the guide on Art. 6, ECHR 2013, p. 49-50.

¹⁵ *Pretto and others v. Italy* §§ 27-28 (App. 7984/77); WHITE & OVEY 2010, p. 271.

¹⁶ DEUMIER 2015, p. 98.

¹⁷ *infra* Chap. III.B.4.

5. *Preliminary screening*.¹⁸ Should the court of last resort reject certain types of cases at an early stage? Every court of last resort has a ‘preliminary screening’ – which, for the purposes of this study, will not be called ‘access filters’¹⁹ – defined in Chapter I as an initial stage of their proceedings, characterised by simplified conditions for rejecting cases.²⁰ This definition means that some of the decision-making guarantees that characterise the ordinary recourse procedure – such as reasoned judgment, bigger composition of the judges panel or an oral hearing for the parties – are restricted at the preliminary screening stage.²¹ The question here is what criteria the court should use to choose the cases that will be rejected in such simplified form at the initial stage of the recourse.²² The role of this preliminary screening is to focus the court of last resort’s scarce resources only on the most important disputes.²³ Therefore, the cases that do not meet the standard of screening importance are summarily rejected so as to avoid deviation in the court of last resort’s proper attention. However, what counts as an important case at the preliminary screening will be defined by the court’s function and the respective scope of review.²⁴
6. *Panel composition*.²⁵ How many judges are needed to resolve each case in the court of last resort? How stable should the composition of the panel be? A more numerous panel reviewing each case may have the advantage of combining more perspectives, but at the cost of spending more human resources per case. Keeping the same composition has the advantage of more stability of the decision criteria over time, but the disadvantage of less flexibility to distribute judges according to the diversity of the caseload. The answer to the proper composition of the panel depends, as we shall see, on the number of disputes and on the relevance of the dispute that the court has to review according to its judicial function.
7. *Total size*.²⁶ How numerous should the judges on the court of last resort be? For the previous questions in respect of panel composition, the study will analyse the composition of the specific panels of judges that hear and resolve each case.²⁷ A different issue is the ‘total size’ of the court, the number of judges that the court of last resort has when adding all

¹⁸ *infra* Chap. III.B.5; on the definition of ‘preliminary screening’, *supra* Chap. I.E.8.

¹⁹ On why this initial stage will not be called ‘access filters’ in this study, *supra* Chap. I.E.8.

²⁰ *supra* Chap. I.E.8.

²¹ For examples, *supra* Chap. I.E.8.

²² The comparative analysis on preliminary screening requires an additional extension. The main focus of this study is the criterion according to which the preliminary screening is performed. Before analysing the screening criterion itself, however, some additional explanations about the characteristic of the preliminary screening procedure will be necessary.

²³ NORKUS 2015, p. 9. In the German-speaking countries, for instance, the screening criteria are based on different understandings of such importance, see DOMEJ 2014, p. 277-290.

²⁴ On the relation between access filters and courts of last resort functions, SILVESTRI 2001, p. 105; FERRAND 2005A, p. 68.

²⁵ *infra* Chap. III.B.6.

²⁶ *infra* Chap. III.B.7.

²⁷ *supra* Chap. III.B.6.

these smaller panels together. In courts that have just one full bench panel – such as the US Supreme Court, as we shall see²⁸ – the composition of its panel is the same as the total size of the court. But in the three remaining jurisdictions, whose courts of last resort have more than one panel, the panel composition is something different than the total size of the court. The answer to the question of the total size depends on the number of cases that the court should resolve which, in turn, is previously defined by the function of the court.²⁹ Therefore, the total size of the court, which has to be capable of coping with the caseload according to its function, should also change according to the court model.

8. *Opinion style*.³⁰ How detailed should the court of last resort judgments be in their reasoning? Should the judgment be an exposition of all the arguments and counterarguments? Or should it contain only the core facts and applicable law? Is it necessary that the judgment keep a registry of the judges who had a different point of view than the majority? Or is it better to write down the decision as the single opinion of the full court? Whether or not the decisions should be lengthy, detailed or include dissenting opinions is something that depends, as we shall see, on the model and functions expected of the court of last resort.

B. Horizontal comparison

Each section begins by analysing how each of these attributes should be configured according to the four ideal models of courts (constitutional court, court of precedents, court of error and trial court). Later on, the subsections will identify the actual characteristics of the attribute in the four jurisdictions under study, grouped in supreme courts (US and UK) and cassation chambers (France and Italy). The conclusion of each subsection, called ‘horizontal comparison’, will discuss to which model of court, and its judicial functions, the specific attributes of each court of last resort correspond.

As a result of this analysis, the study will be able to arrive at three conclusions in the final Chapter VI. First, the extent to which the differences between the attributes of the courts of last resort can be explained based on their different manifest functions.³¹ Second, whether the attributes of each court of last resort are adequate or not to perform their manifest functions.³² And third, whether or not there are other latent functions that could cause deviation in the court of last resort’s attributes configuration.³³

²⁸ *infra* Chap. III.B.7 (i).

²⁹ *supra* Chap. III.B.4 (a,b,c,d).

³⁰ *infra* Chap. III.B.8.

³¹ *infra* Chap. VI.D.1.

³² *infra* Chap. VI.C.3.

³³ *infra* Chap. VI.C.4.

1. Scope of review

(a) *Political counterweight*. In the constitutional court the scope of review will be the legal decisions and norms (public acts) that are under constitutional regulation.³⁴ Private actions will be subject to its review only exceptionally, just to the extent that the doctrine of the horizontal effect of fundamental rights – about its applicability not only against public agents but also among private citizens – is accepted.³⁵ If the constitutional court has jurisdiction over the executive branch, this review will be extended to the administrative acts.³⁶ But as regards the courts of last resort that perform this function, as discussed in Chapter II,³⁷ the most important scope of review is the constitutionality of legislation,³⁸ at a national and especially at a federal level.³⁹

(b) *Judicial lawmaking*. In a court of precedents the judicial lawmaking function requires that the court of last resort have a narrow scope of review. This model cannot be open to hearing every minor misapplication of the law or legal dispute (like the courts of error⁴⁰ and trial courts⁴¹ do). With such an open scope of review, its attention would be diluted in cases that do not have relevance for orienting future decision criteria. Instead, the court of precedents should be focused only on certain disputes in which case law problems arise.⁴² Not every alleged misapplication of the law, but only those disputes that involve a general interpretation conflict will be reviewed. The types of issues that are of interest to a court of precedents are, for example, those that raise different interpretations (contradiction), those for which there is a lack of prior precedent in the legal field (lacuna) or those for which an update in the decision criteria is needed (overruling).⁴³

(c) *Error-monitoring*. In a court of error model, configured as a surveillance device,⁴⁴ the court should review every possible mistake, regardless of the relevance of the current case for future disputes.⁴⁵ Because the goal is minimising mistakes, the proper court of error tends to intervene only when the higher court has a better perspective than the lower court to identify and correct those errors. If the court of error has, quite the contrary, a worse perspective and still reviews the lower court's decision, the probability of error will not be

³⁴ HERINGA & KIIVER 2012, p. 159; STONE SWEET 2013, p. 822; for a list, HARDING, LEYLAND & GROPPi 2009, p. 6-7.

³⁵ On the horizontal effect discussion in the US Constitution, GARDBAUM 2003, p. 387-459; in the UK Human Rights Act, PHILLIPSON 1999, p. 824-849; BAMFORTH 2001, p. 34-41; and the European Convention on Human Rights, LECZYKIEWICZ 2013, p. 479-497; FRANTZIOU 2015, p. 657-679; VAN DER SCHYFF 2010, p. 9-10.

³⁶ SHAPIRO 1980, p. 644; HARDING, LEYLAND & GROPPi 2009, p. 8.

³⁷ *infra* Chap. II.C.4.

³⁸ HARDING, LEYLAND & GROPPi 2009, p. 9; FAVOREAU & MASTOR 2011, p. 24-27.

³⁹ SHAPIRO 1980, p. 639-640; *infra* Chap. II.C.4.

⁴⁰ *infra* Chap. III.B.1 (c).

⁴¹ *infra* Chap. III.B.1 (d).

⁴² FERRERES COMELLA 2009, p. 22.

⁴³ *supra* Chap. II.C.3.

⁴⁴ *supra* Chap. II.C.2.

⁴⁵ GALIC 2014, p. 4.

lower but higher with the court of error's intervention.⁴⁶ For that reason, the questions of law and procedure will typically be within the scope of the court of error, but not the pure questions of facts and evidence. All the courts are, or should be, on equal footing as regards their knowledge of the applicable law (*iuria novit curia*). As regards procedure, the court of error will review the important missteps that can be identified based on a reading of the files in which the procedural steps should be registered.⁴⁷ But pure questions of fact, quite the contrary, will be restricted in this model. Unlike in the trial court,⁴⁸ in the court of error there is no reproduction of evidence, because its scope of review is limited to reviewing what was previously discussed and proven in the lower trial court. Therefore, the reason for the exclusion of the facts from the court of error's review is that, in principle, the lower trial court, with direct contact with the evidence (immediacy), the oral testimonies particularly, has a better perspective than the higher court of error to assess that evidence.⁴⁹

(d) *Dispute resolution*. The scope of review marks an important difference between the court of error model and the trial court model. The trial courts at the first instance should be willing to accept all evidence and allegations.⁵⁰ In a court of error, as we saw, new evidence or allegations cannot be accepted.⁵¹ Quite the contrary, in a higher court that repeats the first instance dispute-resolution function, the evidence, new or old, will be discussed because the court should pacify any complaint that the litigants (still) have, regardless of whether it is a question of law, procedure or even facts. The trial court orientation towards litigants' dissatisfaction⁵² may imply a willingness not only to a review but to a total re-evaluation for a second or third time of the same disputed questions as the lower instance did (appeal *de novo*).⁵³

i. Supreme courts

(a) *General interpretation*. According to the black letter of the legislation that defines the powers of the US and UK supreme courts, these courts are allowed to make a full review on both law and facts.⁵⁴ That could give the initial impression that they have a scope of review open enough to become a full

⁴⁶ TULLOCK 1994, p. 9-21; applied to appeals, KODEK 2014, p. 45.

⁴⁷ That is why in the literature this model is called appeal *on the record*. SHAPIRO 1980, p. 646 ('... in which the court reviews only the questions of law, leaving questions of facts to the trial judge and/or jury. Thus the appeals court [on the records] looks at only those portions of the record relevant to the trial court's legal ruling, rather than fully re-examining all the evidence in order to reach its own independent findings of fact.').

⁴⁸ *infra* Chap. III.B.1 (d).

⁴⁹ KODEK 2014, p. 44.

⁵⁰ In the literature, this is also known as appeal *de novo*, SHAPIRO 1980, p. 645 ('... in which the appellate court re-examines all the evidence and legal argument advanced in the initial trial.').

⁵¹ *supra* Chap. III.B.1 (c).

⁵² *supra* Chap. II.C.1.

⁵³ SHAPIRO 1980, p. 636-637 (stating that appeal *de novo* and an initial trial before a higher authority 'become almost indistinguishable'); BARENDRECHT, BOLT & HOON 2006, p. 13-14.

⁵⁴ GEEROMS 2004, p. 254.

recourse for the dispute resolution function, as in a trial court model. The actual practices of these supreme courts, however, are much more limited. As we will observe, their main scope of review is, in reality, focused on taking a stand when contradictory interpretations of the law are competing, to fill the gaps in the fields where there is no settled criteria yet and to keep the case law updated to the current context of society. In this sense, the US and UK supreme courts are characterised, in practice, by a scope of review focused on case law problems, as we shall see.

This is precisely the situation in the US Supreme Court. The three hypotheses in Rule 10 for the writ of certiorari refer to these types of case law contradictions.⁵⁵ For example, contradictions between state courts of appeals;⁵⁶ between a state court of appeals and the court of last resort of the same state;⁵⁷ between the court of last resort of one state and the court of last resort or court of appeals of another state;⁵⁸ or between the court of appeals of one state and the US Supreme Court.⁵⁹

In a similar manner, the UK Supreme Court defines its scope of review broadly as to the ‘points of law of general public importance’.⁶⁰ But the kinds of questions of law that could raise such ‘general importance’ are precisely those in which there is contradiction in the case law, problems of gaps or other interpretation problems which apply to future cases, as well. These case law problems fall within its scope of review because in those kinds of situations the intervention of the UK Supreme Court is needed to clarify or develop the law.⁶¹

(b) *Particular application.* Because its attention is focused on such general case law problems only, these supreme courts will review just those disputes that involve more general complexities of interpretation, but not any other particular mistakes in the application of the law. In the US, the *Rules of the Supreme Court* are explicit in stating: ‘A petition for a writ of certiorari is rarely

⁵⁵ BAUM 2010, p. 91.

⁵⁶ *Rules of the Supreme Court of the United States*, Rule 10 ((a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter ...).

⁵⁷ *Rules of the Supreme Court of the United States*, Rule 10 ([a United States court of appeals] has decided an important federal question in a way that conflicts with a decision by a state court of last resort’).

⁵⁸ *Rules of the Supreme Court of the United States*, Rule 10 ((b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals’).

⁵⁹ *Rules of the Supreme Court of the United States*, Rule 10 ((c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court’).

⁶⁰ UK Supreme Court - *Practice Directions 3*, Rule 3.3.3.

⁶¹ LE SUEUR 2004B, p. 273 (‘The principle criterion for granting a petition of leave to the [House of] Lords is whether there is a “point of law of general public importance” ... This reflects the principal function of top-courts in common law systems: it ought to be concerned not with the error correction but has the broader responsibility of clarifying and developing the law...’).

granted when the asserted error consists of ... the misapplication of a properly stated rule of law.’⁶²

In the UK, the supreme court has the same limitation based on its aforementioned preliminary screening criterion. Permission to appeal may be granted only if a ‘point of law of *general* public importance’ is at stake.⁶³ *A contrario sensu*, not every *particular* misapplication of the law in the current dispute will be under review at the UK Supreme Court. It is not a ‘point of law’ without additions. Instead, it should be only those misapplications of an importance that could qualify as ‘general’ – contradictions, gaps or developments of the case law are the paradigmatic examples – as opposed to those errors of a mere ‘particular’ relevance.

(c) *Procedural missteps*. The procedural violations committed at the lower courts are usually excluded from these supreme courts’ scope of review. In the US, the procedural violations are, in principle, within the scope of the US Supreme Court. However, according to its *Rules*, the writ of certiorari may review when ‘[a US Court of Appeals] *has so far departed* from the accepted and usual course of judicial proceedings ...’.⁶⁴ This means that the review of procedure is not intended to be a common practice in the US Supreme Court. Instead, only the most severe or important procedural violations (‘so far departed’) will be heard, not every possible misstep.

The UK Supreme Court is in a similar situation. This court is, in general, subject to the same regulation of appeal as the lower Court of Appeal, which does have power to review procedural violations.⁶⁵ In practice, however, when it comes to the ‘points of procedure ... the House of Lords [now the UK Supreme Court] is normally reluctant to take appeals’.⁶⁶ Therefore, even if the revision of procedural violations is, in theory, within the UK Supreme Court’s scope of review as well, in practice the court will not exercise that power on an error of the process.

(d) *Re-evaluation of facts*. The same happens with questions of fact. These supreme courts may have the power to review the facts of the case.⁶⁷ However, they will exercise that power rarely, due to an extreme deference to the work done by the lower court.⁶⁸ In the US, the same restriction on the writ of certiorari that applies against any pure misapplication of the law applies to questions of fact. Rule 10 states that, as regards the ‘erroneous factual findings,’ the certiorari ‘is rarely granted,’ as well.⁶⁹

⁶² *Rules of the Supreme Court of the United States*, Rule 10, final paragraph [emphasis added].

⁶³ UK Supreme Court - *Practice Direction 3*. Rule 3.3.3 [emphasis added].

⁶⁴ *Rules of the Supreme Court of the United States*, Rule 10, (a) [emphasis added].

⁶⁵ *English Civil Procedure Rules*, Rule 52.11 (3)(b); ZUCKERMAN 2013, p. 1187-1188.

⁶⁶ BLAKE & DREWRY 2004, p. 227; in detail, ANDREWS 2013, p. 458-459.

⁶⁷ GEEROMS 2004, p. 279-280.

⁶⁸ GEEROMS 2004, p. 280.

⁶⁹ *Rules of the Supreme Court of the United States*, Rule 10, final paragraph.

In the UK, traditionally the House of Lords, in a practice continued by the current UK Supreme Court, has been reluctant to review the facts.⁷⁰ This limited practice on reviewing facts is present despite its being within the UK Supreme Court's scope of review according to the general appeal regulation in the *Civil Procedure Rules*.⁷¹ In ZUCKERMAN's view:

[T]here is an even greater restraint on Supreme Court interference with the factual findings, especially where both the trial court and the Court of Appeal agreed on the matter.⁷²

In sum, these supreme courts do not review the facts, even if they have the power to do so. The rationale behind this self-constraint is the assumption that the task of finding the facts belongs to the lower instances.

(e) *Constitutional review*. One of the most important differences between the US and the UK in their supreme courts' scope of review is the judicial review of legislation. In the US, since *Marbury v. Madison* (1803), the US Supreme Court exercises a *strong* power of judicial review on the constitutionality of legislation, which implies the power to directly annul or strike down the statutes enacted by the Congress due to conflict with the US Constitution.⁷³ In the UK, quite the contrary, there is no constitutional supremacy, but the principle of parliamentary sovereignty instead. As a consequence, in the UK there is no strong judicial review of legislation that can be exercised by the supreme court,⁷⁴ nor by any other court in the UK.⁷⁵ In exchange – based on WALDRON's terminology – the UK has only a *weak* judicial review (due to the Human Rights Act), because the UK Supreme Court's declaration of incompatibility does not affect the validity of the legislation.⁷⁶ Still, according to DARBYSHIRE, the UK Supreme Court may effectively 're-write, quash or suspend' legislation that conflicts with EU law, strike down Scottish Acts and reinterpret or declare the incompatibility of (but not annul or strike down directly) UK statutes that infringe the European Convention on Human Rights.⁷⁷ As a result of this (more or less weak) power of judicial review, judges of the UK Supreme Court – such as Lord HOPE and Lord STEYN – are now of the opinion that parliamentary sovereignty should have limits.⁷⁸ This emerging opinion against parliamentary sovereignty in the UK remains highly criticised still.⁷⁹ In either case, however,

⁷⁰ GEEROMS 2004, p. 271.

⁷¹ The English *Civil Procedure Rules*, Rule 52.11 (3) (a), authorises to amend any 'wrong' on appeal, without a limitation on questions of fact nor law, *supra* Chap. V.C.1.

⁷² ZUCKERMAN 2013, p. 1185. Based on *Hicks v. Chief Constable of the South York* [1992] 2 All ER 65 (HL).

⁷³ SCHWARTZ 1993, p. 21 ff.

⁷⁴ ANDREWS 2013, p. 456 ('The [UK] Supreme Court lacks the power to invalidate an Act of the Parliament'); *Jackson v. Attorney General* [2005] UKHL 56; [2006] 1 AC 262, HL.

⁷⁵ DARBYSHIRE 2011, p. 359; BELL 2011, p. 803-805; HERINGA & KUIVER 2012, p. 177; VAN DER SCHYFF 2010, p. 184-189; according to WALDRON 2006, the UK has a 'weak' judicial review due to the Human Rights Act, because the declaration of incompatibility does not affect the validity of the legislation (p. 1355).

⁷⁶ WALDRON 2006, p. 1355.

⁷⁷ DARBYSHIRE 2011, p. 359. Also, SORABJI 2014A, p. 7-8.

⁷⁸ See *R (Jackson) v. HM Attorney General* [2005] Q.B. 579 at [101-102, 107].

⁷⁹ SORABJI 2014A, p. 10-12.

these powers of judicial review on human rights are, in practice, seldom used by the UK Supreme Court against the Parliament.⁸⁰

ii. *Cassation chambers*

The chambers of the French and Italian courts of cassation define their scope of review based on a certain conceptual classification. ‘The main criterion to delimit the scope of control [in cassation] is the distinction between facts and law (*distinction du fait et du droit*).’⁸¹ This clear-cut separation is problematic in their case law.⁸² However, the basic dogma of the doctrine is that cassation is focused on the questions conceptualised as ‘law’, but the law only.⁸³ Questions under the category of ‘facts’, instead, are explicitly banned from review by their cassation courts.⁸⁴

(a) *General interpretation.* The questions of law, in their view, also include the general conflicts of judicial interpretation. Unlike the US and UK supreme courts,⁸⁵ however, the cassation courts do not focus their attention on case law problems only. A case with a general interpretation conflict will be heard by the chambers, together with all the other questions of law that do not raise such a general problem.⁸⁶ However, the case will be resolved in a transitory way because the case law contradictions can go even further, to the cassation court’s plenary session instead.⁸⁷

(b) *Particular application.* The vast majority of the chambers’ caseload is constituted by particular misapplications of a clear law in the current case.⁸⁸ That is to say, the erroneous application of the codes or any other pieces of legislation. Such application of the law to a certain context of facts is under the chambers’ review because it is classified as a question of ‘law’, as well. In France, this particular application of the law to the current case is called *qualification juridique des faits*,⁸⁹ and in Italy, *error in iudicando*.⁹⁰

⁸⁰ DICKSON 2013A, p. 377 (‘The reluctance of the top court [*i.e.*, UK Supreme Court] to trespass on Parliament’s patch has been very marked in the years to date [2013] since the commencement of the 1998 Act and there is little reason to believe that this attitude is likely to change in the years to come.’).

⁸¹ FERRAND 2017, p. 188; also BORÉ & BORÉ 2015, p. 239-240.

⁸² For example, BORÉ & BORÉ 2015, p. 240, 283-300.

⁸³ TARUFFO 1998, p. 122 (‘In the “Cassational Model”, the supreme court is by definition – so to say – restricted to the considerations of questions of law.’).

⁸⁴ TARUFFO 1998, p. 123 (‘[T]he Court must “take the facts” as they were established in the court below. No new judgment on these facts can be made by the Court of cassation, and therefore no evidence need or can be admitted.’).

⁸⁵ *supra* Chap. III.B.1 (i).

⁸⁶ In detail, *infra* Chap. V.C.1 (vi).

⁸⁷ In detail, *infra* Chap. IV.C.1.

⁸⁸ In France, according to TROPER & GRZEGORCZYK’s estimations, only 200 Court of Cassation cases per year – among a total caseload of ca. 22,000 – are useful for creating precedents which clarify the general interpretation problems (1997, p. 106); also, FERRAND 2017, p. 196; *infra* Chap. III.B.4 (ii).

⁸⁹ WEBER 2010A, p. 87; TROPER & GRZEGORCZYK 1997, p. 104; FERRAND 2010, p. 598; in detail, see BORÉ & BORÉ 2015, p. 301 ff.

⁹⁰ SILVESTRI 2017, p. 234; LUCIDO & RAIMONDI 2015, p. 80-83.

(c) *Procedure missteps*. Violations of procedure are also included in the cassation chambers' review. In France, there is no explicit list of procedural violations that should be reviewed by the cassation chambers. However, procedural violations in general are also considered questions of law, not substantive but of the 'formal' law.⁹¹ In Italy, the civil procedure code explicitly has a list of procedural violations that should be checked in cassation.⁹² Italian scholars also consider these procedural violations as questions of law under cassation review, namely, errors *in procedendo*.⁹³

(d) *Re-evaluation of facts*. According to cassation dogma, only the questions conceptualized as 'fact' are excluded from the court of last resort's review.⁹⁴ According to FERRAND, '... properly understood, the [French] Court of Cassation cannot go back into the facts which were sovereignly assessed by the lower judge. It [the Court of Cassation] is, indeed, solely a court of the law.'⁹⁵ The first consequence of this prohibition against review of the facts is that no evidence can be presented in cassation,⁹⁶ not even if it is new.⁹⁷ The second consequence is that the assessment of the credibility of evidence, especially the oral testimony, is excluded too.⁹⁸ Written evidence is, exceptionally, under review in cassation because its assessment is regulated by the codes.⁹⁹ The review of written evidence is accepted in cassation because, due to the codes' regulation on its value, the value of written evidence counts as questions of law instead of purely questions of fact.

An indirect way of reviewing the facts in cassation is through the drawing of rational inferences from the evidence presented in the judgments. '[D]eficiencies in the *reasoning* as to the assessment of the evidence may be challenged by cassation ... in many countries.'¹⁰⁰ Even if it is a practice that, according to cassation dogma, should not be tolerated, it is in practice inevitable.¹⁰¹ This happens in the French *Cour de cassation* because, when the judgment is not properly grounded, the procedural requirement (formal law) of a properly motivated judgment is violated (*défaut the motif*).¹⁰²

⁹¹ FERRAND 2010, p. 599-600; in detail on the procedural violations, BORÉ & BORÉ 2015, p. 369 ff.

⁹² *Codice di Procedura Civile*, Art. 360.

⁹³ COMOGLIO, FERRI & TARUFFO 2011, p. 713, 715; LUCIDO & RAIMONDI 2015, p. 83-86.

⁹⁴ TARUFFO 1998, p. 123 (stating that the cassation restriction on facts is obeyed 'at least as a general rule').

⁹⁵ FERRAND 2010, p. 598 ('*Bien entendu, la Cour de cassation ne peut revenir sur les faits tels que souverainement constatés per les juges inférieurs. Elle est en effet uniquement juge du droit.*'); BORE & BORE 2015, p. 285.

⁹⁶ TARUFFO 1998, p. 123 ('[T]here is no opportunity at all to admit fresh evidence before the Court of Cassation ...'); BORE & BORE 2015, p. 285; WEBER 2010A, p. 85; French *Code procédure civile*, Art. 619: '*Les moyens nouveaux ne sont pas recevables devant la Cour de cassation.*'

⁹⁷ BORE & BORE 2015, p. 286.

⁹⁸ BORE & BORE 2015, p. 286, 289.

⁹⁹ FERRAND 2010, p. 603-606; BORE & BORE 2015, p. 295-296.

¹⁰⁰ KODEK 2014, p. 45 [emphasis added]; TARUFFO 1998, p. 123.

¹⁰¹ BARSOTTI & VARANO 1999, p. 218; TARUFFO 1991, p. 135-156.

¹⁰² WEBER 2010A, p. 79; in detail, BORÉ & BORÉ 2015, p. 400-426; *infra* Chap. V.C.1.

In Italy, this has been an especially acute problem. For a long time Italian scholars have denounced the tendency of their cassation court to re-examine the evidence and the questions of fact through such indirect way of questioning the reasoning of the lower court's judgment.¹⁰³ By doing so, the authors say, the Italian *Suprema Corte di Cassazione* has betrayed its role as a pure cassation on law, becoming a third instance of full review of the merits of the case (both of law and of fact).¹⁰⁴ The last reforms on cassation procedure have been efforts to solve that problem. The reforms aimed at regulating the review of facts in cassation in order to introduce limitations. For example, the reform of 2012 stated that the cassation court can review facts only if they were omitted by the lower court judges, but discussed by the parties.¹⁰⁵ However, the succession of one reform after the other seems to prove that none of them have been really effective in solving the problem, raising the scepticism of Italian scholars again.¹⁰⁶

(e) *Constitutional review*. Finally, neither the French *Cour de cassation* nor the Italian *Suprema Corte di Cassazione* has the power of constitutional review of legislation.¹⁰⁷ In France, the equivalent constitutional court model is the *Conseil Constitutionnel*, which originally was limited to the control of bill projects prior to their enactment.¹⁰⁸ Since the constitutional reform of 2008, however, the *Conseil Constitutionnel* is allowed to review legislation after its enactment.¹⁰⁹ In Italy, such judicial review is the charge of a separate constitutional court (the *Corte Costituzionale*), which has the power to annul a piece of legislation already enacted.¹¹⁰ As regards the cassation courts themselves, they do not have such annulment power over legislation. That does not mean that matters with some sort of constitutional relevance cannot end up on the courts of cassation dockets. However, it is outside their scope of review to challenge the constitutionality of the legislation in civil matters which they shall apply.¹¹¹ If a statute violates the constitution, the task of the court of cassation will be limited to referring the case to the constitutional court.¹¹²

iii. *Horizontal comparison*

(a) *Re-evaluation of facts*. From a horizontal point of view, the courts of last resort of both pairs of jurisdictions tend to exclude questions of fact. In the US and UK, even if they have the power to review the facts, in practice their supreme

¹⁰³ TARUFFO 1991, p. 135 ff.

¹⁰⁴ COMOGLIO, FERRI & TARUFFO 2011, p. 708, 727-728; SILVESTRI 2017, p. 239-240.

¹⁰⁵ FERRARIS 2015, p. 222-226; CONSTANTINO 2012, p. 14-16; in detail on the 2012 reform, BARTOLINI 2012.

¹⁰⁶ TARUFFO 1991, p. 104-105; SILVESTRI 2017, p. 241-242.

¹⁰⁷ On the separation between the ordinary courts of last resort (supreme court) and the constitutional court in Europe, FERRERES COMELLA 2004, p. 466-469.

¹⁰⁸ STONE SWEET 1992, p. 57.

¹⁰⁹ FABRINI 2008, p. 1297-1312; MATHIEU 2011, p. 476-477.

¹¹⁰ In detail, FERRARESE 2011, p. 64-89.

¹¹¹ JOLOWICZ 1998, p. 44.

¹¹² JOLOWICZ 1998, p. 44; FERRERES COMELLA 2004, p. 465; HERINGA & KIIVER 2012, p. 180-181.

courts do not exercise that power.¹¹³ On the French and Italian side, the restricted scope on facts comes from the cassation dogma based on the procedural regulation, in which the cassation courts review questions of law exclusively. Therefore, there is a similarity as regards the exclusion of facts, *de facto* or *de iure*, between the courts of last resort of the US, England (UK), France and, to a lesser extent, Italy. These common restrictions on facts ensure that the courts of last resort do not have, in principle, a scope broad enough which could be compatible with a proper trial court model. However, in cassation courts the facts can be reviewed indirectly, although not explicitly admitted. Facts can be reviewed through the assessment of the rationality in the grounds of the judgments, and the application of the law over the facts, in which questions of law and fact can be mixed.¹¹⁴ According to TARUFFO:

[T]here may be some more or less clear deviations from this rule [that cassation does not review the facts]. On the one hand, when the judgment of the Court is more intensively oriented to take into account the specific circumstances of the single case, it may be difficult to believe that the Court does not make any further evaluation about the facts of the case, although such evaluation does not (cannot) reach the surface of the Court's judgment. On the other hand, there are situations in which the Court of Cassation may be pushed to control the merits of the judgment on the facts, although this kind of control is formally excluded from its function.¹¹⁵

This hidden way of reviewing the facts in cassation seems to be a more acute problem in the Italian cassation than in the French one. This indicates that Italy, among the four jurisdictions under study, is the one with a more prominent latent deviation in its scope of review towards repeating the dispute resolution function through a (third) trial court model which reviews facts as well.

(b) *Procedure missteps*. As regards procedural violations, we can observe an asymmetry. The US and UK supreme courts tend to exclude the revision of infringements in the proceedings. As in questions of fact, even if they have the power to review them, in practice they refrain from exercising that power. French and Italian cassation chambers, instead, have a broader review of procedural issues. French cassation includes procedure in its review because it is part of the formal law, and Italy includes a catalogue of procedural rules that shall be reviewed in cassation.

This difference in the review of procedure can be attributed to the different models of courts. The US and UK supreme courts are courts of precedents, whose function is limited to solving general interpretation problems of the law, whereas the Italian and French cassation chambers operate as courts of error, whose function is to minimise the mistakes in the final judgments of the lower courts. But such mistakes can be the result not only of a substantive misinterpretation, but of a procedural violation, as well. Because French and Italian cassation chambers are courts of error and the US and UK supreme

¹¹³ SHAPIRO 1980, p. 648; GEEROMS 2004, p. 279-280.

¹¹⁴ In detail, *infra* Chap. V.F.1 (vii).

¹¹⁵ TARUFFO 1998, p. 123.

courts are not, only the former review particular procedural violations, and the latter tend to omit them. Instead, a court of precedents model – such as the US and UK supreme courts – does not have interest in reviewing every particular violation of procedure unless a general interpretation problem of the procedural rules themselves arises.

(c) *Particular application vs. general interpretation.* The most important asymmetry from a horizontal perspective lies in the review of questions of law: whether they control the particular application of the law in every possible case or only when general problems of legal interpretation arise. In the French and Italian cassation chambers every misapplication of the law to a current case will be reviewed, whereas in the US and UK supreme courts the misapplications of the law receive attention only if they involve a more public impact on case law interpretation and development. This is consistent with the main difference between a court of precedents and a court of error model. Both aim at the uniformity of the decision criteria. But the court of error has a one-by-one approach (in which each misapplication is equally relevant and worthy of attention).¹¹⁶ And a court of precedents aims at uniformity by issuing guidelines only in a few and exemplary disputes that raise a general problem of interpretation.¹¹⁷ Because French and Italian cassation chambers correspond to a court of error model, and the US and UK supreme courts to the court of precedents model instead, the former have a broader scope of review, open to any particular misapplication of the law; and the latter have a restricted scope of review, concentrated only in cases that involve a general problem of interpretation.

(d) *Constitutional review.* As regards the constitutional review of legislation, the French and Italian courts of cassation do not have that power, neither based on their national constitutions nor in international sources. Therefore, no clear latent deviation towards a constitutional court model can be observed in these cassation chambers. Instead, the French and Italian cassation courts refer the cases to a separate constitutional court (the *Conseil Constitutionnel* and *Corte Costituzionale*, respectively) if the applicable legislation raises constitutional problems.¹¹⁸ This is consistent with their manifest functions that deny their role as a political counterweight.¹¹⁹ To what extent are the French and Italian cassation courts similar to or different from the US and UK supreme courts in respect of constitutional review? The answer will depend on whether we take into account only the manifest function, or the manifest and latent functions, as well.

At a purely manifest level, the situation is different between the supreme courts under study. The US recognises a strong judicial review of the constitutionality of legislation, based on its national constitution and *Marbury v. Madison*; whereas the UK, not having a single written constitution and because of the

¹¹⁶ BRAVO-HURTADO 2014, p. 326.

¹¹⁷ BRAVO-HURTADO 2014, p. 326.

¹¹⁸ On the relation between ordinary courts of last resort (supreme court) and constitutional courts, GARLICKI 2007, p. 44-68.

¹¹⁹ *supra* Chap. II.D.1 (*iv*); Chap. II.D.2 (*iv*).

principle of parliamentary sovereignty,¹²⁰ does not. If we keep to the manifest functions only, we could observe a point of horizontal symmetry in the scope of review between the French and Italian cassation courts and the UK Supreme Court (but not the US). These cassation courts and the UK Supreme Court have the lack of constitutional review in common. In the horizontal picture of manifest functions, only the US remains outside this similarity, because it does recognise constitutional review, unlike the UK, France and Italy.

However, this similarity on the lack of constitutional review between the UK Supreme Court and the French and Italian courts of cassation becomes less apparent if we take into account not only the manifest but also the latent functions. In practice, the UK Supreme Court does exercise other sorts of judicial review of national legislation, based not on a national constitution but in international sources.¹²¹ Nevertheless, within the UK to admit that this could count as a proper constitutional review is highly resisted, because it goes against their tradition of parliamentary sovereignty.¹²² This traditional resistance to an (explicit) political counterweight function against the Parliament explains why, even having a tool that can be used as a strong judicial review against the legislation, the UK Supreme Court exercises this power to a considerably lesser extent than the US Supreme Court, which openly admits it.¹²³

Therefore, if we take into account manifest and latent functions together, the supreme courts under study (US and UK) are less different in this aspect. Both in practice have some sort of power of judicial review of legislation; however, in the US it is explicitly admitted and intensively used (manifest) and in the UK it is still denied and rarely invoked (latent). When taking into account the latent functions, therefore, the previous horizontal similarity between the French and Italian cassation courts and the UK Supreme Court disappears. Cassation chambers under study do not have judicial review of legislation, neither at a manifest level nor at a latent level; the UK Supreme Court does have it, at a latent level at least. In conclusion, the current view of a horizontal asymmetry in the constitutional review of legislation reappears when not only the manifest level, but also latent functions are included in the picture. On the one hand, the French and Italian cassation courts do not have judicial review of legislation (neither at a manifest level nor at a latent level) and, on the other hand, the US and UK supreme courts do have it (the former at the manifest level and the latter at the latent level).

¹²⁰ *supra* Chap. II.D.2 (iii).

¹²¹ SORABJI 2014A, p. 7-10; HERINGA & KUIVERS 2012, p. 177-179; *supra* Chap. I.D.2. (iii).

¹²² SORABJI 2014A, p. 11.

¹²³ DICKSON 2013A, p. 98.

2. Judgment effects

(a) *Political counterweight*. In a constitutional court, the force of its decisions comes from its very constitutional review power.¹²⁴ In this model, the judgment will have general effects because when a piece of legislation is struck down, the statute ceases to exist *erga omnes*. This affects future cases because a statute that is annulled because it is unconstitutional cannot be applied not just in the current dispute but neither in subsequent ones.¹²⁵

The political struggles inside a constitutional court, however, make it possible for the general effects of a previous judgment to be overturned more easily. Over intense ideological issues ('salient' in SEGAL & SPAETH's words), future panels of the court may show little deference to the decisions rendered by earlier panels,¹²⁶ in a way similar to how a legislature may act. When the majorities within a legislature change, the new winning coalition is expected to reform the legislation enacted by the legislature in the past, previous legislation enacted under majorities now defeated. In a similar way, new majorities in a political court will tend to explicitly overrule the precedents delivered during previous court majorities. In a constitutional court, the current panels of judges can relate to the previous ones also as political rivals, as the politicians in the Parliament do. They too have the task of dismantling the ideological agenda settled by their rival predecessors, and now enforcing their own. In that context, constitutional precedents will be stable as long as the internal political balance of the court is maintained.¹²⁷

(b) *Judicial lawmaking*. The picture differs in a court of precedents model. The court of precedents does not aim to be a counterweight to the Parliament, but its complement.¹²⁸ Therefore, this model deals with less politically sensitive issues because the annulment of Parliament's legislation due to unconstitutionality is not at stake. In a pure court of precedents, the current judges relate in a different manner to their predecessors. Instead of being viewed as rivals with incompatible political agendas, they see each other as colleagues of diverse legal expertise but with a shared responsibility of maintaining continuity. In this less political context, non-constitutional precedents can have a stability that goes beyond the composition of the panel of judges over time. Therefore, future compositions of the panel in this model may show a higher level of deference to the precedents established by their predecessors.

In a court of precedents, therefore, the judicial lawmaking function requires that the court of last resort's judgments be, *de iure* or *de facto*,¹²⁹ followed by all

¹²⁴ *supra* Chap. II.D.4.

¹²⁵ HERINGA & KUIVER 2012, p. 163 ('Disapplication, invalidation or setting aside means to leave the statute as it stands, but to refrain from applying it to a particular case. Annulment or declaring void [a statute due to its unconstitutionality] carries further reaching consequences. It means that the statute is truck out and ceases to exist, as it were.').

¹²⁶ SEGAL & SPAETH 1999, p. 308-312.

¹²⁷ Empirical approach, SPRIGGS & HANSFORD 2001, p. 1091-1111.

¹²⁸ *supra* Chap. II.D.3.

¹²⁹ PECZENIK 1997, p. 465-467.

judges, from the lower court judges to the judges of the court of last resort itself. It will be of no use to have a court of last resort focused on solving case law problems if its solutions will not be considered by the other courts. Therefore, in this model it is necessary that the lower courts actually adhere to the court of last resort's rulings, not only for the current case, but also for similar cases that might occur in the future.¹³⁰ To perform this judicial lawmaking function it is necessary that the court of last resort's criteria be generally followed in practice, regardless of whether this adherence to its judgments is achieved through a proper *stare decisis* mandatory doctrine or just due to a high respect for the court of last resort's moral authority. The important aspect is that the rest of the courts closely follow the court of last resort precedents, independently if they are actually binding, or just as though they were binding.

(c) *Error-monitoring*. In a court of error, the routine error-checking has the consequence that most of the court's decisions have no crucial relevance for future cases, but just for the current case. Unlike the model of constitutional court,¹³¹ and of a court of precedents,¹³² in which both may have general effects or binding force for future disputes, in the model of a court of error instead the judgments normally have only particular effects. However, the influence in future disputes can be a side effect of the monitoring function.¹³³ Lower court judges may decide to follow the court of error's decisions not due to a legal obligation or moral deference, but for fear of potential retaliation by their superiors that could affect their career promotion.¹³⁴ However, this deterrent effect is the result not of one single decision of the court of error, but of a pattern of review constantly repeated, and forecasted by the lower courts.

d) *Dispute resolution*. Finally, the judgments of a trial court model, in principle, have effects only for the particular dispute, as well. Most of its cases will be just a repetitive and routine catharsis,¹³⁵ in SHAPIRO's terms,¹³⁶ which add no relevant information for the public – e.g., an ordinary landlord-tenant case or a case involving debt collection. We expect that all the courts decide according to the same criteria at a general level. But the direct contact with the particularities of the dispute in the first instance trial courts justifies a more case-by-case subjective approach. Therefore, other judges will pay little attention to trial court judgments since they know that the closer approach to the particularities of the conflict make them hard to apply to other disputes that are slightly different. Therefore, when a court of last resort repeats the dispute resolution function of the first instance trial courts, we could expect a similar subjective approach, casuistic and adaptive to the particularities of the current case, rather than based on repeating previous solutions.

¹³⁰ TARUFFO 2001B, p. 96; MITIDIERO 2015, p. 214.

¹³¹ *supra* Chap. III.B.2 (a).

¹³² *supra* Chap. III.B.2 (b).

¹³³ *supra* Chap. II.C.2.

¹³⁴ CAMINKER, 1994, p. 77.

¹³⁵ *supra* Chap. II.C.1.

¹³⁶ See again, SHAPIRO 1980, p. 629.

i. Supreme courts

Since the US started to follow the *stare decisis* doctrine by following the English influence,¹³⁷ let us start with the latter. England traditionally adheres to the *stare decisis* doctrine.¹³⁸ According to the principle of hierarchy, a decision made by the UK Supreme Court in an appeal coming from England is binding for all the lower English courts.¹³⁹ This doctrine was clearly settled in 1898, in the *London Tramways v. London County Council* case.¹⁴⁰ Since then, the House of Lords was strictly bound to follow its own precedents, without the possibility of explicitly overruling its previous decisions (besides, of course, the distinguishing technique).¹⁴¹ To avoid an excessive rigidity of the law, in 1966 a *Practice Statement* was enacted in order to allow the House of Lords to depart from its prior precedents, and set a new one, when the circumstances of the case required doing so.¹⁴²

The current situation of the new UK Supreme Court, continuing the last practices of the House of Lords, is that it is bound by its prior precedents, but it does have the power to overrule.¹⁴³ However, the UK court of last resort – both the former House of Lords and the current UK Supreme Court – historically appears reluctant to exercise this overturning power, and much more favourable than the US Supreme Court to adhere to precedents even if they are unpopular.¹⁴⁴ In fact, the House of Lords only exercised this power in eight occasions from the 1960s to the 1990s.¹⁴⁵ Therefore, this overruling power has not been used frequently in the UK, and there is no suggestion that the new supreme court will use it more.¹⁴⁶ However, when overruling is at stake, the practice of this court has been that the case will be decided not by the regular panel of five, but in a meeting of seven or more judges.¹⁴⁷

In the US Supreme Court, judgments have general effects on future cases when the court exercises constitutional review of legislation. These general effects

¹³⁷ FLETCHER & SHEPPARD 2005, p. 35.

¹³⁸ For all, CROSS & HARRIS 1991, p. 3-4.

¹³⁹ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 325; COWNIE, BRADNEY & BURTON 2013, p. 94; the judgments of the UK Supreme Court are binding for the jurisdiction of the case but persuasive for the other jurisdictions of the UK, INGMAN 2004, p. 14; SORABJI 2014A, p. 3.

¹⁴⁰ CROSS & HARRIS 1991, p. 102.

¹⁴¹ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 326.

¹⁴² CROSS & HARRIS 1991, p. 103 ff.

¹⁴³ SLAPPER & KELLY 2016, p. 142-144.

¹⁴⁴ FLETCHER & SHEPPARD 2005, p. 80.

¹⁴⁵ CROSS & HARRIS 1991, p. 135 ff. The eight overruling decisions are: *E.L. Oldendorff and Co. GmbH v. Tradax Export SA*, (1974) AC 479; *Miliangos v. George Fails (Textiles) Ltd.* (1976) AC 433; *Dick v. Burgh of Falkirk* (1976) SLTR 21; *Vestey v. Inland Revenue Commissioners* (1980) AC 1148; *R. v. Secretary of State of the Home Department, ex parte Khawaja* (1984) AC 74; *R. v. Shivpuri* (1987) AC 1; *R. v. Howe* (1987) AC 417; *Murphy v. Brentwood District Council* (1990) 2 All ER 908.

¹⁴⁶ COWNIE, BRADNEY & BURTON 2013, p. 94.

¹⁴⁷ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 326 ('... the Inner House of the Court of Session, which have a practice that resembles that of the House of Lords. When a precedent is to be considered for overruling, a 'Whole Court' of seven or more judges is convened.').

come from the fact that the unconstitutional legislation will be annulled and, therefore, it cannot be applied in other disputes.¹⁴⁸ But besides the general effects of the constitutional annulment of the legislation, as we observed, the US Supreme Court also adheres to the *stare decisis* doctrine following the English influence.¹⁴⁹ Therefore, in principle, US Supreme Court judgments have to be followed by the court itself and by all the other courts, state or federal, in the lower hierarchies.¹⁵⁰

However, an important distinction is made between statutory and constitutional precedents in the US.¹⁵¹ The latter are those that apply norms of the US Constitution, while the former only provide interpretation of general common law or legislative statutes of the ordinary hierarchy. In the US, the consensus is that the statutory precedents have a stronger binding force than the constitutional ones.¹⁵² The stronger binding force of the statutory precedents over the constitutional ones seems paradoxical. Due to the higher hierarchy of the Constitution itself, quite the contrary, constitutional precedents should have a higher precedential hierarchy, and therefore more stability than statutory precedents which come from a normative source of a lower hierarchy instead. However, the actual practice in the US is exactly in the opposite direction. Why does the US make a distinction between the binding force of statutory and constitutional precedents contrary to their respective normative hierarchies? In the US perspective, the reason for this lower deference to constitutional precedents, than the statutory ones, lies in the possibility of the Congress to amend an error committed in a prior precedent.¹⁵³ If the US Supreme Court created a statutory precedent that (according to the current composition of the panel) was based on erroneous criteria, the normal majorities of the US Congress could fix that statutory precedent because the congressional normal majorities can reform ordinary statutes too.¹⁵⁴ If the US Supreme Court commits an error in a constitutional precedent, quite the contrary, the normal majorities of the Congress will not be able to fix the mistake due to the super-majorities required to amend the Constitution. It is not the Congress, therefore, that can amend the mistakes in the constitutional precedents but the US Supreme Court itself again.¹⁵⁵ As a result, the US Supreme Court seems to be more willing to overrule its prior decisions – and, therefore, diminish the *stare decisis* force – in the constitutional precedents, where more political or ideological views are at stake:

The US Supreme Court has displayed a considerable willingness to overturn precedent, not only in the mid-twentieth century, when the

¹⁴⁸ HERINGA & KIIVER 2012, p. 163 ('[O]nce the US Supreme Court has found a statute in violation of the Constitution, a common-law precedent is established so that in the future all other courts will have to disapply the statute as well.').

¹⁴⁹ See again, FLETCHER & SHEPPARD 2005, p. 35.

¹⁵⁰ FLETCHER & SHEPPARD 2005, p. 79.

¹⁵¹ On the origins of this distinction, ESKRIDGE 1988, p. 1361-1439.

¹⁵² LEE 1999, p. 703-704; an extensive discussion in PETERS 2013, *passim*.

¹⁵³ LEE 1999, p. 704-705; ESKRIDGE 1988, p. 1362.

¹⁵⁴ LEGARRE & RIVERA 2006, p. 117-118.

¹⁵⁵ LEE 1999, p. 704-706; ESKRIDGE 1988, p. 1362.

Court was often described as liberal or activist, but also in recent decades in which it is described as conservative or restrained.¹⁵⁶

A contrario sensu, in the issues with fewer political implications – not in the constitutional matters but in the purely statutory precedents – we can expect a more solid and stable deference to *stare decisis* in the US.¹⁵⁷ This distinction between statutory and constitutional precedents is relevant for the object of this study, because, besides the general due process clause, litigation on purely civil matters, as defined in this study,¹⁵⁸ are usually not questions of a constitutional level but of the ordinary legislation. Therefore, when the US Supreme Court sets a precedent relating to a dispute in a case of civil matters – *e.g.*, private contracts or tort compensation – the court is normally setting a statutory precedent. In statutory precedents of purely civil matters, therefore, the US Supreme Court should have a stronger adherence to *stare decisis* than in constitutional precedents.

ii. Cassation chambers

As regards France, authors begin their description by stating that *Cour de cassation* judgments do not have general effects, unlike proper common law precedents. For example, WIJFFELS states that ‘the *Cour de Cassation*’s decisions do not create any binding precedent for the court in other cases, where the same legal issue may arise’.¹⁵⁹ That denial comes from their civil code.¹⁶⁰ One of its first articles states that judges are forbidden to issue general dispositions when resolving the cases brought before them.¹⁶¹ This clear view, at first sight, of the judges as non-creators of (general) law is a tradition that goes back to MONTESQUIEU and his famous observation that judges are the mere mouth that pronounces the legal statutes (*bouche de la loi*).¹⁶²

However, this initial denial is contradicted in two ways. First, French scholars, and the *Cour de cassation* itself, do recognise the relevance for legal certainty of having a clear and fixed case law (*jurisprudence*).¹⁶³ They will not admit, as a general rule, that cassation *arrêts*, individually considered, are binding. But when a consistent line of *arrêts*, following the same criteria, is consolidated over time, they will recognise that courts should respect the doctrinal authority of the *Cour de cassation* in such stable case law (*jurisprudence constante*).¹⁶⁴ Second, legal scholars tend to make a distinction about the relevance of certain cassation judgments. For example, BORE & BORE explain that:

¹⁵⁶ FLETCHER & SHEPPARD 2005, p. 80.

¹⁵⁷ LEE 1999, p. 730-733.

¹⁵⁸ *infra* Chap. I.E.2

¹⁵⁹ WIJFFELS 2013C, p. 80.

¹⁶⁰ BELL 2001, p. vii.

¹⁶¹ *Code civil*, Art. 5 (*‘Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.’*); ELLIOTT, JEANPIERRE & VERNON 2006, p. 77.

¹⁶² MONTESQUIEU 1747, Book XI, Chapter 6 ; BELL 2001, p. viii; GARAPON & PAPADOPOULOS 2003, p. 50-51.

¹⁶³ WEBER 2009, p. 116.

¹⁶⁴ BORE & BORE 2015, p. 699; MALINVAUD 2008, p. 163.

The case law authority [*autorité jurisprudentielle*] of certain decision [of the *Cour de cassation*] could be absolutely null; their authority could be weak, and limited to the judgment of the process in the remanded court (*tribunal de renvoi*). Their authority, at last, could be great, and sometimes of exceptional importance for the solution of a problem of law and, consequently, for the judgment of a multitude of present and future cases.¹⁶⁵

As regards the chambers' decisions, the vast majority of the *Cour de cassation's* caseload, only a few of them will reach such exceptional relevance. According to FERRAND, among the 20,000 *arrêts* rendered in a year, no more than 200 might have some importance for the development of interpretations.¹⁶⁶ That is only 1 per cent of the total caseload in civil matters. *A contrario sensu*, the remaining 99 per cent of the chambers' judgments have little, or no, general effects.

Italy also shares the *prima facie* denial of any general effect in respect of their *Corte di Cassazione*. For ALVAZZI DEL FRATE, 'in the Italian legal system the judgments of the *Corte di Cassazione* are not considered to be binding precedents'.¹⁶⁷ This denial comes from a legal source of a higher hierarchy than in France. In Italy, it does not come from the civil code, but from the Italian Constitution. Its Article 101 states that judges shall be subject to legislation only.¹⁶⁸ *A contrario sensu*, judges are forbidden to decide based on other sources than the legal statutes: for example, it is constitutionally prohibited to judge based on previous case law. Therefore, according to the Italian Constitution, and to what has now become part of the local legal culture, the legislature should be the only one that can create law.¹⁶⁹

However, Italian scholars, thereupon, moderate this initial statement. Instead of a *de iure* binding effect, they say, cassation judgments can have a *de facto* influence;¹⁷⁰ or instead of formally binding, they are *persuasive* precedents.¹⁷¹ In Italy, it is also admitted that, even if a single judgment may not have an important force, when it is reunited in a uniform, consistent and coherent way with many others (*jurisprudence constante*), they gain as a whole a strong normative force.¹⁷²

¹⁶⁵ In the original, BORE & BORE 2015, p. 702 ('*L'autorité jurisprudentielle de certaines de ses décisions peut être absolument nulle; cette autorité peut être faible, et limitée au jugement du procès par le tribunal de renvoi; cette autorité, enfin, peut être grande, et même parfois d'une importance exceptionnelle, pour la solution d'un problème de droit, et par conséquent pour le jugement d'une foule d'espèces présentes et futures.*') [Author's translation].

¹⁶⁶ FERRAND 2017, p. 196-197. In the same direction TROPER, GRZEGORCZYK & GARDIES 1991, p. 106.

¹⁶⁷ ALVAZZI DEL FRATE 2013, p. 60. In the same direction, SILVESTRI 2017, p. 235 ('In principle, the judgments rendered by the Court of Cassation do not have any precedential value ...').

¹⁶⁸ *Costituzione della Repubblica Italiana*, Art. 101 ('*I giudici sono soggetti soltanto alla legge.*').

¹⁶⁹ LIVINGSTON, MONATERI & PARISI 2015, p. 224.

¹⁷⁰ SILVESTRI 2017, p. 235.

¹⁷¹ TARUFFO & LA TORRE 1997, p. 154.

¹⁷² TARUFFO & LA TORRE 1997, p. 160-161.

iii. *Horizontal comparison*

Comparative law scholars highlight the effects of the judgments as one of the most distinctive differences between the common law and civil law legal traditions.¹⁷³ The common law tradition is characterised by a system of ‘precedents’. That is to say, a system in which their judgments have general effects, and count as formally binding. Therefore, each common law judgment, individually considered, has the power to change future criteria.¹⁷⁴ The civil law tradition, instead, has a *jurisprudentia constante* system.¹⁷⁵ Here the judgments have only particular effects, no binding force for subsequent disputes. In the civil law, future decision criteria cannot be changed by a single judgment but only if many judgments are coordinated in the same new direction.¹⁷⁶

This broad characterisation of the two legal traditions is consistent with the asymmetry in their courts of last resort, at least from a purely horizontal perspective between the US, England (UK), France and Italy. In the US and UK supreme courts, almost all judgments individually considered have general effects. A single judgment of these supreme courts will have the power to change decision criteria in the future.¹⁷⁷ In the Italian and French chambers of the courts of cassation, the reality is the opposite. Only a few of them will have some kind of general repercussions due to the exceptional relevance of the issue resolved. The vast majority of the chambers’ judgments will have relevance for the current case only. Instead, the cassation chambers’ decisions will have, *de facto* but not *de iure*, general repercussions only if a large number of judgments form a regularity, a consistent and large body of case law in the same direction (*jurisprudence constante*). But each judgment of a cassation chamber, individually considered, normally will not have the power to change future decision criteria.¹⁷⁸

The situation of the US and UK supreme courts, where judgments do have general effects, is consistent with both a constitutional court and a court of precedents. In a constitutional court the general effects are needed due to the *erga omnes* annulment based on the unconstitutionality of legislation. In the court of precedents, the general effects are also needed to align the lower courts with the court of last resort’s interpretation guidelines settled in a small number of cases. The UK Supreme Court does not have constitutional review of legislation. Therefore, the general effects of its judgments do not come from the *erga omnes* annulment of unconstitutionality, but just from the judicial lawmaking function of a court of precedents. In the US, however, not just one but both sources of binding force can be found. Their constitutional precedents will have general effects due to the annulment power of constitutional review

¹⁷³ GLENDON, CAROZZA & PICKER 2008, p. 132 ([U]nlike the common law, the civil law tradition from ancient times has regarded the judicial function as limited to deciding particular cases.’).

¹⁷⁴ MACCORMICK & SUMMERS 1997B, p. 538.

¹⁷⁵ GLENDON, CAROZZA & PICKER 2008, p. 133 ff.

¹⁷⁶ MACCORMICK & SUMMERS 1997B, p. 538.

¹⁷⁷ MACCORMICK & SUMMERS 1997B, p. 538.

¹⁷⁸ On how this characterisation of the civil law and common law legal traditions should be revisited based on the diagonal symmetry found in this study, *infra* Chap. VI.G.

of legislation. And its statutory precedents, which deal not with constitutional issues but with ordinary federal law, will have general effects too, due to adherence to the *stare decisis* doctrine, as in the UK Supreme Court.

Despite the shared general effects, between the US and the UK there is a different rate of overruling that needs to be explained. We observed that the UK Supreme Court seems to be more reluctant to use the overruling power than its US counterpart.¹⁷⁹ This distinctive rate of overruling can be explained based on the different judicial functions and court models. In a court of precedents model, the current judges see themselves as a new generation in charge of keeping continuity in the collective judicial lawmaking function started by their colleagues of previous generations. But in a constitutional court model, the judges see themselves not as a new generation of continuators but rather as victorious political rivals over their defeated predecessors. According to its manifest functions, the UK Supreme Court is only a court of precedents for judicial lawmaking, it is not a constitutional court for the political counterweight to the Parliament.¹⁸⁰ According to the court of precedents model, the UK Supreme Court judges see themselves more as a new generation of continuators rather than political rivals. As a result, the UK Supreme Court can have more stable precedents, because it does not have the politically sensitive task of constitutional review of legislation.

The US Supreme Court, on the other hand, combines both manifest functions, judicial lawmaking (court of precedents) and political counterweight (constitutional court).¹⁸¹ As regards statutory precedents, where the US Supreme Court acts as a court of precedents, it can secure more stability in its previous decision criteria due to the lack of strong ideological conflicts at stake. In the statutory precedents, therefore, the US Supreme Court judges may see themselves more as continuators than rivals. But in respect of constitutional precedents, where strong political values are in dispute, its function as a constitutional court model predominates. The situation is inverted, the judges become more akin to political rivals than collegial continuators. Therefore, the political rivalry between the US Supreme Court judges makes constitutional precedents more variable. In sum, only as regards the statutory precedents, where the US Supreme Court acts as a court of precedents, can the court attain a comparable stability as the UK Supreme Court, which is a court of precedents only. But as regards constitutional precedents, the US Supreme Court will show a level of variability greater than its UK counterpart, because the dynamics of the unstable constitutional court predominate over the steadiness required in the model of a court of precedents.

Despite this difference in long-run stability, the US and UK supreme courts share, for different reasons, the fact that each of their judgments, individually considered, have the power to change future decision criteria. This is the element that is absent, from a horizontal perspective, in the chambers of the

¹⁷⁹ See again, FLETCHER & SHEPPARD 2005, p. 80.

¹⁸⁰ *supra* Chap. II.D.2 (i, iii).

¹⁸¹ *supra* Chap. II.D.1 (i,iii).

cassation courts in France and Italy. Changing decision criteria is not the outcome of each cassation judgment, but of the accumulation of numerous decisions. This is consistent with the differences between the court of precedents and court of error models. The court of precedents requires strong binding force of each judgment because this model reviews a limited number of cases,¹⁸² but each decision of that reduced caseload should be influential guidelines for the lower courts.¹⁸³ That cassation chambers do not have such general effects in each of their judgments means that the effects of cassation chambers judgments are not compatible with the court of precedents model in the judgment effects attribute.

Instead, French and Italian cassation chambers operate as the court of error model and, as such, their task is to correct more or less repetitive mistakes on a case-by-case basis.¹⁸⁴ In that context, the judgments' general effects in a court of error are not the result of a single correction, but of a consistent pattern of monitoring over time. In this model, the deterrence of lower courts is not the result of each quality control individually considered, but the by-product of the permanent surveillance.¹⁸⁵ The cassation system of *jurisprudence constante*, identified by comparative law scholars, is the court of error in action. The lower courts will follow the cassation chambers' criterion not because it was stated in one precise decision, but because it is consistently repeated by their superior.¹⁸⁶ Therefore, the general effects come from the prediction made by the lower court in which, if the case reaches the cassation court again, the same pattern of quality control will be replicated.

In that context, if the cassation chamber applies a different criterion in a particular case (something that in the US and UK supreme courts will be enough to change future decision criteria), but the cassation general pattern continues, the lower courts will discharge that exceptional judgment as an anomaly. Under the strong monitoring presence of a court of error, lower courts are more concerned with the probability of being reversed in large numbers. Therefore, lower court judges will calculate that risk based on the average of many cassation *arrêts*, not just one of them, in which the impact of a single dissident judgment ends by being diluted.

The lack of general effects in the cassation courts is, in principle, useful not only for a court of error but also for the model of trial court. In order to pacify a heterogeneity of conflicts, the first instance trial courts need flexibility to find an individual solution that suits each case.¹⁸⁷ In that setting, it is an advantage that the judgments of previous disputes are not strictly binding for subsequent disputes. If they were binding, quite the contrary, it would make the process of

¹⁸² *supra* Chap. III.B.4 (b).

¹⁸³ *supra* Chap. III.B.2 (b).

¹⁸⁴ *supra* Chap. III.B.2 (c).

¹⁸⁵ *supra* Chap. II.C.2.

¹⁸⁶ See again, MALINVAUD 2008, p. 163 (France); TARUFFO & LA TORRE 1997, p. 160-161 (Italy).

¹⁸⁷ *supra* Chap. III.B.2 (d).

finding the adequate solution to the particularities of the current dispute too rigid.

Instead, in the trial court model the court will use previous decisions for the main purpose of saving time. The first instance trial courts are open to receiving any conflict, and a large number of them will be the same situation, replicated hundreds of times. In those exactly homogeneous disputes, the court will repeat the previous judgments not because there is a strong normative reason to do so. In this model, the copy-paste practice will be a pragmatic device to save human resources, not only a deference to prior precedents. But even within that ‘industrial Taylorism’, the trial court will maintain total freedom to depart from the chain of production at any moment in order to apply a special solution if the exceptional circumstances of the case so recommend. Under that need of flexibility, the long-term restrictions of the cassation’s system of *jurisprudence constante* may seem too rigid for a model of trial court.

3. Exposure

(a) *Political counterweight*. In a constitutional court, the judgments will have the highest level of exposure. First, the court will take action in making its decisions known through their inclusion in reports or on web pages.¹⁸⁸ Due to their political relevance, moreover, in this model the judgments will probably receive intense media coverage.¹⁸⁹ The general public, and not only the legal community, will be informed of the cases decided by their constitutional court through the daily newspapers and television talk shows, especially when they involve a political or moral debate – abortion, same-sex marriage, among others.¹⁹⁰

(b) *Judicial lawmaking*. In a court of precedents, the disputes also have such an importance as to deserve high exposure. Therefore, the publication of every single judgment is a constituent part of a court of precedents. In this model, the court decides a few cases a year, but each one of them needs to have a strong force influencing the judicial decision criteria.¹⁹¹ The guiding strength of a precedent is affected, among another things, by its level of exposure.¹⁹² In order to be influential, the court of precedents’ judgments first need to be widely known. Not only the other courts, also future litigants who will be governed by that precedent need to be informed. In this model, however, the court may be dealing with specific and technical matters of law that might not be of interest to the general public, but certainly for the legal scholars and lawyers in the field.¹⁹³ The court of precedents also takes action in publishing its judgments in

¹⁸⁸ For example, the constitutional courts of Spain (www.tribunalconstitucional.es); Chile (www.tribunalconstitucional.cl); Italy (www.cortecostituzionale.it).

¹⁸⁹ On the relation between constitutional courts and the mass media, STATON 2006, p. 98-112 (Mexico).

¹⁹⁰ In Canada, for example, SAUVAGEAU, SCHNEIDERMAN & TARAS 2005.

¹⁹¹ *infra* Chap. III.B.4 (b).

¹⁹² TARUFFO 1997, p. 451-452.

¹⁹³ TARUFFO 1997, p. 454; BOBEK 2009, p. 34.

public reports and on web pages, but it is less likely that its judgments will receive the same media coverage as the politically controversial decision of a constitutional court.¹⁹⁴

(c) *Error-monitoring*. In a court of error the level of exposure is more limited than in a court of precedents or a constitutional court. The routine error-checking it performs means that most of its cases are of no interest to the general public, with the exception of a few significant disputes.¹⁹⁵ Therefore, we should not expect that most of the court of error's judgments should be included in the public reports on case law, but only a small selection of them.¹⁹⁶ Accordingly, legal scholars and lawyers will concentrate their attention only on those significant judgments or on the ones that are representative of a bigger trend. However, the deterrent effects of its supervision require that its judgments should be known at least by the lower courts. In this model, therefore, the ordinary judgments may not be easily accessible to the whole population, but there certainly are databases internal to the judiciary in which every judge can query the court of error's case law on the matter.¹⁹⁷

(d) *Dispute resolution*. Finally, the trial court model requires the lowest level of exposure. The general public may have an interest in the well functioning of the trial courts in general, but a detailed public scrutiny into every single dispute is simply unfeasible. Moreover, it is possible to imagine that some moderate level of privacy, in which the judgments and evidence are accessible only between the parties, can be helpful for the role of peaceful resolution of disputes, and for reaching an agreement quickly.¹⁹⁸ That is why most of the dispute resolution function of first instance trial courts in civil and commercial matters can be delegated to the confidentiality of arbitration.¹⁹⁹

i. Supreme courts

In the US, the US Supreme Court's judgments receive the highest degree of exposure among the four jurisdictions under study. First, the most controversial issues are usually covered by the media.²⁰⁰ As with a recent case on gay marriage (*Obergefell v. Hodges*, 2015), extensive reporting in newspapers and on television shows is made.²⁰¹ In addition to the controversial cases, every judgment of the court is published once it is announced. First, its decisions are

¹⁹⁴ On how civil rights disputes receive more media coverage than other economic issues, O'CALLAGHAN & DUKES 1992, p. 195-203.

¹⁹⁵ RICHMAN & REYNOLDS 2013, p. 27-28.

¹⁹⁶ TARUFFO 1997, p. 451-452.

¹⁹⁷ UZELAC 2014B, p. 3-4. TARUFFO 1997, p. 452; BOBEK 2009, p. 34; in Chile, for example, (www.pjud.cl).

¹⁹⁸ In general, KRATKY DORÉ 1999, p. 283-402.

¹⁹⁹ On confidentiality in arbitration, for all COLLINS 1995, p. 121-134; *cfr.* SCHMITZ 2006, p. 1211-1253.

²⁰⁰ On the US Supreme Court mass media coverage, the literature is abundant. For example, SLOTNICK 1991, p. 128-142; HOEKSTRA 2003; COLLINS & COOPER 2012, p. 396-407; in general, GRABER & DUNAWAY 2015, p. 211-238.

²⁰¹ On the US Supreme Court in TV news, SLOTNICK & SEGAL 1998.

distributed to the federal courts of appeals and the state supreme courts.²⁰² Copies are delivered to the most important libraries and faculties of law.²⁰³ Most of its judgments, but not all, will be included as well in the series of important private publishing companies (West Publishing, Lawyers Cooperative, etc.). One journal specialises in the US Supreme Court case law: *The Supreme Court Review* of the University of Chicago. Also, an independent web page is devoted to publishing its judgments.²⁰⁴ For more than two centuries, the US Supreme Court has published all its decisions in the *United States Report*,²⁰⁵ and now on its own institutional web page, as well.²⁰⁶

In England, the UK Supreme Court's judgments also receive a high degree of exposure. But, unlike its US counterpart, the UK Supreme Court usually receives less attention from the media.²⁰⁷ Thus, the higher exposure of the UK Supreme Court's judgments is more focused in the legal community, not the general population.²⁰⁸ The barristers have traditionally been in charge of reporting and publishing the judgments.²⁰⁹ They administer the *Weekly Law Report* and *The Law Report*. Accordingly, the UK Supreme Court's judgments are regularly included in these semi-official reports.²¹⁰ For example, around 70 per cent of the former House of Lords' decisions were published in the *Weekly Law Report*.²¹¹ Once announced, the judgments of this court are also distributed. In addition to sending copies to solicitors and parties' counsels, the clerk will send copies to the press.²¹² Currently, the UK Supreme Court also posts every judgment on its institutional web page.²¹³

ii. Cassation chambers

In France, the decision to publish is not delegated to external lawyers, but is made by the court itself. The *Cour de cassation* has a clear plan on the different hierarchies of publication that their *arrêts* could have.²¹⁴ French authors acknowledge that the normative force of a cassation judgment can be dependant on the level of publication.²¹⁵ The few judgments that are published have a higher relevance than the vast majority that are finally unpublished.²¹⁶ According to Judge WEBER:

More than the total number of decisions, it is important to focus on the published judgments [*arrêts*], which are those that truly express the

²⁰² KARLEN 2014, p. 63.

²⁰³ KARLEN 2014, p. 63.

²⁰⁴ supremecourtreview.com/.

²⁰⁵ www.supremecourt.gov/opinions/boundvolumes.aspx.

²⁰⁶ www.supremecourt.gov/opinions/opinions.aspx.

²⁰⁷ DARBYSHIRE 2011, p. 358-359.

²⁰⁸ In detail, BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 320-321.

²⁰⁹ KARLEN 2014, p. 75.

²¹⁰ COWNIE, BRADNEY & BURTON 2013, p. 39.

²¹¹ KARLEN 2014, p. 106.

²¹² KARLEN 2014, p. 105.

²¹³ www.supremecourt.uk/decided-cases/index.html.

²¹⁴ In detail, *infra* Chap. IV.C.3 (i).

²¹⁵ See again, DEUMIER 2015, p. 98.

²¹⁶ FERRAND 2017, p. 196-197.

doctrine of the *Cour de cassation* ... This relatively modest number of published judgements should not hide the real importance of the case law [*jurisprudence*] in the law of our country ...²¹⁷

However, the French cassation chambers' decisions that are not published do not remain totally secret. They are at least available to the parties in dispute through an internal web page (www.courdecassation.fr/justiciables).²¹⁸

As a result, only a minor percentage of the French cassation chambers' judgments end by being published for a broader audience. Cassation chambers mostly review repetitive and relatively simple mistakes. Therefore, most of their judgments remain unpublished because only a few have some relevance as interpretation guidelines.²¹⁹ In France, 'far less than the 10 per cent of the judgments rendered by the *Cour de cassation* constitute a doctrinal contribution, leading the chambers to decide on publication.'²²⁰ Only this minor percentage of the cassation judgments are posted on the court's institutional web page.²²¹ Therefore, the remaining 90 per cent of the cassation judgments are not included in the official reports, such as the *Bulletin des arrêts des chambres civiles*.²²²

In Italy, the decision about which judgments will be published is not the charge of the cassation chamber itself. It is delegated to a special office (*Ufficio Massimario*) created in 1941 and composed of career judges.²²³ The *Ufficio Massimario* decides based on the interpretation relevance of certain legal arguments in the judgment.²²⁴ The judgments of the *Corte di Cassazione* are not regularly published in full, neither in official nor in private series.²²⁵ The publication of their full content remains exceptional. According to TARUFFO & LA TORRE, the reason for this limited publication of the full decision is the 'excessively large number of such'.²²⁶ Instead, a small part of the judgment ends up being published, only the specific '*massima*' – which could be translated here as 'principle of law' or 'legal principle' extracted from the court's holding²²⁷ – as it was identified and edited by the *Ufficio Massimario*.²²⁸ These

²¹⁷ In the original, WEBER 2010A, p. 105-106 ('*Plus que le nombre total des décisions rendues, il importe de s'intéresser aux arrêts publiés, qui sont ceux qui expriment véritablement la doctrine de la Cour de cassation ... Cette relative modestie des chiffres des arrêts publiés ne doit pas dissimuler l'importance réelle de la jurisprudence dans le droit de notre pays ...*') [Author's translation].

²¹⁸ See also JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 54.

²¹⁹ FERRAND 2017, p. 196-197.

²²⁰ WEBER 2010A, p. 105-106 ('... il ressort de ces chiffres que nettement moins 10% des arrêts rendus par la Cour de cassation constituent un apport doctrinal conduisant les chambres à en décider la publication'.) [Author's translation]; mentioning the same 10% of publication, FERRAND 2017, p. 196-197; DEUMIER 2015, p. 99.

²²¹ For example, FRENCH COURT OF CASSATION – FIRST CHAMBER 2016. Directly on the website,

www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/.

²²² www.courdecassation.fr/publications_26/bulletin_arrets_chambres_civiles_2711/.

²²³ COCCIA 2015, p. 25.

²²⁴ TARUFFO & LA TORRE 1997, p. 148.

²²⁵ TARUFFO & LA TORRE 1997, p. 149.

²²⁶ TARUFFO & LA TORRE 1997, p. 149.

²²⁷ DE FRANCHIS 1996, p. 962.

short legal principles are reported in semi-official series, such as *Rassegna della giurisprudenza di legittimità*.²²⁹ Additionally, the principles of law will be available in the databases administered by the *Ufficio Massimario*.²³⁰ But if someone wants to know the full content of the judgment, his or her option will be to ask the law clerks for a copy.²³¹ On the institutional web page of the *Corte di Cassazione*, finally, only a minor portion of the full cassation judgments are posted.²³²

iii. *Horizontal comparison*

From a horizontal perspective, we can observe an asymmetry in this third attribute. The courts of last resort of each pair of jurisdictions publish their judgments in different percentages. The US and UK supreme courts tend to include almost all of their decisions in the law reports and on institutional web pages. In the cassation chambers of France and Italy, instead, only a small selection of judgments will end up published in such official form. In the UK the level of publication, as we saw, is around 70 per cent, whereas in France it is just 10 per cent.

This different pattern of publication is consistent with the also different functions that each court of last resort aims to perform in a horizontal comparison. In the US and UK supreme courts, the rate of publication is high due to the strong binding force that their judgments have as a proper court of precedents.²³³ Unlike in the UK, in the US the supreme court judgments that are politically sensitive, due to the constitutional review of legislation, receive wide media exposure. This extra level of publicity can be explained by the US Supreme Court's manifest function as a political counterweight, which is absent in its UK counterpart.²³⁴

We can observe that cassation chambers, instead, have a narrower and selective approach as regards publication of their decisions. This different level of publicity, from a horizontal perspective, can be explained based on their different models of court, in which the level of exposure is proxy for the relevance of each judgment. Each judgment of a court of precedents model requires a high level of exposure.²³⁵ Instead, for a court of error a more selective publication is enough.²³⁶ The selective publication pattern of the French and Italian cassation chambers is consistent not with the court of precedents but

²²⁸ COCCIA 2015, p. 26; TARUFFO & LA TORRE 1997, p. 148.

²²⁹ TARUFFO & LA TORRE 1997, p. 149.

²³⁰ TARUFFO & LA TORRE 1997, p. 149; COCCIA 2015, p. 26; the *Ufficio Massimario*'s database is called CED (Electronic Center of Documents [*Centro Elettronico di Documentazione*]). See online: www.italgiure.giustizia.it.

²³¹ TARUFFO & LA TORRE 1997, p. 149.

²³² For example, ITALIAN COURT OF CASSATION – FIRST CHAMBER 2016; in detail, DI CERBO 2015, p. 577-592; see, for example: www.cortedicassazione.it/corte-di-cassazione/it/prima_sezione.page.

²³³ *supra* Chap. III.B.3 (b).

²³⁴ *supra* Chap. III.B.3 (a).

²³⁵ *supra* Chap. III.B.3 (b).

²³⁶ *supra* Chap. III.B.3 (c).

with the court of error model instead. As courts of error, cassation chambers are meant to review a large number of cases,²³⁷ most of them routine complaints or mistakes easy to fix. In that huge docket, therefore, the error-monitoring function has a relevance mostly for the current case. Sporadically, however, the cassation chambers will receive a new and important complaint that can be useful in clarifying future litigation scenarios. According to the court of error model, only that minor fraction of the cassation chambers' significant decisions will be published.²³⁸ The vast majority will not be held secret, but made available for consultation only by the litigants and judges. Third parties or observers will have access only through a deeper search by the ID number of the dispute or in a direct petition to the court clerks.

Even the limited exposure that cassation courts require could be problematic for the dispute resolution function of the trial court model. At first sight, the wide publication of only 10 per cent of the cassation chambers' judgments may not seem disruptive of the role of peaceful resolution of disputes in the remaining 90 per cent of disputes. But the availability of each and every judgment under specific request of third parties, the bare minimum of publicity in the French and Italian courts of cassation, will be inconvenient for those litigants who prefer the total confidentiality of arbitration.²³⁹ The lack of confidentiality of cassation courts may not be optimal for a pure trial court model because the peaceful resolution of confidential disputes becomes more difficult if there is a chance, however limited, of wide publication of the decision.

4. Number of cases

(a) *Political counterweight.* In a constitutional court the number of cases will depend on whether the judicial review includes the administrative acts of the executive branch or the statutes enacted by the legislature. The number will be relatively high if the court is in charge of reviewing the executive branch, which generates thousands of acts in a year. When this is the case, the constitutional court will need to have several smaller panels working on reviewing the big caseload of administrative acts.²⁴⁰ Other alternatives are, first, that the judicial review of the executive branch could be delegated in a specialised set of administrative courts or, second, decentralised in the ordinary courts for civil and criminal matters. But as regards the constitutional review of the legislation passed by the Parliament, the caseload will be smaller. The public acts of the Parliament under constitutional control – *e.g.*, legislation – are only a minor fraction compared to the executive's administrative acts. This reduced number

²³⁷ *infra* Chap. III.B.4 (ii).

²³⁸ *supra* Chap. III.B.3 (c).

²³⁹ *supra* Chap. III.B.3 (d).

²⁴⁰ The federal constitutional court in Germany (*Bundesverfassungsgericht*) has constitutional review on administrative acts. Its sixteen judges are divided into two senates which are sub-divided in panels of three. ROGOWSKI & GAWRON 2016, p. 8-14; In detail, COLLINGS 2015.

of cases allows that judicial review of legislation can be assumed by a constitutional court model consisting of a single but larger panel instead.²⁴¹

(b) *Judicial lawmaking*. The court of precedents is similar to a constitutional court that is focused on legislation. An important characteristic of this second model is that the court hears a limited number of cases, as well.²⁴² The judicial lawmaking function requires a model of court of last resort with a minimal caseload for several reasons. First, the consequentialist reasoning that each case implies – due to the general effects of every judgment²⁴³ – requires an immense amount of work per case.²⁴⁴ Therefore, a court that decides only a small number of cases can devote more time to study each decision.²⁴⁵ With too many cases to hear, the court of precedents would not be able to go deep enough into the consequences for future disputes that each one of its precedents has. A second reason is that a court of precedents does not really hear ‘cases’, but ‘topics’ or interpretation ‘problems’. Therefore, the caseload of the court of last resort in this model is defined not by the total flow of cases of the judiciary. Instead, the court of precedents’ caseload is defined by the emergence of new topics or areas in the law with problems of interpretation, regardless of the number of particular cases affected by that area.

A third reason is the relation that might exist between the number of judgments that a court of last resort delivers and the individual force of each of them to guide case law interpretation. This relation between the number of judgments and its precedential force will be called TARUFFO’s Theorem in this study. According to TARUFFO, there is an inverse proportion between the number of judgments and their precedential force.²⁴⁶ The greater the number of judgments, the weaker the force of each of them, and vice versa. Therefore, the judicial lawmaking function requires that the court of precedents hear a smaller number of appeals because a low ceiling on the number of cases maintains the high influential strength of each judgment.

(c) *Error-monitoring*. In this attribute, a court of error can be the opposite to a court of precedents. The court of error is an inspection agency that should be willing to process many litigants’ complaints of judicial mistakes.²⁴⁷ As a consequence, in this model the court has to be prepared to receive a large number of recourse petitions denouncing those errors.²⁴⁸ Also, the judgments of a court of error are meant to have particular effects only.²⁴⁹ Therefore,

²⁴¹ *infra* Chap. III.B.6 (a).

²⁴² TARUFFO 2009, p. 96; BOBEK 2009, p. 34.

²⁴³ *supra* Chap. III.B.2 (b).

²⁴⁴ NORKUS 2015, p. 6.

²⁴⁵ MAK 2013, p. 61.

²⁴⁶ TARUFFO 2011A, pp. 29-30. (*‘L’esperienza delle corti supreme che operano effettivamente come corti del precedente mostra chiaramente che la forza dei precedenti è inversamente proporzionale al loro numero. Un singolo precedente che non viene overruled e viene seguito per decenni ha evidentemente una efficacia ben maggiore di quella che può essere ascritta ad una massima che si trova in una lista che contiene dozzine di enunciazioni ripetitive...’*).

²⁴⁷ *supra* Chap. II.C.2.

²⁴⁸ BRAVO-HURTADO 2014, p. 326; BOBEK 2009, p. 33.

²⁴⁹ *supra* Chap. III.B.2 (c).

TARUFFO’S Theorem (in which the force of each judgment loses weight as the total caseload grows bigger) does not count as a problem in this model because the court of error does not aim at having judgments with general effects in the first place.

Moreover, a large number of cases under review is useful for the deterrent effect in a court of error. The lower courts will be aware that the higher court is effective in its role as a check on them if, in fact, the court of error is supervising an important percentage of the cases decided in the lower courts.²⁵⁰ As a consequence of its monitoring function, the caseload of the court of error should increase together with the number of cases heard in the lower courts. But its number of cases remains only a percentage of them, the ones that have serious mistakes, and not all. Therefore, the court of error will review a larger number of judgments than a court of precedents, but smaller than the total caseload of the trial court model in the first or second instance below it.

(d) *Dispute resolution.* The trial courts of the first instance have, all together, the heaviest caseload. Their judicial function is the social, peaceful resolution of every possible dispute that the parties bring before the courts.²⁵¹ The trial court, therefore, needs to handle every case in which a dispute between the parties exists (or remains) and not only the portion of them in which a judicial mistake has been committed. As a result, the trial courts’ caseload will be an indicator, quite the contrary, of the level of social conflict in the society.²⁵² In this model, the several trial courts that perform this dispute resolution function will, in total, review a number of cases larger than the court of error, court of precedents and every other court above them.

i. Supreme courts

In the US, between 7,000 and 8,000 petitions for certiorari are filed with the US Supreme Court in a year.²⁵³ The number of petitions has increased over time. In 1975, there were only 3,950 cases.²⁵⁴ In 2001, there were 8,000.²⁵⁵ Currently, however, that tendency has been reversed, since in 2015 the US Supreme Court received around 6,500 petitions.²⁵⁶

Among the total of petitions, only about 80 cases end up being heard in a plenary review, with oral arguments by the attorneys.²⁵⁷ The remaining number, about 100 cases or more, will be decided in a summary procedure that omits the plenary review.²⁵⁸ More than two decades ago (1991), the US Supreme Court was used to receiving 5,000 petitions per year and deciding, with an

²⁵⁰ DRAHOZAL 1998, p. 492; FERRARI 2012, p. 259.

²⁵¹ DAMAŠKA 1986, p. 98.

²⁵² *supra* Chap. II.C.1; See again, COUTURE 1950, p. 7.

²⁵³ US SUPREME COURT – CASELOAD 2016.

²⁵⁴ US SUPREME COURT – CASELOAD 2016.

²⁵⁵ WHEELER 2004, p. 248.

²⁵⁶ US CHIEF JUSTICE REPORT 2016, p. 11.

²⁵⁷ US SUPREME COURT – CASELOAD 2016.

²⁵⁸ US SUPREME COURT – CASELOAD 2016.

opinion, around 150.²⁵⁹ In 2001, a higher number of cases were presented before the court, ca. 8,000. But 70 of the cases were decided summarily and 88 by a full oral hearing in a plenary review (158 in total).²⁶⁰ Therefore, the total number of cases decided on the merits did not change considerably from 1991 to 2001 (150-158).²⁶¹ Currently, the number of petitions has decreased to, approximately 6,500 per term.²⁶² But despite these increases and decreases in the volume of petitions, the number of decided cases has stayed relatively the same once again. According to the US Supreme Court, currently ‘formal written opinions are delivered in 80 to 90 cases. Approximately 50 to 60 additional cases are disposed of without granting plenary review’.²⁶³ The total number of cases decided on the merits thus remains the same or is even smaller, between 140–150. Behind these small numbers of decided cases, in proportion to the total of petitions, lies the fact that the US Supreme Court is not counting cases, but general legal problems that need to be resolved. According to WHEELER, for example, ‘[T]he Supreme Court decides “issues” (albeit as framed in individual cases)’.²⁶⁴

In England, the UK Supreme Court receives an even smaller number of applications for appeal in a year,²⁶⁵ approximately 200.²⁶⁶ Among them, however, the percentage that are finally heard by the UK Supreme Court is half when compared to its US counterpart: a number that varies between 50 and 70.²⁶⁷ In 1996, before the WOOLF’s Reforms,²⁶⁸ 72 appeals were presented to the House of Lords, but only 67 were finally decided.²⁶⁹ In 2001, after the WOOLF reforms but when the House of Lords was still the court of last resort of the UK, it received a much larger number of permission for appeal, 268, but the number of cases finally decided remained fairly constant, 68.²⁷⁰ Currently, the number remains the same or can be slightly smaller. For example, in 2011 (after the reform that replaced the House of Lords) the new UK Supreme Court received 208 permissions for appeal but 143 were refused outright.²⁷¹ The result was that 59 disputes were finally judged in that year. In a similar way as in the US, English authors also emphasise that the UK Supreme Court should not deal

²⁵⁹ SUMMERS 1991, 408.

²⁶⁰ WHEELER 2004, p. 248.

²⁶¹ WHEELER 2004, p. 248.

²⁶² US CHIEF JUSTICE REPORT 2016, p. 11.

²⁶³ US SUPREME COURT – CASELOAD 2016.

²⁶⁴ WHEELER 2004, p. 253.

²⁶⁵ The same situation in the previous House of Lords, BLACKSTON 2004, p. 875 (‘[B]ecause the House of Lords acts as a supreme court and concentrates its attention on a relatively small number of cases.’).

²⁶⁶ For example, UK JUDICIAL STATISTICS 2012, p. 63 (‘[I]n the UKSC in 2011, 208 petitions for permission to appeal were presented, 202 were disposed of, of which 143 were refused outright.’).

²⁶⁷ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 318; LE SUEUR 2004, p. 271; ANDREWS 2017, p. 41.

²⁶⁸ On original proposals of this reform, WOOLF 1996; for a critical analysis on the Woolf reform, SORABJI 2014B.

²⁶⁹ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 318.

²⁷⁰ LE SUEUR 2004, p. 271.

²⁷¹ UK JUDICIAL STATISTICS 2012, p. 63.

with particular cases but with legal interpretation issues.²⁷² Whereas the House of Lords' practice was to the contrary (dealing with cases instead of issues), the change to a proper UK Supreme Court, they suggest, should reverse that practice, and follow the US example of deciding issues instead of cases.²⁷³

ii. *Cassation chambers*

Comparing the number of cases between the US and UK supreme courts, on the one hand, and the French and Italian cassation courts, on the other, requires some methodology precautions. The judicial statistics of France and Italy indeed disaggregate the number of civil and criminal cases of the cassation courts; while the supreme court statistics of the US and the UK, quite the contrary, do not separate clearly between civil and criminal cases. Therefore, the reader needs to be aware that the previous caseload numbers of the US and UK supreme courts include not only civil but also criminal cases (and constitutional ones in the US). To overcome the comparability problem, this section will focus on the number (and evolution) of civil cases of the cassation courts but will mention the criminal caseload of these courts too. Therefore, in the following section of horizontal comparison the reader may have a clear picture of both: the total caseload of the US and UK supreme courts *vis-à-vis* only the civil caseload of the cassation courts; or *vis-à-vis* the civil and criminal caseload of the same cassation courts. In either situation, as we shall see, including the criminal caseload of the cassation courts does not contradict the conclusions of the comparison based on the civil caseload, but confirms the trend.²⁷⁴

In France, the *Cour de cassation* receives around 22,000 cassation petitions (*pourvoi en cassation*) in civil matters a year.²⁷⁵ Among them, the vast majority end up being judged on the merits, around 20,000 yearly.²⁷⁶ In 2014, for example, the French cassation court received 21,295 cassation petitions in civil matters, and judged 19,636 of them.²⁷⁷ The situation is not much different from what happened ten years before in France. In 2001, 20,613 cases were decided from among 22,700 cassation petitions.²⁷⁸ But if we look at this over the long run, the current caseload of the *Cour de cassation* is much bigger than a half century ago. In 1950, this court reviewed only 3,665 *pourvois* and 6,525 in

²⁷² LE SUEUR 2004, p. 288-289.

²⁷³ LE SUEUR 2004, p. 289.

²⁷⁴ *infra* Chap. III.B.4 (iii).

²⁷⁵ In detail, FRENCH COURT OF CASSATION – STATISTICS 2014, p. 2. Methodology note: since the object of this study is civil matters (*supra* Chap. I.E.2), the number of cases of these cassation courts is based on civil matters. Still, aggregating the criminal cases would be unnecessary since that will show an even more exaggerated asymmetry between cassation courts and supreme courts, an asymmetry that already appears clear enough with the civil cases only. Furthermore, the US and UK supreme courts' statistics do not disaggregate the civil cases from others fields of law. Unlike the cassation courts which do have separate specialised chambers, in the US and UK supreme courts the same judges review cases from different fields.

²⁷⁶ CADIET 2011A, p. 187.

²⁷⁷ FERRAND 2017, p. 196.

²⁷⁸ FERRAND 2005B, p. 14 footnote 30.

1975.²⁷⁹ Despite the huge case-flow that it has today, the French Court of Cassation seems to deal relatively well with its abundant workload. In the last decade, the average delay of cassation was reduced from 554 days in 2004 to 387 days in 2014.²⁸⁰

On top of the civil cases, the *Cour de cassation* also receives ca. 8,000 cassation petitions in criminal cases per year,²⁸¹ which are resolved by a separate criminal chamber. Among the total of criminal petitions, 32 per cent do not pass the admissibility stage and the remaining cases are decided on the merits, either by rejection (49 per cent) or annulment of the lower judgment (27 per cent).²⁸² The criminal caseload has increased slowly in the last decade, from ca. 7,800 cassation petitions in 2004 to 8,600 in 2013.²⁸³ When compared to civil cases, the criminal caseload represents a small fraction of the total caseload of the *Cour de cassation*: one fourth approximately. As a result, combining civil and criminal cases, the French cassation courts resolves a total of ca. 30,000 cassation petitions per year (22,000 civil + 8,000 criminal).

In Italy, the numbers are even higher than in France. To some extent, this situation has been considered a real crisis.²⁸⁴ The *Corte Suprema di Cassazione* has a backlog of 100,000 cases, in which the length of the proceedings is more than three years.²⁸⁵ The *Corte di Cassazione* currently receives, in civil matters alone, around 30,000 cassation petitions (*ricorso per cassazione*) and decides close to 26,000 cases a year.²⁸⁶ In 2014, for example, 30,303 cassation petitions were lodged, but 98,690 remain pending resolution. Of the cases presented that year, the *Corte di Cassazione* finally decided 28,198.²⁸⁷ One decade before, the situation in Italy was relatively less dramatic. In 2001, approximately 25,000 cassation petitions were presented, 20,000 were decided, with a backlog of (just) 5,000.²⁸⁸ Two decades ago (1996), in civil matters the *Corte di Cassazione* had only 12,000 cases.²⁸⁹

Besides civil cases, the *Corte Suprema di Cassazione* receives more than 50,000 cassation petitions in criminal matters per year,²⁹⁰ which are resolved by a separate structure of seven criminal chambers (*le sezioni penali*). From this total of criminal petitions, however, 64 per cent do not pass the admissibility stage,²⁹¹ mostly at the seventh criminal chamber which is similar to the sixth civil chamber because both perform a filtering function. The number of cases that

²⁷⁹ WEBER 2010A, p. 22.

²⁸⁰ FERRAND 2017, p. 182.

²⁸¹ COUR DE CASSATION 2013, p. 2.

²⁸² COUR DE CASSATION 2013, p. 2.

²⁸³ See '*activité pénale*' in COUR DE CASSATION 2013, p. 2.

²⁸⁴ See again, TARUFFO 2011A, p. 31; SILVESTRI 2017, p. 229-239.

²⁸⁵ SILVESTRI 2017, p. 237-238.

²⁸⁶ SILVESTRI 2017, p. 237-238.

²⁸⁷ Data obtained from combining, CASSAZIONE CIVILE 1/2014; CASSAZIONE CIVILE 2/2014.

²⁸⁸ TROCKER & VARANO 2005B, p. 264.

²⁸⁹ TARUFFO & LATORRE 1997, p.144; explaining the Italian crisis, SILVESTRI 2017, p. 237-239; FERRARIS 2015, p. 156-162; TARUFFO 1991, p. 158 ff.

²⁹⁰ CASSAZIONE PENALE 2016, p. 3.

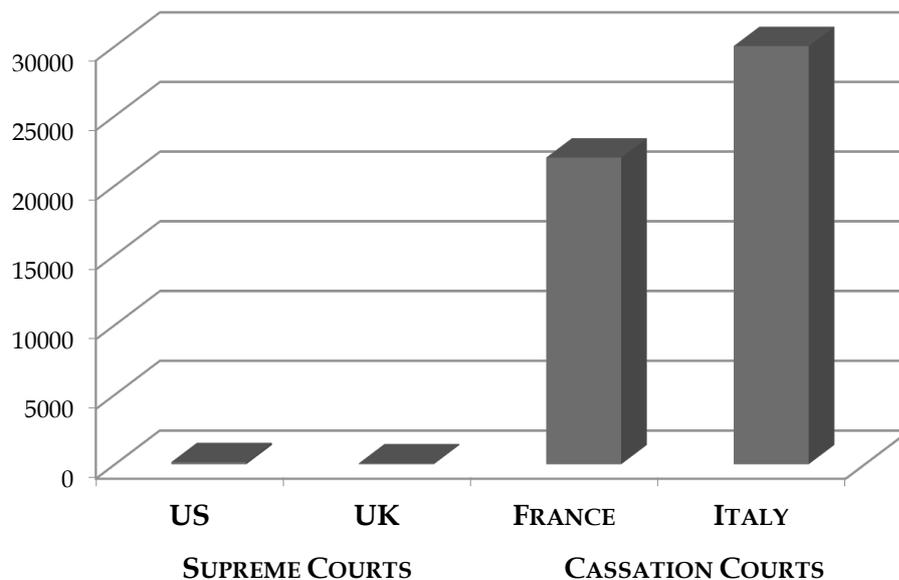
²⁹¹ CASSAZIONE PENALE 2016, p. 11.

indeed pass the admissibility stage and, therefore, are resolved on the merits is ca. 17,300 (33 per cent); from which 14 per cent are rejected and 19.3 per cent are annulments of the lower court judgment.²⁹² The cassation petitions in criminal matters has also increased slowly in the last decade, from ca. 47,900 cassation petitions in 2007²⁹³ to ca. 53,500 in 2015.²⁹⁴ In proportion to the civil caseload, the criminal cases represent the majority of the caseload of the Italian cassation court: 62 per cent of the total. Criminal and civil cases combined, therefore, the *Corte Suprema di Cassazione* handles an impressive number of 80,000 cassation petitions per year (30,000 civil + 50,000 criminal).

iii. *Horizontal comparison*

From a horizontal perspective, we can observe a radical asymmetry in the total number of cases that each court of last resort finally decides on the merits. Supreme courts decide a small number of cases, between 150 (US) and 60 (UK). Whereas in the courts of cassation, the civil caseload has to be counted in the dozens of thousands (22,000 in France, 30,000 in Italy).²⁹⁵ Graph III.1 displays the dimensions of this quantitative difference.

Graph III.1 – *Courts of last resort – Number of cases (only civil cassation)*



If we include both civil and criminal cases of the cassation courts in the picture, the asymmetry appears even more radical. Graph III.2 compares, from a horizontal perspective, the caseload of the US and UK supreme courts *vis-à-vis* the civil *and criminal* caseload of the French and Italian cassation courts. The additional criminal caseload is represented in Graph III.2 as a light column on top of the dark column of civil cases in France and Italy. To fully appreciate the

²⁹² CASSAZIONE PENALE 2016, p. 11.

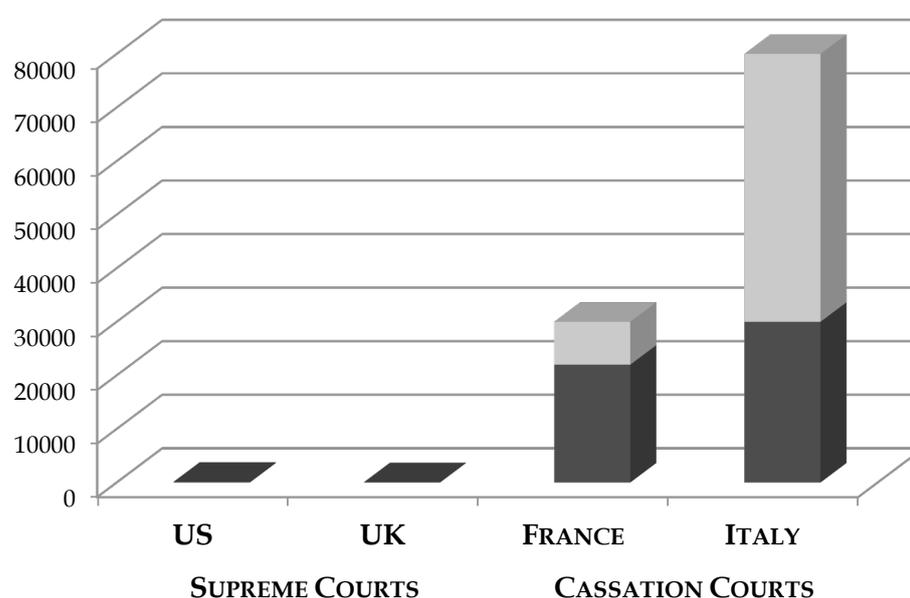
²⁹³ CASSAZIONE PENALE 2008, p. 1.

²⁹⁴ CASSAZIONE PENALE 2016, p. 3.

²⁹⁵ TARUFFO 1998, p. 109.

difference, the reader should be aware that the scale of the Y axis has increased from 0 to 30,000 to 0 to 80,000. See below.

Graph III.2 – *Courts of last resort* – Number of cases (plus criminal cassation)



This asymmetry in the number of cases is also relevant from the perspective of its evolution over time. The US and UK supreme courts have been receiving an increasing number of cases over the past decades. But, despite the growing number of litigants' petitions – *e.g.*, US certiorari or UK appeal – the number of cases that reach a final judgment on the merits remains relatively the same (around 140-150 in the US and 60-70 in the UK). As we will see in the next section,²⁹⁶ this is mainly the result of a preliminary screening process that gives these courts full control over their dockets.²⁹⁷ Vice versa, cassation courts traditionally have not been equipped with a restrictive preliminary screening as in these common law jurisdictions.²⁹⁸ Therefore, the French and Italian cassation courts do not have a proper control on their dockets.²⁹⁹ As a result, in the courts of cassation under study, when observed over time, the number of cases that are finally decided indeed increases together with the number of recourse petitions lodged by the parties.

A court of precedents needs to decide a small number of cases because the fields of the law that need to be clarified will be only a few per year.³⁰⁰ This is consistent with the small dockets of the US and UK supreme courts that have judicial lawmaking as a manifest function.³⁰¹ Also, the high complexity of these types of issues implies that the court cannot deal with a docket bigger than that.

²⁹⁶ *infra* Chap. III.B.5 (i).

²⁹⁷ GOLDSTEIN 1998, p. 308.

²⁹⁸ *infra* Chap. III.B.5 (ii); SILVESTRI 1986, p. 305; GALIC 2014, p. 10.

²⁹⁹ SILVESTRI 1986, p. 306; MAK 2013, p. 61.

³⁰⁰ *supra* Chap. III.B.4 (b).

³⁰¹ *supra* Chap. II.D.1 (i); Chap. II.D.2 (i).

But, even more importantly, according to TARUFFO'S Theorem, it is relevant by itself to maintain a reduced caseload in order to strengthen the influence of each judgment.³⁰² Therefore, the reduced docket of the US and UK supreme courts can be explained on the basis of the complexity and impact that a reduced docket has in a proper model of a court of precedents.³⁰³

However, we can observe that the US Supreme Court has a bigger caseload than its UK counterpart (150 and 70, respectively) which is more than twice as much. The reason could lie in the fact that the UK Supreme Court has as its manifest function only judicial lawmaking and, thus, it aims at being a court of precedents exclusively;³⁰⁴ whereas the US Supreme Court combines the judicial lawmaking and political counterweight manifest functions.³⁰⁵ Therefore, the US Supreme Court needs to combine the model of a court of precedents and simultaneously the model of a constitutional court. A constitutional court model also reviews a small number of cases if it is focused on the judicial review of legislation. The pieces of legislation that might raise constitutional issues should be a few every year, too.³⁰⁶ Therefore, that extra caseload in the US Supreme Court can be attributed to the additional docket which comes from the constitutional review of legislation, a constitutional caseload that is absent in its UK counterpart.³⁰⁷

The enormous caseload of the French and Italian courts of cassation, assumed mainly by their chambers, makes them incompatible with a court of precedents model. According to TARUFFO'S Theorem, the force of each cassation chamber's judgment will be lost in a gigantic database of previous cases. Therefore, their possibilities to guide the case law will be limited to a case-by-case adherence to the same decision criteria, until it becomes a truly statistical regularity.³⁰⁸

The high number of cases under review makes the cassation court compatible with another model. In a court of error, for instance, to maintain a high rate of monitoring on the lower courts' judgments counts as an advantage. In this model, the goal is to correct particular errors but, at the same time, to produce a deterrent effect.³⁰⁹ Therefore, the big docket implies that French and Italian cassation chambers can keep a closer and more intensive check on the intermediate appellate courts below them.³¹⁰ However, a court of error does not need to review 100 per cent of the cases judged in the lower instance. It needs to review only a portion of them in which a serious mistake is involve, but a

³⁰² See again, TARUFFO 2011, p. 29-30.

³⁰³ *supra* Chap. III.B.4 (b).

³⁰⁴ *supra* Chap. II.D.4 (i,iii).

³⁰⁵ *supra* Chap. II.D.3 (i,iii).

³⁰⁶ *supra* Chap. III.B.4 (a). GOLDSTEIN 1998, p. 326.

³⁰⁷ In 2007, for example, from the total number of cases which received a full opinion in the US Supreme Court (70), only 19 were decided based on constitutional issues. Therefore, in the remaining 73% of its caseload (51 cases) no constitutional issues were decided. BAUM 2010, p. 157. Therefore, if we exclude the constitutional decisions of the US Supreme Court, its caseload seems comparable to its UK counterpart.

³⁰⁸ See again, MACCORMICK & SUMMERS 1997B, p. 538; also PECZENICK 1997, p. 465.

³⁰⁹ *infra* Chap. III.B.4 (c).

³¹⁰ LASSER 2004, p. 181; BRAVO-HURTADO 2014, p. 328.

portion large enough to create the perception in the lower court judges that they are under permanent potential scrutiny.³¹¹ Certainly, 22,000 or 30,000 civil cases reviewed in a year by the French and Italian cassation chambers may count as sufficient inspection presence.

In a trial court a large number of cases is also needed. But in this model the number is not only a portion, as in a court of error, but all the disputes that are brought by the parties.³¹² A court that reviews only around one hundred cases in a year – *i.e.*, the US and UK supreme courts – is, for every practical purpose, non-existent for ordinary litigants because the procedure will end (almost always) in the previous instance.³¹³ In the cassation courts under study, not all the petitions brought by the parties are reviewed in depth either, but the percentage is much higher than in the US and UK supreme courts. The larger number of cases that these courts of cassation are reviewing – *i.e.*, more than 20,000 cases in Italy and France – will seem to the litigants as a more realistic option. Properly speaking, a pure model of trial court requires a total openness to new cases, total openness that is not completely present in the French and Italian courts of cassation. Nevertheless, due to the large number of cases under review by these cassation chambers, private litigants will have incentives to instrumentalise the chambers' review as a mere third round, as in the trial court model. We observed that the Italian Court of Cassation has a total caseload in civil matters that is 150 per cent larger than its French counterpart (despite the smaller Italian population). Therefore, the potential instrumentalisation of the cassation chambers as a third round, proper in the trial court model, is numerically more prominent in Italy than in France.

5. Preliminary screening

(a) *Political counterweight*. In a constitutional court model, cases are subjected to a preliminary screening based on their public relevance in a political agenda.³¹⁴ For example, legal disputes that involve the competences of public organs (government, legislature and different judiciaries). Because the constitution regulates the interaction between those public organs, the constitution, public law and fundamental rights violations are among the main sources of selection for a constitutional court.³¹⁵ In the context of fundamental rights violations, cases can also be relevant, under this model, due to the political ideologies that collide – free speech, same-sex marriage, abortion, for example.³¹⁶ Quite the contrary, disputes related to the mere particular relations between private actors probably will be preliminarily screened out.

³¹¹ *supra* Chap. III.B.4 (c).

³¹² *supra* Chap. III.B.4 (d).

³¹³ On the UK, ATKINS 1990; DREWRY, BLOM-COOPER & BLAKE 2007, p. 31-32. On the US, RICHMAN & REYNOLD 2013, p. x; WHEELER 2004, p. 244; in detail, *infra* Chap. V.B.

³¹⁴ ROGOWSKI & GAWRON 2016, p. 7.

³¹⁵ HARDING, LEYLAND & GROPPi 2009, p. 19-21.

³¹⁶ In general, WALDRON 1999; on these issues in constitutional courts, SPERTI 2017.

(b) *Judicial lawmaking*. In the court of precedents the preliminary screening is also based on the case being of public concern, but not necessarily having a political connotation. A dispute has public relevance, according to this model, if its judgment will have repercussions or transcendence in subsequent cases, regardless of whether it is about public or private law issues. Therefore, the court of precedents will have a preliminary screening based on the identification of case law interpretation problems, such as contradictions, inconsistencies, overruling, among others.³¹⁷ In this sense, a dispute between private actors will receive the court of precedents' attention as long as the dispute can be potentially replicated between other people. Quite the contrary, the appeals that raise no general case law problems, because the applied law under question already has a uniform interpretation or is a dispute relevant only for the current litigants, will be discharged in the preliminary screening of this model.

Another element particularly highlighted by TARUFFO,³¹⁸ among other authors,³¹⁹ about a court of precedents is the discretionary power to select cases. The preliminary screening is not only characterised by a criterion focused on general interpretation problems. In this model, the court also recognises an important level of discretion to apply that criterion. This selection power is necessary because it helps the court of precedents to keep a limited caseload,³²⁰ – which is, as we observed in the previous section,³²¹ a key attribute of this model because, according to TARUFFO's Theorem, a low ceiling on the number of cases increases the precedential force of each decision.³²² The kind of legal issues that can raise a general interpretation problem are, to some extent, unpredictable. Therefore, it makes sense to entrust the court of precedents with some level of freedom to identify, on a case-by-case basis, which are the most important interpretation problems that deserve priority attention. This type of preliminary selection can be manifested in different forms. For example, as a discretionary authority or as a permission (rather than an obligation) to select a case when the screening criterion is met. Perhaps the screening criterion is formulated in an open clause which *de facto* grants to the court an important freedom of interpretation of the screening criterion itself. Or, finally, the selection power can be granted in explicit discretionary terms.

(c) *Error-monitoring*. Unlike the constitutional court and the court of precedents, the court of error does not screen cases based on their public relevance. The purely private concerns in the dispute will not be a reason to screen out the recourse petition. Errors in disputes between public or private actors deserve equal attention for surveillance purposes of this model.³²³ However, this does

³¹⁷ TARUFFO 1997, p. 446; BOBEK 2009, p. 34.

³¹⁸ TARUFFO 1991, p. 167; TARUFFO 2009, p. 95-96 ; TARUFFO 2011A, p. 20-21.

³¹⁹ For example, SILVESTRI 1986, p. 312; SILVESTRI 2001, p. 115.

³²⁰ TARUFFO 2011A, p. 30 ('Il numero de precedenti dipende evidentemente dall'esistenza di un metodo di selezioni dei ricorsi destinati ad essere decisi nel merito, e dai criteri che vengono applicati per compiere questa selezione.').

³²¹ *supra* Chap. III.B.4 (b).

³²² See again, TARUFFO 2011A, p. 29-30.

³²³ *supra* Chap. II.C.2.

not mean that a court of error should be prohibited from having any preliminary screening. Because its function is limited to error-monitoring, in this model the screening criterion will be a preliminary evaluation of error, as well. The losing litigant will have a strong bias to see an unfavourable judgment as a mistaken decision. An experienced higher court, however, will have enough impartiality to make an early distinction between serious mistakes and the mere dissatisfaction of the losing litigant. Therefore, the court of error will screen out at an initial stage in the proceedings the ill-grounded recourse petitions in which it is clear that no relevant mistake has been committed by the lower court.

(d) *Dispute resolution.* The trial court model does not screen cases based on the public relevance of the dispute either. Public and private disputes are on equal footing to receive the first instance trial court's attention. Because the purpose is the peaceful resolution of conflicts,³²⁴ parties deserve a full opportunity to present their cases. In this sense, in a higher court that repeats the first instance trial court model, weak cases will receive more attention than in a court of error (which would screen them out immediately). Instead, in this model we can observe some screening based on the value in dispute.³²⁵ In the first instance courts, for example, disputes are usually distributed between courts of small-claims and ordinary courts based on a monetary criterion (*summa gravaminis*).³²⁶ Therefore, cases of low value will not be screened out in this model but assigned to special courts and simplified proceedings.

i. Supreme courts

In the US, the preliminary screening organ is at the supreme court itself. Within the US Supreme Court, the screening workload is distributed in a particular way among the Chief Justice, the other judges and their law clerks, as we will see. The final decision on the preliminary screening, however, is taken by the Certiorari Conference, a weekly meeting of the full bench of the US Supreme Court.³²⁷ The decision to grant certiorari is made by a special voting mechanism, the so-called 'rule of four' based on which only four votes, among the nine judges, are enough to pass the preliminary screening stage.³²⁸

However, the cases that are considered at this Certiorari Conference are only the ones that the Chief Justice previously included in the 'discuss list'.³²⁹ In reality, therefore, the US Supreme Court has an important preliminary screening before the Certiorari Conference itself.³³⁰ In this previous stage, the

³²⁴ *supra* Chap. II.C.1.

³²⁵ GALIC 2014; p. 9; FERRAND 2015, p. 155.

³²⁶ For example, the distinction between *Amstgericht* and *Landgericht* in Germany, KOCH & DIEDRICH 2006, p. 47.

³²⁷ GOLDSTEIN 1998, p. 302; in detail, PROVINE 1980, p. 30-32; PERRY 1994, p. 42 ff.

³²⁸ On the origins of this rule, LEIMAN 1957, p. 978 ff.; several theoretical models have been developed to explain the strategies of the judges in the rule of four voting. For example SEGAL & SPAETH 2002, p. 252-267; SOMMER 2014, p. 29-44.

³²⁹ RHENQUIST 2002, p. 234.

³³⁰ PROVINE 1980, p. 18-22.

law clerks have become increasingly important as a screening organ.³³¹ Most of the US Supreme Court's law clerks have the task of writing 'memos' in which they summarise each petition and make a recommendation for granting certiorari or not.³³²

In the US, the screening criterion is enshrined in the *Rules for the Supreme Court of the United States*. Particularly, it is described in Rule 10.³³³ The main feature that needs to be highlighted about this rule is the repeated idea of discretion.³³⁴ Within this discretion, Rule 10 provides examples that refer to case law contradictions.³³⁵ Accordingly, a circuit conflict is one of the most important criteria to grant certiorari in practice.³³⁶ A circuit conflict or 'split' means a contradiction between the rulings of two or more courts.³³⁷ For example, the courts of appeals of two states have different interpretations on the same piece of federal legislation.

Moreover, according to Rule 10, these case law contradictions should be of 'important federal questions'. The United States of America is a federal system,³³⁸ and, therefore, the US Supreme Court deals with issues of federal law. The US Constitution is, of course, the main source of federal law.

³³¹ PROVINE 1980, 22-26; PERRY 1994, p. 69-71; GOLDSTEIN 1998, p. 303; in detail, STRAS 2007, p. 947-998.

³³² On the origins of the law clerk in the US Supreme Court, see NEWLAND 1961, p. 300 ff.

³³³ *Rules for the Supreme Court of the United States*, Rule 10: 'Considerations Governing Review on Writ of Certiorari. Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; -(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.- A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.'

³³⁴ It explicitly states that to grant certiorari is not a right but a 'judicial discretion'. Rule 10 gives three examples of the kind of cases in which certiorari should be granted. However, this is only an open-ended list ('... although neither controlling nor fully measuring the Court's discretion'.) Therefore, the Court keeps discretion to, on the one hand, select disputes of a different kind or, on the other hand, not to select cases even if they fall within these examples.

³³⁵ *supra* Chap. III.B.1 (i).

³³⁶ PERRY 1994, p. 246-253; GOLDSTEIN 1998, p. 305; an early empirical study that confirms this preference for circuit conflicts, ULMER 1984, p. 901-911.

³³⁷ In detail, ROEHNER & ROEHNER 1953, p. 656-665.

³³⁸ In detail, FLETCHER & SHEPPARD 2005, p. 150-169.

Therefore, a case usually passes the preliminary screening stage when a federal or state judge declares the unconstitutionality of a piece of federal legislation.³³⁹

However, the rule stresses that only ‘important’ federal questions should receive the court’s attention. Based on the US Supreme Court’s practice of granting certiorari, PERRY identifies three sources of ‘importance’: the case has *sui generis* characteristics,³⁴⁰ it involves high political concern³⁴¹ or it is relevant for purely legal matters.³⁴² Also, depending on the judge, different areas will have priority (capital punishment, abortion, water law, freedom of speech and of religion, and national security, among others).³⁴³ Despite this conception of dispute importance, the US Supreme Court seems to be willing to grant certiorari to extreme cases of blatant injustice or a flagrant (egregious) disregard of a precedent.³⁴⁴ However, judges and clerks emphasise that the last type of dispute for which certiorari is granted, not due to their general importance but to their particular egregiousness, remain rare.³⁴⁵

In England two separate organs are involved in the screening process of the appeal to reach the court of last resort. First, the lower court (*a quo*) and, later, the Appeal Panel of the UK Supreme Court (*ad quem*),³⁴⁶ previously called Appeal ‘Committee’ during the times of the House of Lords.³⁴⁷ If permission to appeal is denied at the lower court, as normally happens,³⁴⁸ litigants can request permission directly at the UK Supreme Court.³⁴⁹ There, the UK Supreme Court’s Appeal Panel will be in charge of this preliminary screening of granting or refusing permission to appeal.³⁵⁰ The Appeal Panel is a smaller bench: the UK Supreme Court usually sits in panels of five, seven or more judges; instead, the Appeal Panel has only three judges.³⁵¹ If the Appeal Panel refuses to grant permission, it does not need to provide a fully reasoned judgment but a mere ‘formulaic’ refusal.³⁵²

In the UK Supreme Court, the screening criterion is explicitly enshrined in the selection clause: ‘points of law of general public importance’.³⁵³ Here ‘general

³³⁹ PERRY 1994, p. 24.

³⁴⁰ PERRY 1994, p. 253-260.

³⁴¹ PERRY 1994, p. 253-260.

³⁴² PERRY 1994, p. 253-260.

³⁴³ PERRY 1994, p. 260-265. However, empirical studies show little support on these civil liberties as relevant criteria for selection, SEGAL & SPAETH 2002, p. 271.

³⁴⁴ PERRY 1994, p. 265-268.

³⁴⁵ PERRY 1994, p. 267.

³⁴⁶ *The Supreme Court Rules* 2009, Rule 10 (1) (2). On the selection by the lower courts in Germany and the UK, FERRAND 2005A, p. 54-60.

³⁴⁷ LE SUEUR 2004B, p. 277.

³⁴⁸ ANDREWS 2017, p. 41 (stating that the court below grants permission to appeal ‘remains quite rare’).

³⁴⁹ *Rules of the Supreme Court*, Art. 10(2); ZUCKERMAN 2013, p. 1139; SORABJI 2014A, p. 15.

³⁵⁰ *Rules of the Supreme Court*, Art. 15(3); called ‘Appeal Committee’ during the times of the House of Lords, LE SUEUR 2004B, p. 279; screening practices that ‘survived’ in the new UK Supreme Court, ANDREWS 2017, p. 41.

³⁵¹ UKSC *Practice Direction* 3.1.1.

³⁵² ANDREWS 2017, p. 41.

³⁵³ UKSC *Practice Direction* 3.3.3; ZUCKERMAN 2013, p. 1139.

public importance’ calls for cases whose relevance transcends the current dispute. For example, a type of case whose facts are common to many other disputes and, therefore, the current judgment will also be applicable to them.³⁵⁴ Also, the criterion of general public importance will screen out disputes in which there is no case law interpretation problem. For example, according to Lord BINGHAM, the UK Supreme Court should concentrate its attention only on cases of general public importance and, *a contrario sensu*, not on those purely of errors of settled law.³⁵⁵ Here the ‘settled law’ – which is not considered to be of general public importance according to Lord BINGHAM – in the legal language in English means areas in which there is no current conflict of interpretations of the sources of law, but a consistent criterion for their application.³⁵⁶

The discretionary nature of the UK Supreme Court’s preliminary screening is also explicitly enshrined in the procedural rules. First, the *Constitutional Reform Act* of 2005, which gave birth to the new UK Supreme Court, states that this court ‘has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment’.³⁵⁷ Based on that self-determination power, second, the UK Supreme Court enacted its own rules on procedure, which regulate permission to appeal. Accordingly, the *Rules of the Supreme Court* of 2009 established that the Appeal Panel ‘may ... grant or refuse permission’ to appeal.³⁵⁸ Therefore, granting permission to appeal is not mandatory but rather an open option of the UK Supreme Court – ‘may’ grant or refuse, the *Rules* state. Finally, the same discretion is emphasised by English authors in several ways: the UK Supreme Court ‘decides itself’ to grant permission or not;³⁵⁹ the Appeal Panel needs to be ‘persuaded’ of the importance of the case;³⁶⁰ this court has a full ‘control’ over its docket³⁶¹ and the power to set its ‘own agenda,’³⁶² among others.

ii. Cassation chambers

In France, the reform of 1979 allowed the ordinary chambers of the *Cour de cassation* to refer a case to a ‘restricted formation’ of just three judges (*formation restreinte*).³⁶³ The task of this restricted formation is to resolve cases, whether by

³⁵⁴ For example, the Court of Appeal granted permission to appeal before the House of Lords because it considered that it is of general public importance if ‘the answer to the question will determine the legal rights of a finite but significant number of similarly placed individuals’, *Nadezda Anufrijeva v. Secretary of State for The Home Department*, cited by LE SUEUR 2002, p. 277.

³⁵⁵ ZUCKERMAN 2013, p. 1139-1140; *supra* Chap. II.D.4 (ii).

³⁵⁶ For example, GARNER defines ‘black-letter law’ as follow: ‘[o]ne or more legal principles that are old, fundamental, and well settled.’ (2009, p. 192 [emphasis added]).

³⁵⁷ Constitutional Reform Act 2005, Art. 40(5); ZUCKERMAN 2013, p. 1139.

³⁵⁸ *Rules of the Supreme Court*, Art. 16(2)(a); ZUCKERMAN 2013, p. 1139.

³⁵⁹ ANDREWS 2017, p. 41; LE SUEUR 2004B, p. 282.

³⁶⁰ ANDREWS 2017, p. 41.

³⁶¹ ANDREWS 2017, p. 41; LE SUEUR 2004B, p. 282.

³⁶² LE SUEUR 2004B, p. 276.

³⁶³ On the origins of the restricted formation, see PERDRIAU 1994; the French Court of Cassation used to have a separate chamber for preliminary screening, *chambres des requêtes*, until 1947. In that year, this screening chamber was reformed into the current chamber for commercial matters. FERRAND 2017, p. 190-191.

rejecting or quashing them, when the solution seems clear from the file (*la solution du pourvoi s'impose*).³⁶⁴ In other words, the *formation restreinte* is in charge of deciding quickly the 'easy cases'. Initially, it was thought that this referral would be an exceptional practice. However, in 1997 the exceptional practice became the general rule.³⁶⁵ Since then, all cassation petitions first go through the *formation restreinte* before they are transferred to the ordinary chamber.³⁶⁶ In this sense, the *formation restreinte* became a preliminary screening. In this initial stage it is allowed to reject cases without an especially motivated judgment,³⁶⁷ just based on the written submission of the parties (no oral argument).³⁶⁸

The *formation restreinte* screening criteria is the new procedure of inadmissibility (*procédure de non-admission*).³⁶⁹ This is not a preliminary screening based on purely formal requirements (*irrecevables*).³⁷⁰ It also evaluates the strength and consistency of the arguments in the written submission.³⁷¹ The specific criteria have changed over time. In its origins in 2001, the initial *formation restreinte* evaluated whether or not the recourse was founded on 'serious grounds for cassation' (*non fondés sur un moyen sérieux de cassation*).³⁷² However, in 2014 the screening criteria changed into a recourse 'manifestly not of a nature as to result in cassation' (*lorsqu'il n'est manifestement pas de nature à entraîner la cassation*).³⁷³ Despite the differences between the original and current French formulation,

³⁶⁴ BORE & BORE 2015, p. 72.

³⁶⁵ BORE & BORE 2015, p. 72.

³⁶⁶ *Code de l'organisation judiciaire – Loi du 23 avril 1997*, Art. L431-1, first paragraph: 'Les affaires soumises à une chambre civile sont examinées par une formation de trois magistrats appartenant à la chambre à laquelle elles ont été distribuées.'

³⁶⁷ *Code de procédure civile*, Art. 1014: '... cette formation décide qu'il n'y a pas lieu de statuer par une décision spécialement motivée ...'; FERRAND 2017, p. 200-201; the lack of motivation created a debate about its correspondence with the European Convention on Human Rights, see FLAUSS 2005, p. 43-50; BORE & BORE 2015, p. 657.

³⁶⁸ *Code de procédure civile*, Art. 1014: '... Après le dépôt des mémoires...', which could be translated as 'after the written submission'; BORE & BORE 2015, p. 657.

³⁶⁹ In detail on the non-admission procedure, VIGNEAU 2010, p. 102-111.

³⁷⁰ On the purely formal requirements ('*irrecevables*' in French terminology), BUFFET 2005, p. 106-107; VIGNEAU 2010, p. 106-107; BORÉ & BORÉ 2015, p. 91-96.

³⁷¹ ARMANI-MEKKI 2005, p. 24-25.

³⁷² For the non-admission procedure during this period, see AMRANI-MEKKI 2005, p. 19-31. The text of the code in that time said: 'After the filing of the briefs (*mémoires*), this [restricted] formation shall declare non admitted the recourse ... not argued on serious grounds for cassation.' ('Après le dépôt des mémoires, cette formation déclare non admis les pourvois irrecevables ou non fondés sur un moyen sérieux de cassation.') Originally in the *Code de l'organisation judiciaire*, Art. 131-6, since reform of the *Loi n°2001-539 du 25 juin 2001*. Later on, this rule was transferred to Art. 1014 of the *Code de procédure civile* in 2008 by the *Décret n°2008-522 du 2 juin 2008*.

³⁷³ *Code de procédure civile*, Art. 1014 first paragraph ('After filing the briefs, this [restricted] formation decides not to deliver a resolution specially grounded when the recourse ... is manifestly not of a nature as to result in cassation. [Après le dépôt des mémoires, cette formation décide qu'il n'y a pas lieu de statuer par une décision spécialement motivée lorsque le pourvoi est irrecevable ou lorsqu'il n'est manifestement pas de nature à entraîner la cassation.]), after the reform *Décret n°2014-1338 du 6 novembre 2014*; BORE & BORE 2015, p. 656-658.

the same idea seems to underly as the screening criterion:³⁷⁴ a preliminary evaluation of the strength of the litigants' arguments for cassation, excluding the petitions that are manifestly ill grounded.³⁷⁵ Despite the new power to exclude ill-grounded petitions, French authors deny that this preliminary screening of the *formation restreinte* could consist of an evolution towards a 'discretionary' selection.³⁷⁶

In Italy, regardless of the constitutional right to cassation,³⁷⁷ the reform of 2009 introduced a preliminary screening.³⁷⁸ For that purpose, the sixth civil chamber (*sesta sezione civile*) of the *Corte di Cassazione* was created; it is also known as the filter chamber (*sezione 'filtro'*).³⁷⁹ This preliminary screening chamber is divided into five panels.³⁸⁰ Each screening panel is specialised in correspondence with the other five ordinary chambers for civil matters.³⁸¹ The screening panels have a non-titular president and ordinary judges (*consiglieri*) of the corresponding ordinary chamber.³⁸² In practice, the filter chamber works in panels of five judges, as the ordinary chambers do.³⁸³

The same reform of 2009 introduced two new hypotheses of inadmissibility (Art. 360bis): on the one hand, where the alleged violation of due process is manifestly unfounded (Art. 360bis.2),³⁸⁴ on the other hand, where the challenged judgment is aligned with the *Corte di Cassazione's* case law (*giurisprudenza*) and there is no further reason to revise its orientation (Art. 360bis.1).³⁸⁵ This second hypothesis can also be seen as a similar 'manifestly unfounded' type of filter of the previous procedural violations, but now as regards questions of substantive law. If a litigant argues his or her cassation recourse on an interpretation of the law that has already been rejected by the *Corte di Cassazione's* case law, that argument counts as a manifestly unfounded

³⁷⁴ French authors admit that marking the difference between a 'serious' or a proper 'grounded' cassation is difficult, BORÉ & BORÉ 2015, p. 656.

³⁷⁵ Efforts towards defining this French criterion can be found in BLONDEL 2005, p. 83-102; BUFFET 2005, p. 103-109.

³⁷⁶ FERRAND 2017, p. 196 (The *Cour de cassation* 'has no discretion to select which appeals it will consider').

³⁷⁷ *Costituzione della Repubblica Italiana*, Art. 111.

³⁷⁸ On the details of this reform, FERRARIS 2015, 167-174.

³⁷⁹ FERRARIS 2015, p. 208-212.

³⁸⁰ CORTE SUPREMA DI CASSAZIONE 2013 (§ 39.1), p. 27.

³⁸¹ FERRARIS 2015, p. 211-212; criticism on the sixth section functioning, MACIOCE 2015, p. 392-395.

³⁸² CORTE SUPREMA DI CASSAZIONE 2013 (§ 39.1), p. 27.

³⁸³ *Ordinamento Giudiziario*, Art. 67; FERRARIS 2015, p. 210.

³⁸⁴ *Codice di Procedura Civile*, Art. 360bis number 2 [Author's translation]: '*Il ricorso è inammissibile: 2) quando è manifestamente infondata la censura relativa alla violazione dei principi regolatori del giusto processo.*'; FERRARIS 2015, p. 196-205; critical comments on MACIOCE 2015, p. 391-392.

³⁸⁵ *Codice di Procedura Civile*, Art. 360bis number 1 [Author's translation] '*Il ricorso è inammissibile: 1) quando il provvedimento impugnato ha deciso le questioni di diritto in modo conforme alla giurisprudenza della Corte e l'esame dei motivi non offre elementi per confermare o mutare l'orientamento della stessa.*'; FERRARIS 2015, p. 184-196.

recourse, as well.³⁸⁶ Despite the new two hypotheses of inadmissibility, Italian scholars argue that this preliminary screening does not grant discretion to the *Corte di Cassazione* for selecting cases – not a level of discretion comparable to the writ of certiorari in the US Supreme Court.³⁸⁷

iii. *Horizontal comparison*

From a horizontal perspective, it is possible to observe an important asymmetry in this fifth attribute. On the one hand, the US and the UK have a preliminary screening proper for the model of a court of precedents,³⁸⁸ and, to some extent, of a constitutional court, as well.³⁸⁹ On the other hand, France and Italy have preliminary screening according to a court of error model instead. In order to understand these differences, let us begin with the cassation jurisdictions under study.

The preliminary screening by the courts of cassation of France and Italy is based on a criterion of manifestly unfounded petitions. Despite their different wordings, this can be seen as a preliminary evaluation of error proper of a court of error model.³⁹⁰ The grounds for cassation recourse are a violation of the legislation by the lower court or, in other words, an error in the particular application of the law. Accordingly, manifestly unfounded petitions will be those in which it is clear that there is no legal misapplication. Therefore, the cassation petitions in which, at first sight, no error needs to be corrected will be summarily rejected at the initial stage of proceedings of the French and Italian cassation courts.

Because the manifestly unfounded petitions, besides the formal requirements, are the only criterion in France and Italy, the chambers of their courts of cassation do not exhibit the screening criteria of the other models of courts. First, in the French and Italian cassation chambers the constitutional cases of high political concern are not *per se* among the competences of the court of cassation for civil matters in the first place. Disputes that involve political organs of the executive branch are usually the charge of a separate set of administrative courts – *i.e.*, the French *Conceil d'État* or the Italian *Consiglio de Stato*. The political power that comes from the constitutional review of legislation will also normally be centralised, to a larger or lesser extent, in a separate constitutional court (*Conseil Constitutionnel* and *Corte Costituzionale*, as we observed).³⁹¹ Therefore, the preliminary screening based on political

³⁸⁶ In this sense the reform does not seem to exhibit a major difference with the previous practice of the Italian court of rejecting this type of case as manifestly unfounded. FERRARIS 2015, p. 185.

³⁸⁷ TARUFFO 2011, p. 31. ('[The reform of 2009] *non se attribuisce alla Corte [di Cassazione] una discrezionalità totale come quella di cui dispone ad esempio la Corte Suprema degli Stati Uniti, ma neppure se indicano criteri relativi alla natura e all'importanza della questione di diritto sollevata con l'impugnazione.*').

³⁸⁸ *supra* Chap. III.B.5 (b).

³⁸⁹ *supra* Chap. III.B.5 (a).

³⁹⁰ *supra* Chap. III.B.5 (c).

³⁹¹ *supra* Chap. III.B.1. (ii)(e); for France, PONTTHOREAU & HOURQUEBIE 2009, p. 92-95; for Italy, GROPPI 2009, p. 130-132.

relevance, which would characterise a proper constitutional court model,³⁹² is not present in the courts of cassation themselves, but in other specialised constitutional courts of their jurisdictions.

The cassation chambers do not screen as a court of precedents either. In a court of precedents only the recourse petitions that involve a general problem of interpretation may pass the preliminary screening stage.³⁹³ The rest of the petitions which do not exhibit such relevance for defining interpretation guidelines would be preliminary excluded in a court of precedents model.³⁹⁴ The chambers of the French and Italian courts of cassation, quite the contrary, do not exclude cases without general interpretation problems as a court of precedents does. According to FERRAND, for example, the *Cour de cassation* ‘may not pick and choose some cases that could be of general interest’.³⁹⁵ The cassation petitions, regardless of whether they have or do not have such importance as interpretation guidelines, will equally pass the preliminary screening stage of the chambers itself. However, once inside the cassation court, the cases which do exhibit general problems of interpretation will be transferred from the chambers to the plenary session, as we will analyse in Chapter IV.³⁹⁶

Cassation petitions cannot be screened out based on a low value in dispute in the courts of cassation of France and Italy.³⁹⁷ The US and the UK supreme courts do not screen based on the monetary value in dispute either. In this sense, neither do they have the screening criteria that the model of trial court of first instances could exhibit when allocating cases between small-claims and ordinary courts.³⁹⁸

However, the situation is asymmetrical as regards their resemblance to a court of error. Unlike the courts of cassation, exclusion in the initial stage of proceedings at the US and the UK supreme courts does not imply that the case is manifestly unfounded in the particular application of the law. In other words, the preliminary screening in these supreme courts is not necessarily based on a preliminary evaluation of error. In the US Supreme Court, for example, the refusal to grant certiorari is not considered a confirmation of the correctness of the judgment of the lower court.³⁹⁹ In a similar way, in the UK Supreme Court the judges have been emphatic that the stage of permission of appeal ‘is not of

³⁹² *supra* Chap. III.B.5 (a).

³⁹³ *supra* Chap. III.B.5 (b).

³⁹⁴ *supra* Chap. III.B.5 (b).

³⁹⁵ FERRAND 2017, p. 196.

³⁹⁶ *infra* Chap. IV.C.8 (i,ii).

³⁹⁷ However, such screening based on a monetary value can be present in the courts of cassation of other jurisdictions, which are not included in this study, for example, in Spain. The Spanish cassation contemplates a monetary threshold of €600,000. However, a case below that value may pass if the requirements of ‘cassational interest’ are met. *Ley de Enjuiciamiento Civil*, Art. 477.1.2 and 477.3. ORTELLS RAMOS 2010, p. 31-39, 57-66; SÁNCHEZ POS 2010, p. 511-522; DE BENITO 2017, p. 115-116.

³⁹⁸ *supra* Chap. III.B.5 (d).

³⁹⁹ PERRY 1994, p. 37; BAUM 2010, p. 89; in detail, see LINZER 1979, p. 1251 ff.

itself an indication that the judgments below are thought to be wrong'.⁴⁰⁰ Therefore, the preliminary screening criteria of these supreme courts is different than the preliminary evaluation of error of a proper court of error model.

Instead, the US and UK supreme courts both screen based on the general impact of the dispute. Something they have in common is that both positively select at the initial stage of the proceedings the cases that are of public relevance due to a general case law problem, whose decision could be transcendent for future disputes. In the US Supreme Court, the main hypothesis of Rule 10 is circuit splits, which are contradictions in the interpretation of federal law between federal or state higher courts.⁴⁰¹ And in the UK Supreme Court, as we observed, the main hypothesis of general public importance is a difficulty in the case law interpretation.⁴⁰² In this sense, the US and UK supreme courts share a preliminary screening based on the public relevance of the dispute for future case law problems, screening criterion proper of the court of precedents model.⁴⁰³

However, the political connotations of the dispute, which can also make it of public relevance, are more sensitive in the US Supreme Court preliminary screening than in that of the UK Supreme Court.⁴⁰⁴ Because the US legal system has a strong power of constitutional review of legislation and the UK does not, the preliminary screening in the US Supreme Court naturally comes closer to the model of a politicised constitutional court than its UK counterpart.⁴⁰⁵ This does not mean that the political connotations are totally irrelevant for the UK Supreme Court either. Let us remember that even if the UK Supreme Court has no strong judicial review of legislation, it does have a strong power of judicial review in respect of the administrative action (executive branch in a broad sense).⁴⁰⁶ Therefore, among the cases that pass the UK Supreme Court's preliminary screening and receive a final judgment on the merits, an important percentage of them involves relevant political actors from the executive branch against whom the judicial review can be exercised.⁴⁰⁷ Also, the Human Rights Act of 1998 grants to the UK Supreme Court, and to the other English higher

⁴⁰⁰ LE SUEUR 2002, p. 273. *In Re Wilson* (1985) AC 750, 756.

⁴⁰¹ BAUM 2010, p. 91; on circuit splits, BRUHL 2015, p. 361-383.

⁴⁰² LE SUEUR 2014B, p. 273, 282.

⁴⁰³ *supra* Chap. III.B.5 (b).

⁴⁰⁴ GOLDSTEIN 1998, p. 307 ('[T]he granting or denial of petitions for review is much more integral part of the pursuit of legal-ideological, policy aims by the individual judges in the United States Supreme Court than in the House of Lords ...').

⁴⁰⁵ In the UK, LE SUEUR 2004B, p. 276 ('The constitutional function of the leave filter is to enable the top-level court to define, for itself, its judicial role and how it is to exercise its power. To suggest that the new [UK] Supreme Court will (or ought to have) an "agenda" is not to imply that it will be a court with a partisan political "mission" – a criticism levelled at many top-level courts [e.g., US Supreme Court].' [emphasis added]).

⁴⁰⁶ INGMAN 2004, p. 442; see *Associated Picture House Ltd v. Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v. Minister for th Civil Service* [1984] 3 All ER 935, HL.

⁴⁰⁷ For example, between 2003 and 2007 12 per cent of the cases that passed the preliminary screening in the House of Lords, and reached a decision on the merits, were of administrative law, based on DWERY & BLOOM-COOPER 2009, p. 53; ZUCKERMAN 2013, p. 1173.

courts (High Court and Court of Appeal), jurisdiction in cases of human rights,⁴⁰⁸ which could be considered as politically sensitive cases too. Cases of human rights infringement are politically relevant in the preliminary screening of the constitutional court model.⁴⁰⁹ Therefore, with the Human Rights Act the UK Supreme Court to some extent will also have a similar preliminary screening based on fundamental rights violations, thus cases with political connotation as well.

Finally, as regards the attribute highlighted by TARUFFO – *i.e.*, the discretionary case selection in a court of precedents⁴¹⁰ – a clear asymmetry can be observed between these courts of last resort from a horizontal perspective. On the one hand, the US and UK supreme courts have preliminary screenings which entrust to the judges a high level of discretionary power in selecting cases. Based on that discretion, these supreme courts can control their dockets,⁴¹¹ set their own agendas,⁴¹² and keep a limited number of decisions on the merits that increases the influential force of each precedent (TARUFFO’s Theorem).⁴¹³ On the other hand, the preliminary screening of the French and Italian cassation chambers is not recognised as a ‘discretionary’ power by the local legal authors.⁴¹⁴ To an important degree, the much larger caseload of these cassation chambers⁴¹⁵ could be explained based on the absence of an equivalent discretionary preliminary screening such as those of the US and UK supreme courts.⁴¹⁶ Furthermore, that absence of a discretionary preliminary screening that produces a large caseload could explain, according to TARUFFO’s Theorem,⁴¹⁷ the weak guiding force that each cassation chamber judgment has.⁴¹⁸

6. Panel composition

(a) *Political counterweight.* In the constitutional court, which branch is under judicial review (executive or legislative) will define the size of the panel. For the daily review of the numerous executive acts, many judges sitting together in several but small panels will be sufficient.⁴¹⁹ An option could be to have a separate structure of administrative courts, or to decentralise the constitutional review among the rest of the ordinary judges. However, the situation will be different when legislation is under review. Due to the democratic importance in the annulment of a legal statute, instead, the constitutional court will sit in a

⁴⁰⁸ For example, between 2002 and 2008 37.3 per cent of the House of Lords’ cases were on human rights, FELDMAN 2009, p. 546.

⁴⁰⁹ *supra* Chap. III.B.5 (a).

⁴¹⁰ See again, TARUFFO 2009, p. 95-96.

⁴¹¹ WHEELER 2014, p. 242; ANDREWS 2017, p. 41.

⁴¹² SOMMER 2014, p. 2; LE SUEUR 2004B, p. 274.

⁴¹³ *supra* Chap. III.B.4 (b).

⁴¹⁴ For France, FERRAND 2017, p. 196; for Italy, TARUFFO 2011, p. 31.

⁴¹⁵ *supra* Chap. III.B.4 (ii).

⁴¹⁶ SILVESTRI 1986, p. 320.

⁴¹⁷ See again, TARUFFO 2011A, p. 29-30.

⁴¹⁸ *supra* Chap. III.B.2 (ii).

⁴¹⁹ For example, the German Constitutional Court (*Bundesverfassungsgericht*) which sits in panels of three judges, ROGOWSKI & GAWRON 2016, p. 8-9.

single but larger panel of judges.⁴²⁰ If the constitutionality of the legislation is at stake, to decide the dispute in a panel of three judges would seem that too much power is in too few hands. Instead, the judicial review of legislation should be decided by a bigger panel, for example, of seven or more judges. The more constitutional judges that are involved, the more legitimacy the decision of annulling a piece of legislation of the Parliament, which also has its own majoritarian legitimacy, could have.

Furthermore, the judges sitting on a constitutional court should not be exchangeable. The panel composition of the constitutional court model needs to be stable, the same team for every dispute. This stability of the panel's composition is justified by the politically sensitive task of this model.⁴²¹ The declaration of unconstitutionality implies negative lawmaking,⁴²² and thus a counter-majoritarian power.⁴²³ Due to that political relevance of the constitutional review on legislation, the political branches will participate directly in the appointment of the constitutional judges.⁴²⁴ As a result, the composition of the constitutional court represents the struggle of bigger political forces, between the chief executive and the legislative majorities and minorities.⁴²⁵ Therefore, the political balance between the judges appointed to the constitutional court needs to be preserved in most of the cases.

(b) *Judicial lawmaking*. In the court of precedents the judicial lawmaking is also a power that cannot be left in a few hands. But the reason why in this model a large panel is needed is different than in a constitutional court. The reason is not because of the politically sensitive power to annul legislation, but the higher technical complexity of setting lawmaking precedents in every legal dispute. First, a court of precedents does not review every possible misapplication of the law, but just those disputes that involve a general case law interpretation problem.⁴²⁶ Solving case law contradictions is complicated because the court needs to establish precedents with broad repercussions for future cases.⁴²⁷ These judgments with general effects are more complex due to the special type of reasoning that they require, called consequentialism (also known as prospective reasoning).⁴²⁸ More eyes are needed to attend carefully to the resolution of each case at stake in order to forecast the potential legal

⁴²⁰ On this larger panel composition in the constitutional courts of Austria, Germany, Italy, France Spain, Portugal and Belgium, FAVOREU & MASTOR 2011, p. 57-68.

⁴²¹ The Supreme Court of Israel, for example, is criticised because it has constitutional review powers but sits in panels whose composition changes, which raises the question of the *ad hoc* selection of the judges. GOLDSTEIN 1998, p. 319-320.

⁴²² The notion of 'negative lawmaking' comes from KELSEN 1942, p. 187; explained in BREWER-CARÍAS 2011, p. 5-12.

⁴²³ On the counter-majoritarian argument, the bibliography is abundant. See the original BICKEL 1962; a discussion on Bickel's ideas in WARD & CASTILLO 2005; and the series of articles by FRIEDMAN 1998, 2000A, 2000B, 2002A, 2002B.

⁴²⁴ STONE SWEET 2013, p. 817; on appointment alternatives, HARDING, LEYLAND & GROPPI 2009, p. 16-18; FAVOREAU & MASTOR 2011, p. 33.

⁴²⁵ STONE SWEET 2013, p. 824; FAVOREAU & MASTOR 2011, p. 21.

⁴²⁶ *supra* Chap. III.B.1 (b).

⁴²⁷ *supra* Chap. III.B.4 (b).

⁴²⁸ HOURQUEBIE 2012, p. 30-36.

consequences that the current judgment may have in the future.⁴²⁹ Solving these kinds of case law problems based on consequentialist reasoning and establishing precedents is such a complex task that several legal experts need to be involved. As a result, a court of precedents model also needs a larger panel of judges hearing each case, perhaps five or more.

The stability of the panel in a court of precedents is something useful, as well. If the composition of the group of judges can change often, the precedents can be modified frequently because the experts' legal opinions may change too, making it difficult to have a clear and stable case law over time.⁴³⁰ In this model, however, the stability of the panel is not as critically needed as in an ideal constitutional court. Due to the absence of power to strike down legislation, a court of precedents does not necessarily deal with politically sensitive issues, in which the ideological equilibrium of the court needs to be maintained at all costs. Instead, the supplementary lawmaking function in a court of precedents can refer to precise points in technical legal fields. Because of the general effects of the court of precedents,⁴³¹ however, the judgment can affect other fields of law different from the precise field where the dispute comes from. For example, a case on labour law can have repercussions on private law. For that reason, the court of precedents needs to bring together specialists from the different fields of law that can be potentially affected. In that other context, more technical and less political, it could be better that the panel of the court of precedents be composed of an interdisciplinary combination of judges with higher expertise in the several legal fields which are potentially involved, leaving out the other judges specialised in unrelated topics. While in a constitutional court stability of the panel is preferred over specialisation; in a court of precedents, specialisation is preferred over stability.

(c) *Error-monitoring*. The opposite reason explains why in a court of error, instead, such a large and interdisciplinary panel is not strictly necessary. Unlike a court of precedents and the constitutional court, in which every case has a high level of complexity and impact on future disputes,⁴³² in the court of error most of the recourse petitions (but not all of them) will be routine complaints or simple mistakes that can be easily resolved.⁴³³ Moreover, the court of error's judgments do not have such general effects.⁴³⁴ Thus, in this model, judgments do not have the complexity that comes from the consequentialist reasoning of a court of precedents.⁴³⁵ In the court of error, instead, the judgments normally affect only the current case⁴³⁶ and, therefore, forecasting consequences for other disputes will not be a major concern in this model. Moreover, the lack of general impact of the court of error's judgments also implies that other fields of

⁴²⁹ NORKUS 2015, p. 6.

⁴³⁰ GOLDSTEIN 1998, p. 320 (stating that judges who did not sit on the panel of a previous precedent 'might feel freer to deviate from it ...').

⁴³¹ *supra* Chap. III.B.2 (b).

⁴³² *supra* Chap. III.B.1 (a,b).

⁴³³ *supra* Chap. II.C.2.

⁴³⁴ *supra* Chap. III.B.2 (c).

⁴³⁵ *supra* Chap. III.B.8 (b).

⁴³⁶ *supra* Chap. III.B.2 (c).

law will be less affected by a decision made in the current dispute. Accordingly, the court of error, unlike a court of precedents, does not need to reunite an interdisciplinary combination of judges specialised in different legal fields, but only the judges specialised in the particular topic of the present dispute. In sum, without the necessity of doing the hard task of forecasting the consequences of the current decision in future disputes or different fields of law, a smaller panel of judges with the same specialisation will be enough for the error-monitoring of particular cases.

Because cases are relatively easier, in this model the majority of recourse petitions may be heard by a panel smaller than that in a court of precedents, of three or five judges maximum. With smaller panels, the court of error can have several teams working at the same time in reviewing more cases and, consequently, keeping a higher monitoring capacity on the lower courts. Usually it happens that the recourse petitions are delegated to one judge on the panel. That judge will be in charge of analysing the case and drafting the judgment. The intervention of his or her colleagues on the panel will be limited to the passive hearing of the judge's report, confirming and signing. However, in this model the court needs to be, at least, bigger or more experienced than the lower court under review. Because its function is correcting errors, it is assumed that a larger team of judges reviewing the same case will have a lower rate of mistakes than the smaller team or single judge of the lower courts.⁴³⁷ Therefore, the judges panel in a court of error will be of an intermediate size – smaller than the court of precedents and the constitutional court above it, but bigger than the trial courts of the first (or second) instance below it.

(d) *Dispute resolution*. Finally, the model of trial court is the one that allows the smallest size of the panel. Because the demand for litigation is high everywhere, and the number of judges is scarce, in a first instance trial court it is impractical that each dispute can be heard by a panel of five judges. Instead, a panel of three will be reserved only for the most important cases, and the rest of the disputes will be delegated to a single judge.⁴³⁸

i. Supreme courts

In the US, the panel of the supreme court is composed of nine judges in total.⁴³⁹ Unlike the UK Supreme Court,⁴⁴⁰ no external judges are allowed to sit on the bench for *ad hoc* cases. Each judge may have three or four law clerks to help them.⁴⁴¹ The US Supreme Court does not work divided into smaller teams. Ordinarily, the same nine judges will form the panel that hears all the cases (*en banc*).⁴⁴² Thus, the specialisations that each of the nine judges may have in different fields of law will be combined in every single decision. The

⁴³⁷ NORKUS 2015, p. 6; *cfr.* KODEK 2012, p. 45-46.

⁴³⁸ For example, the distinction between *Tribunal d'Instance* and *Tribunal de Grande Instance* in France, LAYTON & MERCER 2014, p. 148.

⁴³⁹ GREENHOUSE 2012, p. 25.

⁴⁴⁰ *Constitutional Reform Act 2005*, Sections 38 and 39.

⁴⁴¹ WHEELER 2004, p. 243.

⁴⁴² BAUM 2010, p. 12.

particularities of the case do not exclude the judges of specialisations which are not pertinent. Quite the contrary, it is an important aspect from the US perspective that the supreme court reviews every case as a full bench, because:

It would be inconsistent, however, with the Supreme Court's role as national law declarer to have panels of the Court make decisions of the entire Court. Panel decisions might be inconsistent with the constitutional prescription for 'one Supreme Court'.⁴⁴³

The UK Supreme Court is slightly bigger than its US counterpart. It has twelve members and not just nine.⁴⁴⁴ However, the UK Supreme Court normally does not work as a full court, as the US Supreme Court does. In the UK Supreme Court, quite the contrary, the judges are not required to hear each case *en banc*. During the times of the House of Lords, the normal practice was to sit in panels of five.⁴⁴⁵ In the new supreme court, five judges continue to be a recurrent practice,⁴⁴⁶ but more frequently they sit in a bench of seven or nine.⁴⁴⁷ The judge president, based on the principal clerk's proposal, decides which judges will compose the panel in each case, further based on the expertise and specialisation of each judge.⁴⁴⁸ Therefore, in the UK Supreme Court, the case will be reviewed by a selective combination of only judges specialised in the different fields of law affected by the current case. Moreover, in the UK it is allowed that judges external to the supreme court itself – *i.e.*, the 'acting judges'⁴⁴⁹ and the 'supplementary panel'⁴⁵⁰ – may integrate the bench for *ad hoc* cases.

ii. Cassation chambers

In France, the *Cour de cassation* is divided into several chambers, specialised in different fields of law: for civil matters *stricto sensu*, commercial, social and labour law, and for criminal matters.⁴⁵¹ However, each chamber works in smaller panels. Each of these smaller panels is comprised of judges of the same chamber.⁴⁵² Therefore, the case will be reviewed by judges with an expertise not in a different but in a similar field of law, according to their chamber specialisation. Before 1981, a minimum of seven judges were needed to decide a case in the French cassation.⁴⁵³ But since 1981, in a measure meant to cope with the increasing caseload, the minimum composition was reduced to five.⁴⁵⁴ In practice, however, they may work in panels of more than the minimum, for example, between nine and thirteen depending on the chamber.⁴⁵⁵ In 2001, an

⁴⁴³ WHEELER 2004, 253-254.

⁴⁴⁴ ANDREWS 2012, p. 108.

⁴⁴⁵ DICKSON 1999, p. 149-150; MAK 2013, p. 39-40.

⁴⁴⁶ FENNELL 2008, p. 291; UK CONSTITUTIONAL REFORM 2003, p. 36-37.

⁴⁴⁷ PATERSON 2013, p. 72; DARBYSHIRE 2011, p. 372; BURROWS 2013, p. 305-309.

⁴⁴⁸ PATERSON 2013, p. 70-72; UK CONSTITUTIONAL REFORM 2003, p. 37.

⁴⁴⁹ *Constitutional Reform Act 2005*, Section 38.

⁴⁵⁰ *Constitutional Reform Act 2005*, Section 39.

⁴⁵¹ WEBER 2010A, p. 65-67; JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 14.

⁴⁵² BORÉ & BORÉ 2015, p. 60.

⁴⁵³ WIJFFELS 2013C, p. 81.

⁴⁵⁴ WIJFFELS 2013C, p. 81.

⁴⁵⁵ WEBER 2010A, p. 69.

even more reduced composition of the panel was allowed, three judges (*formations restreintes*) also for rejecting or quashing the easier cases.⁴⁵⁶ In other words, this small composition summarily deals with those cassation petitions that are clearly ill grounded (*non-admissions*) or the mistake of the lower court is obvious (*la solution du pourvoi s'impose*).⁴⁵⁷ Nowadays, the *formations restreintes* of three judges resolve around 50 per cent of the civil caseload of the French cassation.⁴⁵⁸ The remaining 50 per cent is resolved by a panel of a larger size, five judges, who hear the cases for which a decision is not obvious because they passed the *formation restreinte* preliminary screening.⁴⁵⁹ An exceptional composition of thirteen or nineteen judges is reserved in France for no more than fifty disputes a year, those which raise case law problems such as contradictions or mixed topics (*Assemblée Plénière, Chamber Mixte*).⁴⁶⁰

In Italy, the *Corte Suprema di Cassazione* is divided into thirteen chambers (each a *sezione*). The Italian chambers are also specialised according to different fields of law. From these chambers, six are dedicated to civil matters in a broad sense (including labour, taxes and the last one dedicated to filtering) and seven for criminal issues.⁴⁶¹ The Italian chambers work in smaller panels too, comprised of judges of the same chamber.⁴⁶² Because they come from the same specialised chamber, in Italy cases are reviewed by judges with a common expertise in the legal field of the respective chamber. Originally, the size of the panel (*collegio giudicante*) was seven judges.⁴⁶³ But in 1977, the size of the panel was reduced to five.⁴⁶⁴ Unlike France, the Italian sixth civil chamber – the one devoted to the preliminary screening (*sesta sezione civile*)⁴⁶⁵ – is not smaller than the ordinary chambers; it also works in panels of five judges.⁴⁶⁶ The composition of the panel will be larger only in the exceptionally important cases that raise contradictions in the case law, for which a plenary session of nine judges will be formed (*Sezioni Unite*).⁴⁶⁷

iii. Horizontal comparison

From a horizontal perspective, we can observe another asymmetry in this attribute. French and Italian courts of last resort look bigger than their US and

⁴⁵⁶ *supra* Chap. III.B.5 (ii); BORÉ & BORÉ 2015, p. 35-36.

⁴⁵⁷ FERRAND 2017, p. 200-202; CADIET 2011A, p. 187-188.

⁴⁵⁸ WEBER 2010A, p. 69 (After the reform of 1997, the normal panel composition of the *Cour de cassation* is, as in the lower courts, three judges. This formation of three judges represents close to 50 per cent of the civil cases [*'Ces formations (restreinte) représentent près de 50% des affaires traitées en matière civile ...'*]).

⁴⁵⁹ WIJFFELS 2013C, p. 81.

⁴⁶⁰ *infra* Chap. IV.C.7 (i).

⁴⁶¹ COCCIA 2015, p. 22-23; for civil matters, AMOROSO 2012, p. 36-37.

⁴⁶² In detail, CORTE SUPREMA DI CASSAZIONE 2013 (§ 30), p. 23.

⁴⁶³ Art. 67. Royal Decree of January 30, 1941. n° 12. Before the reform of 1977: '*La corte suprema di cassazione in ciascuna sezione giudica col numero invariabile di sette votanti.*'

⁴⁶⁴ Art. 67. Royal Decree of January 30, 1941. n° 12. After the reform of 1977: '*Ordinamento giudiziario: 'La Corte di cassazione in ciascuna sezione giudica con il numero invariabile di cinque votanti ...'*' COCCIA 2015, p. 23; AMOROSO 2012, p. 537.

⁴⁶⁵ *supra* Chap. III.B.5 (i).

⁴⁶⁶ FERRARIS 2015, p. 210.

⁴⁶⁷ COCCIA 2015, p. 26-29; TARUFFO 1998, p. 113-114; *infra* Chap. V.C.4 (ii).

UK counterparts when compared in total size, as we will see in the next section.⁴⁶⁸ But they are actually smaller and less interdisciplinary if we note the composition of the specific panels that will hear each case. The question now is to analyse the model of court to which these different panel compositions correspond. Let us start with the cassation courts again.

In France and Italy the normal composition of the panel for the ordinary cases has been reduced. In both jurisdictions, the size went from seven to five as a result of reforms during the second half of the twentieth century. Also, both jurisdictions have implemented a special panel for the preliminary screening.⁴⁶⁹ In Italy this panel (*sesta sezione civile*) is the same size as the panels of the ordinary chambers (five).⁴⁷⁰ But in France it is a smaller panel of just three judge (*formation restreinte*). Therefore, France and Italy confirm the tendency, identified by KODEK,⁴⁷¹ towards reducing the size of the court of last resort panels. Such a tendency is consistent with the function of a court of error that aims at keeping a large capability of monitoring the inferior court judges.⁴⁷² Due to the lower complexity of most of the error review petitions denounced by the litigants,⁴⁷³ and also due to the lack of general effects on future disputes which would have required a complex consequentialist reasoning,⁴⁷⁴ another solution in this model to increase the monitoring capacity of the court of error is to divide the workload among smaller teams of judges, exactly as the French and Italian cassation courts did.⁴⁷⁵

In a trial court model, these ordinary panels of five judges of the French and Italian cassation chambers may seem unnecessarily large. In a pure model of dispute resolution, a panel not of five but just one judge is enough, or perhaps three for the most important disputes.⁴⁷⁶ In the French cassation chamber we can also find cases heard by a panel of three judges (*formation restreinte*). Three judges is also the composition of the panels in the French intermediate appellate courts (*Cour d'appel*),⁴⁷⁷ which are not error-monitoring courts but repeat the dispute resolution function instead. Unlike the three judges panel for high-value claims in the trial courts of the first instance,⁴⁷⁸ however, the three judges of the cassation *formation restreinte* are reserved not for the important cases but, quite the contrary, for the easier ones in the preliminary screening. The normal functioning of the trial courts of the first instance will be by single judges, something that still seems unacceptable for the French and Italian courts of cassation. It is true that, when the caseload is overwhelming, one cassation judge can take the lead in reporting and drafting the judgment. But at least the

⁴⁶⁸ *infra* Chap. II B.7 (iii).

⁴⁶⁹ *supra* Chap. III.B.5 (ii).

⁴⁷⁰ See again, FERRARIS 2015, p. 210.

⁴⁷¹ KODEK 2014, p. 46.

⁴⁷² *supra* Chap. III.B.4 (c).

⁴⁷³ *supra* Chap. III.B.6 (c).

⁴⁷⁴ *supra* Chap. III.B.2 (c); *infra* Chap. III.B.8 (c).

⁴⁷⁵ *supra* Chap. III.B.6 (c).

⁴⁷⁶ *supra* Chap. III.B.6 (d).

⁴⁷⁷ BELL, BOYRON & WHITTAKER 2008, p. 45-46.

⁴⁷⁸ See again, LAYTON & MERCER 2014, p. 148.

reporting judge will have the support of colleagues on the panel if necessary. However, if the participation of the other colleagues appears as a mere formality, and the decision-making is done in practice by the reporting judge alone, then the cassation court latently deviates closer to the trial court model in the panel composition attribute. Moreover, in the first instance trial courts it could be more convenient to have several groups of judges distributed in locations throughout the jurisdiction's territory. In the cassation court, instead, the chambers work concentrated in a single building usually located in the capital city.

A first horizontal asymmetry between the US and UK supreme courts, on the one hand, and the French and Italian cassation chambers, on the other, is the interdisciplinary nature of the panel composition. The US and UK supreme courts tend to have more interdisciplinary panels. Particularly in the case of the UK Supreme Court, as we observed, the judge president changes the composition of the panel on a case-by-case basis, in order to combine judges with different specialisations that could be pertinent for the current dispute. While the French and Italian cassation chambers, quite the contrary, are less interdisciplinary because the panels are comprised of judges who come from the same specialised chamber. Therefore, the judges on these panels tend to share a similar legal expertise in the legal field attributed to that chamber in particular.

A second horizontal asymmetry is the number of judges that comprise the panel. In the US and UK supreme courts the composition of the panel can be, and tends to be, larger than in the French and Italian cassation chambers. In the US Supreme Court, as we observed, the panel is a bench of the total nine judges. Currently in the UK Supreme Court, however, a number of cases are decided by a panel of five judges, similar to the Italian cassation chambers. This may give the initial impression of a point of symmetry in the horizontal comparison of this attribute between the UK and Italian courts of last resort. This initial impression, however, needs to be moderated for two reasons. First, that panel of five judges on the UK Supreme Court seems to be slowly disappearing. According to several English authors,⁴⁷⁹ the UK Supreme Court has a clear tendency towards a bigger panel comprised of seven or nine judges. Therefore, we could expect that this apparent symmetry in the panel composition between the UK and Italy would become another point of asymmetry over time, aligned with the other asymmetries regarding the seven remaining attributes from a horizontal perspective.

Secondly, that panel of five judges on the UK Supreme Court in reality performs a much more relevant function than the same panel of five in the French and Italian cassation chambers. The former creates precedents only in a few important disputes with strong binding force.⁴⁸⁰ The latter reviews a large number of cases, most of them of losing litigants that merely repeat legal arguments consistently discarded by the court in previous similar cases, with

⁴⁷⁹ See again, PATERSON 2013, p. 72; DARBYSHIRE 2011, p. 372; BURROWS 2013, p. 305-309.

⁴⁸⁰ *supra* Chap. III.B.4 (i); Chap. III.B.2 (i).

particular effects on the current dispute only.⁴⁸¹ However, as we will see in Chapter IV, the equivalent judicial lawmaking function of the UK Supreme Court is performed in the cassation courts not at the level of the chambers but at the level of the plenary session.⁴⁸² And, in fact, the French and Italian plenary sections are comprised of panels larger than the UK Supreme Court of seven or more judges.⁴⁸³ In Chapter V we will observe that the equivalent function of a cassation chamber, as an error-monitoring court, is performed in England not by the UK Supreme Court but by the Court of Appeal,⁴⁸⁴ which is smaller than the ordinary panel composition of the cassation chambers, composed not of five but of just three, two or even a single judge.⁴⁸⁵ Therefore, the real question is why in England can the same judicial functions (judicial lawmaking and error-monitoring) be performed by smaller panels of judges than in France and Italy. To answer this interesting question would require separate research.⁴⁸⁶ However, it can be hypothesised at this stage that the answer could lie in the higher social prestige that each English judge enjoys over his or her cassation colleagues, who are seen as ordinary civil servants.⁴⁸⁷ With higher social prestige per judge, we can suggest, fewer judges are needed to perform the same judicial function.⁴⁸⁸

In sum, the US and UK supreme courts tend to have panels comprised of more judges than in the French and Italian cassation chambers. Still, an important difference remains between the US and UK supreme courts in this attribute: the panel of the former is always a full bench, while the latter works divided into smaller panels. This difference between the US and UK supreme courts can be better explained based on the political implications of the model of courts derived from the presence or absence of strong judicial review of legislation. The US Supreme Court is a court of precedents and also a constitutional court. The political counterweight function of the US Supreme Court makes it more important to maintain the fragile political balance of the court. This political reason explains better why the panel of the US Supreme Court should be one and the same full bench, for every dispute. At the same time, this political tension explains why, unlike the UK Supreme Court, external specialised judges are not allowed to comprise *ad hoc* panels in the US Supreme Court either. External judges, despite their valuable specialisation, will be seen as a risk to the fragile political balance of the constitutional court model.

In the UK, the reform drafters thought that this political problem of the US Supreme Court was not present in their country.⁴⁸⁹ According to its manifest

⁴⁸¹ *supra* Chap. III.B.4 (ii); Chap. III.B.2 (ii).

⁴⁸² *infra* Chap. IV.D.

⁴⁸³ *infra* Chap. IV.C.4 (i,ii).

⁴⁸⁴ *infra* Chap. V.D.

⁴⁸⁵ *infra* Chap. V.C.5 (i).

⁴⁸⁶ See further lines of research, *supra* Chap. VI.F.3.

⁴⁸⁷ MARCUS 2014B, p. 3-5; see again, ZWEIGERT & KÖTZ 1998, p. 210; COTTERRELL 1992, p. 231; MERRYMAN & PÉREZ-PERDOMO 2007, p. 34-38.

⁴⁸⁸ On the same hypothesis of the higher social prestige of common law judges, but applied to explain the differences in 'contempt of court', CUNIBERTI 2011, p. 124-125.

⁴⁸⁹ UK CONSTITUTIONAL REFORM 2003, p. 37 (the US political problem 'was not the case' in the UK).

functions, the UK Supreme Court is not intended to be a constitutional court but a court of precedents exclusively.⁴⁹⁰ The lack of constitutional review of legislation in the UK results in an ideological balance being less critical for the composition of the judges panel. That explains why, according to DICKSON, in the UK ‘it is difficult for “camps” or “alliances” to develop within the [Supreme] Court’.⁴⁹¹ When unifying criteria in a relatively technical problem of the ordinary law – *e.g.*, civil and commercial issues – a court of precedents (like the UK Supreme Court) will prefer to delegate the decision only to the more specialised judges in that field.⁴⁹² The same reason of the technical rather than political nature of its scope of review explains also why, unlike the US Supreme Court, the UK Supreme Court is allowed to include on the panel specialised judges even if they are external to the UK Supreme Court itself. The reduced number of politically sensitive cases in the UK Supreme Court has ensured that the variability in the composition of the panel has not affected the strong stability of the resulting case law.⁴⁹³ In sum, due to the political tension of the judicial review of legislation,⁴⁹⁴ in the US Supreme Court panel stability is preferred over panel specialisation as in the model of a constitutional court. While in the UK Supreme Court, without the political tension of the judicial review of legislation, panel specialisation is preferred over panel stability according to the court of precedents model instead.

Finally, US scholars may argue that the reason why their court of last resort sits *en banc* – and is not divided into several panels as in the UK Supreme Court, the French and Italian cassation chambers – is because of the constitutional prescription of having just ‘one’ supreme court.⁴⁹⁵ This explanation, however, does not seem entirely satisfactory from a comparative perspective. A similar provision can be found in France: ‘[i]l y a, pour toute la République, une Cour de cassation’.⁴⁹⁶ In France, however, this provision is not understood as a limitation on dividing their court of last resort into several panels (which, in fact, it is divided). Why do the US and France interpret a similar provision (that there should be just ‘one’ or ‘a [une]’ court of last resort) in opposite directions? The explanation cannot be in the letter of the law itself since, as we observed, the letter of the law does not differ significantly. The explanation should be in the underlying models of courts and functions which motivate such opposite interpretations. The US Supreme Court is a constitutional court model that needs to maintain the judges political balance in each dispute. Therefore, having ‘one’ court of last resort in the US will be interpreted as a full and undivided panel that maintains such political balance. Whereas, the French cassation chambers correspond to the court of error model which needs to keep a large monitoring capacity. Therefore, having ‘one’ court of last resort in France will be interpreted, quite the contrary, just as a single institutional

⁴⁹⁰ *supra* Chap. II.D.2 (i,iii).

⁴⁹¹ DICKSON 2013A, p. 378.

⁴⁹² UK CONSTITUTIONAL REFORM 2003, p. 37.

⁴⁹³ GOLDSTEIN 1998, p. 321.

⁴⁹⁴ STONE SWEET 2013, p. 820-821.

⁴⁹⁵ See again, WHEELER 2004, 253-254.

⁴⁹⁶ *Code de l'organisation judiciaire*, Art. 441-1, which could be translated as ‘[t]here is, for the whole Republic, a [one] Court of Cassation’ [Author’s translation].

building yet comprised of several panels working together on the task of monitoring the lower courts.

7. Total size

(a) *Political counterweight*. In a constitutional court the total number of judges will depend on whether the judicial review includes the administrative acts of the executive branch or is limited to the statutes of the legislature. A constitutional court that reviews the executive branch will need a large team of judges to cope with thousands of administrative acts. Probably, the check on executive actions will not be concentrated in one court, but distributed across an entire structure of tribunals of different levels (administrative courts or decentralised control), having as the court of last resort a big tribunal internally divided into several panels.⁴⁹⁷ But when review is limited to the legislative branch, it becomes more feasible to have the judicial review centralised in a single court.⁴⁹⁸ The legislation subject to constitutional questioning, compared to the countless administrative acts under review, will normally be only a few per year. Therefore, one single and small court can be sufficient to cope with that small amount of legislation under constitutional control. However, we need to remember that the constitutional court is characterised by an internal political struggle. Accordingly, the total number of judges has to be the same as the panel that will decide each case. As previously discussed, in this model the court needs to decide as a full bench always, in order to maintain the ideological balance.⁴⁹⁹ In that political tension, the constitutional review of legislation needs a smaller total number of judges,⁵⁰⁰ yet large enough to reflect the political cleavages of the moral, economic or philosophical positions in dispute in each constitutional topic (left-wing *vs.* right-wing, conservative *vs.* liberal, among others).⁵⁰¹

(b) *Judicial lawmaking*. A court of precedents is in a similar situation as a constitutional court in respect of the judicial review of legislation. Regardless of the number of recourse petitions brought by the litigants, the legal matters that raise a general interpretation dispute remain only a few every year. With a caseload of less than one hundred of such case law conflicts, as a rough estimation, a single team of judges will be sufficient, too.⁵⁰² Due to the need for stability of the composition of the group of judges in these two models, the total

⁴⁹⁷ The French administrative courts with their court of last resort (*Conseil d'Etat*) provide a good example. See again, GONOD 2014.

⁴⁹⁸ FERRERES COMELLA 2011, p. 266-267.

⁴⁹⁹ *supra* Chap. III.B.6 (a). On the total size of European constitutional courts, FAVOREU & MASTOR 2011, p. 34-45.

⁵⁰⁰ FERRERES COMELLA 2009, p. 37.

⁵⁰¹ FERRERES COMELLA 2009, p. 45; MITIDIERO 2013, p. 63; FAVOREAU & MASTOR 2011, p. 20-21.

⁵⁰² BOBEK 2009, p. 34 (stating that in this model the court is smaller in total size).

size of the court of last resort cannot be much different from the panel composition that hears each case.⁵⁰³

However, we have to remember that the need for stability of the judges in a court of precedents is less intense than in a constitutional court model.⁵⁰⁴ The reason is that the less political nature of the issues resolved by the court of precedents makes possible a higher adherence by the future judges to prior decisions, even if they personally disagree with settled criteria.⁵⁰⁵ Therefore, in the court of precedents it could be possible that the court of last resort is, in total, slightly bigger than the panel. This can happen because the court needs to recruit enough specialised judges who cover all the possible legal fields that can potentially be involved in the cases that could reach the court's docket.⁵⁰⁶ However, the cost is that some judges will not be present in the panel composition of certain cases because the dispute falls outside their expertise. Therefore, the total size of the court of precedents can be slightly bigger than a constitutional court because it is meant to represent not only two or three political positions in dispute, but to bring together enough experts to cover all the special legal fields (contracts, torts, criminal, administrative, labour, among others).

(c) *Error-monitoring*. In a court of error, the size of each of its (several) panels can be smaller than the (single) panel in a court of precedents or constitutional court, as discussed in the previous section.⁵⁰⁷ However, the picture is the opposite when we compare their total size. In the court of error model the total size of the court of last resort can be much bigger than the size of its panels. The high number of litigants' complaints that it needs to receive and answer requires that the court of error have enough capability to process them. The court of error needs to maintain a large volume of review for the purpose of monitoring the lower court judges. Thus, many measures to optimise the court's resources, and to speed up its proceedings, will be implemented. However, the most important measure to increase its capacity of surveillance will be to constantly add more judges.⁵⁰⁸ More cases received by the court system inevitably implies more potential mistakes to check. As a result, the court of error will have several smaller teams working in parallel but, as regards its total size, it tends to be a big court, a model of numerous judges whose number grows over time.

(d) *Dispute resolution*. Finally, the first instance trial courts also need to cope with a big caseload, even bigger than the caseload of a court of error.⁵⁰⁹ The higher courts that repeat the trial court function have to hear not only the

⁵⁰³ *supra* Chap. III.B.6 (b).

⁵⁰⁴ *supra* Chap. III.B.6 (c).

⁵⁰⁵ *supra* Chap. III.B.2 (c).

⁵⁰⁶ MITIDIERO 2013, p. 63.

⁵⁰⁷ *supra* Chap. III.B.6 (c).

⁵⁰⁸ GALIC 2014A, p. 6. ('In order to tackle such a huge caseload, a high number of supreme court judges were appointed'); BOBEK 2009, p. 33.

⁵⁰⁹ *supra* Chap. III.B.4 (d).

objective mistakes, but every possible dissatisfaction of any litigant.⁵¹⁰ Therefore, the trial court model needs an even larger capability to deal with an even more numerous caseload.⁵¹¹ Besides the measures to accelerate each proceeding and save court resources, in this model a legion of single judges is needed to cope with the workload. Constant pressure to increase the number of judges will take place if social conflict in the population increases, and vice versa. As a result, the trial courts will have special divisions for smaller and for larger claims, in summary and extended proceedings, conducted by hundreds of judges, seated on individual benches. The social pacification of the dispute resolution function requires that the courts get closer to the conflicts' origins. For that reason, we can expect that the trial courts will be distributed in several locations throughout the jurisdiction territory. Accordingly, the size of each local first instance trial court will be different depending on the number of legal complaints filed in the area.

i. Supreme courts

In the US, the total size of the court is not different from the size of the panel that hears each case, because there the US Supreme Court does not sit divided in smaller panels but acts as a full bench,⁵¹² unless illness or conflict of interest of one of the judges.⁵¹³ Therefore, the panel composition and the total size of the court is the same, nine judges.⁵¹⁴ Originally there were only six members of the court.⁵¹⁵ This total size increased to nine in 1837 and, in practice, this number has remained fairly constant over time.⁵¹⁶ No changes in the number of judges has been made since 1869.⁵¹⁷ Therefore, the US Supreme Court has had the same total number of nine judges for approximately a century and a half.

As regards the Appellate Committee of the UK House of Lords, during the twentieth century its size increased on several occasions: from four to six in 1913, to seven in 1929, to nine in 1949 and to eleven in 1968.⁵¹⁸ In 1994 the Appellate Committee of the House of Lords reached its final composition of twelve judges.⁵¹⁹ The same number of twelve judges remains on the new UK Supreme Court.⁵²⁰ This means that the UK Supreme Court's total size is bigger than its US counterpart which, in turn, has only nine.⁵²¹ But, unlike the US Supreme Court, the UK Supreme Court usually does not work as a full bench, but divided into smaller panels, as observed in the previous section.⁵²²

⁵¹⁰ *supra* Chap. III.B.1 (d).

⁵¹¹ *supra* Chap. III.B.4 (d).

⁵¹² WHEELER 2004, p. 253-254.

⁵¹³ MAK 2013, p. 42.

⁵¹⁴ GREENHOUSE 2012, p. 25.

⁵¹⁵ BAUM 2010, p. 11.

⁵¹⁶ BAUM 2010, p. 11-12.

⁵¹⁷ BAUM 2010, p. 12.

⁵¹⁸ BURROWS 2013, p. 306.

⁵¹⁹ BURROWS 2013, p. 306.

⁵²⁰ ANDREWS 2017, p. 40.

⁵²¹ DARBYSHIRE 2011, p. 360.

⁵²² *supra* Chap. III.B.6 (i).

The total size of the UK Supreme Court has also become stable over time. Since 1994, from the time of the House of Lords, it has had the same twelve judges.⁵²³ Its current total size does not have a tradition as long as its US counterpart. But, the UK Supreme Court has had its current twelve members for more than two decades. When contrasted to the cassation courts of France and Italy, as we will see next, twenty years with the same number of judges counts as a fairly constant size in a comparative perspective.

ii. *Cassation chambers*

In France, the *Cour de cassation* has, in total, approximately 200 judges of different categories.⁵²⁴ First, there are the proper judges (*conseillers*) who are permanent, recruited from the lower courts, plus some law professors.⁵²⁵ Their number is 120.⁵²⁶ Second, there are the extraordinary judges (*conseillers en service extraordinaire*) who are appointed for eight years due to their professional experience and skill.⁵²⁷ Their current number is ten.⁵²⁸ Finally, the deputy judges (*conseillers référendaires*) who are assigned to the *Cour de cassation* for ten years.⁵²⁹ Currently, there are seventy of them.⁵³⁰

The number of judges of the *Cour de cassation* is not stable, but constantly growing.⁵³¹ Two decades ago it was less than half its current size. In 1996 it had not 200, as nowadays, but just eighty-four judges.⁵³² This court has grown in all the categories of judges, but particularly in its deputy judges. Today there are seventy *conseillers référendaires*, whereas in 1967 they were only nine.⁵³³

This growth in size coincides with the internal specialisation of this court. In the first half of the twentieth century, the *Cour de cassation* only had three chambers: the former filtering chamber (*chambre des requêtes*), another chamber for civil matters and a final one for criminal issues.⁵³⁴ However, over time the *Cour de cassation* needed to increase its size and its specialisation in order to cope with its increasing caseload. That is why in 1952 and 1967 two more chambers were added, both with jurisdiction on civil matters.⁵³⁵

In Italy, the *Corte Suprema di Cassazione* is even more numerous than its counterpart in France. In addition to the President and vice-President, it has 357 judges, plus thirty-seven judges of a lower rank, to some extent equivalent to a law clerk but with the formal status of ‘judge’.⁵³⁶ Altogether, therefore, the *Corte*

⁵²³ *supra* Chap. III.B.6 (i); BURROWS 2013, p. 306.

⁵²⁴ CADIET 2011A, p. 186-187.

⁵²⁵ MAK 2013, p. 52. WEBER 2010A, p. 31; in detail, BORÉ & BORÉ 2015, p. 30-34.

⁵²⁶ COUR DE CASSATION – MEMBERS 2016.

⁵²⁷ MAK 2013, p. 52. WEBER 2010A, p. 32; in detail, BORÉ & BORÉ 2015, p. 34-35.

⁵²⁸ COUR DE CASSATION – MEMBERS 2016.

⁵²⁹ WEBER 2010A, p. 32-33; in detail, BORÉ & BORÉ 2015, p. 35-36.

⁵³⁰ COUR DE CASSATION – MEMBERS 2016.

⁵³¹ BORÉ & BORÉ 2015, p. 30, 34, 35.

⁵³² TROPPER & GRZEGORCZYK 1997, p. 105.

⁵³³ FERRAND 2017, p. 199-200.

⁵³⁴ WIJFFELS 2013C, p. 80.

⁵³⁵ WIJFFELS 2013C, p. 81; current civil chambers, BORÉ & BORÉ 2015, p. 59-60.

⁵³⁶ SILVESTRI 2017, p. 238.

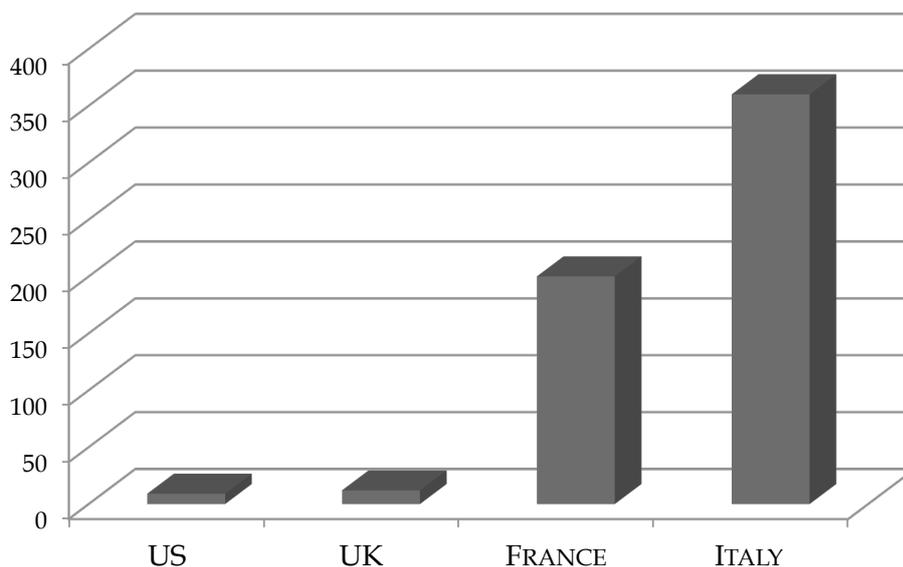
di Cassazione currently has the barely credible number of 394 judges which, for the sake of simplicity, in this study will be approximated to 400.

Its total size has also grown over time. In 1998 there were 350 judges.⁵³⁷ That means fifty judges were added to the *Corte di Cassazione* and, therefore, the court is now 12 per cent bigger than two decades ago. Together with this increase in size, a similar level of specialisation arose. As a result, the *Corte di Cassazione* is sub-divided into chambers (*sezioni*) for civil issues, commercial affairs, labour and taxes besides the traditional chambers for criminal law.⁵³⁸ Despite this enormous workforce that the *Corte di Cassazione* has, it is apparent that the increase in the total number judges did not solve the problems of backlog. In the same timeframe of two decades, quite the contrary, the delay in Italian cassation procedures increased from two years and two months to three years and eight months.⁵³⁹

iii. Horizontal comparison

From a horizontal perspective, there is remarkable asymmetry in the total size. When compared to the French and Italian cassation courts, the US and UK supreme courts look quite small. The cassation courts under study are huge tribunals whose judges could be counted in the hundreds (200 in France, 400 in Italy),⁵⁴⁰ whereas the supreme courts tend to have a total size close to ten (nine in the US, twelve in the UK).⁵⁴¹ Graph III.3 demonstrates this quantitative difference in the total size attribute.

Graph III.3 : Courts of last resort – Total size



⁵³⁷ TARUFFO 1998, p. 118.

⁵³⁸ See again, COCCIA 2015, p. 22-23; AMOROSO 2012, p. 36-37.

⁵³⁹ SILVESTRI 2017, p. 238.

⁵⁴⁰ *supra* Chap. III.B.7 (ii).

⁵⁴¹ *supra* Chap. III.B.7 (i).

Furthermore, the asymmetry is not only in their current total size, but also in their evolution. If we look back two decades ago, we can observe that the US and UK supreme courts have kept their total size unchanged. In the courts of cassation under study, on the other hand, between fifty and one hundred judges have been added in the same timeframe of two decades.⁵⁴² Therefore, from a horizontal perspective, cassation courts are not only big but also constantly growing, while supreme courts are small and remain stable.⁵⁴³

This asymmetry in the total size of the courts of last resort cannot be attributed to the different size of the populations.⁵⁴⁴ The hypothesis that the size of the court of last resort, from a horizontal perspective, is in direct proportion to the size of the population, does not correlate with the size of the population of the US, UK, French and Italian jurisdictions. Among the four jurisdictions under study, the US has the largest population (323 million),⁵⁴⁵ and it actually has the smallest court of last resort. The US Supreme Court is smaller than the UK Supreme Court, even though the US population is five times larger than the UK as a whole (63 million).⁵⁴⁶

Among the cassation jurisdictions of France and Italy we cannot observe a clear relation between the size of the population and the total size of the court of last resort either. France and Italy have a population of 66 and 60 million,⁵⁴⁷ for which their cassation courts have around 200 and 400 judges, respectively. Therefore, these cassation jurisdictions with a similar size of population have courts of last resort with a different total size, in which the latter doubles the size of the former. Unlike the US and UK supreme courts, as we shall see, the cassation courts of France and Italy indeed exhibit a trend towards increasing their total size. However, that growth tendency does not appear strictly correlated with the size of their respective French and Italian populations. Even though Italy has a slightly smaller population than France, the Italy *Corte di Cassazione*, quite the contrary, has been growing at double the speed of the French *Cour de cassation*.

Instead, the asymmetry in this attribute seems to be better explained by the different judicial functions that, at a manifest or latent level, predominate. In that sense, the different evolution of these supreme courts and cassation courts' total size is consistent with the other attributes of each model of court as observed in the previous sections: scope of review,⁵⁴⁸ number of cases that are meant to be heard⁵⁴⁹ and the presence or absence of a restrictive preliminary screening.⁵⁵⁰ On the one hand, a constitutional court (when focused on judicial review of legislation) and a court of precedents have to hear a relatively small

⁵⁴² *supra* Chap. III.B.7 (ii).

⁵⁴³ *supra* Chap. III.B.7 (i).

⁵⁴⁴ TARUFFO 1998, p. 118-119.

⁵⁴⁵ US - CENSUS 2016.

⁵⁴⁶ UK - CENSUS 2011.

⁵⁴⁷ FRANCE - CENSUS 2016; ITALY - CENSUS 2016.

⁵⁴⁸ *supra* Chap. III.B.1 (iii).

⁵⁴⁹ *supra* Chap. III.B.4 (iii).

⁵⁵⁰ *supra* Chap. III.B.5 (iii).

number of cases.⁵⁵¹ This reduced quantity is the result of a scope of review limited to constitutional review of legislation or general interpretation problems.⁵⁵² The number of such constitutional or interpretation problems that a piece of legislation may produce remains relatively low. With a lower caseload due to a limited scope of review, therefore, the supreme courts of the US and the UK can keep a smaller total size as well.⁵⁵³ Furthermore, the limited scope of review justifies that a constitutional court and a court of precedents can have a restrictive preliminary screening.⁵⁵⁴ Therefore, the total size of the court in these two models does not need to grow over time, because the restrictive preliminary screening can also keep their caseload fairly limited and constant. These tendencies in the total size of a constitutional court and a court of precedents, and its interconnection with the other attributes of each model – *i.e.*, scope of review and preliminary screening – are consistent with the situations of the US and UK supreme courts, where we observed that the supreme courts are indeed small and stable in their total size.

On the other hand, in a court of error model the scope of review is broader,⁵⁵⁵ and as a consequence the number of cases that need to be heard is larger, as well.⁵⁵⁶ To cope with this bigger caseload, the court needs to have a higher capacity to process them and, naturally, a larger workforce.⁵⁵⁷ As a result, the court of error tends to have a bigger total size. Moreover, the scope of review open to every particular complaint of a mistake requires a preliminary screening stage that is less restrictive than in the model of a court of precedents or of a constitutional court.⁵⁵⁸ Therefore, the court of error does not have a mechanism to keep its caseload constant over time. As a consequence, the court of error is not only big but also needs to grow in the total number of judges as a response to an also increasing caseload that cannot be screened out.⁵⁵⁹ This section showed that the French and Italian cassation courts are indeed courts comprised of hundreds of judges and that they have grown in their total number of judges during the last two decades. This French and Italian total size tendency, therefore, is consistent with the configuration of that attribute in an ideal court of error, and also consistent with the scope of review, number of cases and preliminary screening of the same model.

The trial court model also needs to be a big court or, properly speaking, a numerous set of courts that have a closer connection with the parties.⁵⁶⁰ Therefore, the small total size of the US and UK supreme courts, appropriate to the constitutional court and court of precedents models, makes them totally incompatible with the dispute resolution function of the first instance trial

⁵⁵¹ *supra* Chap. III.B.4 (a,b).

⁵⁵² *supra* Chap. III.B.1 (a,b).

⁵⁵³ *supra* Chap. III.B.7 (a,b).

⁵⁵⁴ *supra* Chap. III.B.5 (a,b).

⁵⁵⁵ *supra* Chap. III.B.1 (c).

⁵⁵⁶ *supra* Chap. III.B.4 (c).

⁵⁵⁷ *supra* Chap. III.B.7 (c).

⁵⁵⁸ *supra* Chap. III.B.5 (c).

⁵⁵⁹ *supra* Chap. III.B.7 (c).

⁵⁶⁰ *supra* Chap. III.B.7 (d).

courts. But there is no such extreme opposition between a model of (third) trial court and a court of error in the French and Italian cassation courts in this attribute. The general tendency towards the increasing size of these cassation courts is also present in the first instance trial court model. In the first instance trial courts, however, that proportion between the total size and the population could be expected to be closer. Let us remember that a first instance trial court model does not direct its attention to just objective judicial mistakes, but to every possible legal dissatisfaction among the population.⁵⁶¹ Therefore, the population's caseload pressure should be bigger in a first instance trial court than in one of pure error.⁵⁶² In that context, the slower pace of growth of the court of error in its total number of judges could not be sufficient for the growing population demands of a proper trial court model, which needs an even larger workforce.

In the French and Italian cassation courts, as previously discussed, we could not observe that clear proportion between total size and population. The total size of these cassation courts – even if they are much bigger than the US and UK supreme courts – does not seem strictly correlated with the size of the population, as the mere dispute resolution function in a trial court model would require. However, this assertion could better suit France than Italy. According to the proportion between the size of the population and the size of the cassation court, we should have expected that the Italian *Corte di Cassazione* should be a bit smaller than the French *Cour de cassation*. But the reality is the opposite. The *Cour de cassation* is half the size of the *Corte di Cassazione* (200 vs. 400) even though the population of France is, quite the contrary, bigger than that of Italy (66 million vs. 60 million). A possible explanation, suspected for a long time by Italian scholars, is that the Italian *Corte di Cassazione* seems to have deviated from its manifest functions to that of the third trial court model,⁵⁶³ while the French *Cour de cassation* has been more careful in maintaining its function as a pure court of error. This is a reasonable explanation for this abnormal difference between France and Italy in this attribute. A trial court model (Italy) also needs a progressive growth of the court, but at a much faster pace than in a proper court of error (France). The former grows faster because it needs to keep pace with the growth of the population's disputes, while the latter grows slower because its scope of review is limited to that fraction of the population's disputes in which a judicial mistake could have been committed (something that could depend on factors different than population growth). In sum, because the court of last resort in Italy has moved closer to a model of trial court than its counterpart in France, as we observed in the previous attributes, this faster growing tendency of the trial court model could explain why the Italian *Corte di Cassazione* has become bigger than the French *Cour de cassation* despite their similar population size.

⁵⁶¹ *supra* Chap. III.B.1 (d).

⁵⁶² *supra* Chap. III.B.4 (d).

⁵⁶³ TARUFFO 1991, p. 159-160; SILVESTRI 2017, p. 239-240; RUSCIANO 2012, p. 14-20.

8. Opinion style

(a) *Political counterweight*. In a constitutional court model it may be convenient to mention the dissenting opinions so as to make the ideological balance of its composition transparent⁵⁶⁴ as well as the diversity of the economic, political or moral cleavages at stake.⁵⁶⁵ In politics, individual accountability matters and, therefore, expressing individual opinions in this model helps to keep the political judges accountable.⁵⁶⁶ Also, political balances change constantly over time. Therefore, dissenting opinions keep a registry of the arguments made by the current political minorities that can become majorities in the future.⁵⁶⁷ As a consequence, the sole inclusion of dissenting opinions can produce longer judgments. But also the judicial review of legislation may extend the length of the judgments of a constitutional court model. A piece of legislation approved by a representative legislature has a majoritarian legitimacy.⁵⁶⁸ An exercise of judicial review with an insufficient reasoning in the judges' written opinion could be seen as illegitimate interference with representative parliamentary decisions. Therefore, judicial review has a special burden of justifying the logic and cogency of its interpretation of the constitution.⁵⁶⁹ This special burden of justification of the constitutional review of legislation may require an extended judgment reasoning able to defeat the parliament's majoritarian legitimation.⁵⁷⁰

(b) *Judicial lawmaking*. In a court of precedents model the style of the decision could be similar to a constitutional court. In the court of precedents, dissenting opinions can be useful too. In this model the court solves interpretation problems in which there is no clear-cut difference between right and wrong interpretations.⁵⁷¹ In this model the judgment does not deal simply with erroneous decisions, but with reasonable interpretation disagreement between equally competent judges.⁵⁷² Therefore, a court of precedents needs to untangle a 'dialectic tension' between two or more interpretation theories that contradict each other, a dialectic that needs to be shown first before taking a stand. One way is to make dissenting opinions explicit, because this can be useful for future litigants and judges in order to understand the interpretation debate that has been resolved.⁵⁷³ This also tends to produce longer judgments. More space

⁵⁶⁴ SCALIA 1998, p. 20; GINGSBURG 2011, p. 547; in general, MASTOR 2012, p. 87-115.

⁵⁶⁵ LASSER 2004, p. 3 ('Individually signed opinions (including concurrences and dissent) ... and the public judicial debate over substantive policy issues combine to foster judicial accountability and control, to encourage democratic debate and deliberation ...').

⁵⁶⁶ FISS 1983, p. 1443, 1458.

⁵⁶⁷ HABERMAS 1996, p. 179-180; GINGSBURG 2010, p. 4-6; SCALIA 1998, p. 19.

⁵⁶⁸ VAN DER SCHYFF 2010, p. 53-55.

⁵⁶⁹ HARDING, LEYLAND & GROPPI 2009, p. 22.

⁵⁷⁰ VAN DER SCHYFF 2010, p. 56; in general, HABERMAS 1996, p. 238-286.

⁵⁷¹ *supra* Chap. III.B.1 (b).

⁵⁷² BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 319-320 (the prevalence of concurring and dissenting opinions demonstrate that 'many important issues of law are highly arguable ...').

⁵⁷³ SCALIA 1998, p. 21 (stating that dissenting opinions allow 'to set forth clear and consistent positions on both sides of the major legal issues of the day ... In our law schools, it is not necessary to assign students the writings of prominent academics so that they may recognize and reflect upon the principal controversies of legal method or

for detailed reasoning will be needed when reasonable interpretation theories collide. Therefore, the court of precedents' judgments will be extensive in length in arguing and counter-arguing the two or more interpretation theories in dispute.

The judgment in a court of precedents will also have a more extended description of the facts of the current dispute.⁵⁷⁴ The factual details of the case are useful for future litigants and judges because, based on them, they can better anticipate which type of dispute will be governed by the new precedents.⁵⁷⁵ Finally, *stare decisis* extends the length of the judgments too. *Stare decisis* requires a discussion on the pertinence of certain earlier cases for the current one, (discussion about past judgments that is practically absent in the courts of error).⁵⁷⁶ Therefore, an important extension of the court of precedents' judgment will be devoted to the analysis of previous cases.

(c) *Error-monitoring*. The style of the decision in a court of error is affected by the need to cope with a bigger, but simpler, caseload.⁵⁷⁷ Accordingly, as we observed, the panels in a court of error tend to be smaller.⁵⁷⁸ In smaller panels the possibilities of dissenting opinions are lower due to the simple fact that fewer judges are involved in the decision-making. To cope with the large caseload, moreover, the panel of a court of error usually delegates to one of the judges the role of studying the case file and informing colleagues about the main points of the recourse petition. Afterwards, the other members of the panel will limit their intervention solely to confirming or not the suggestion made by the reporting judge, and quickly moving on to the next case.⁵⁷⁹ This system of reporting judges on a panel optimises its human resources and monitoring capacity, but causes dissenting opinions (frequent in a court of precedents and a constitutional court) to be rarely found in a court of error. In general, the task of providing reasons to justify the judgments, and, in particular, to write dissenting opinions, requires a considerable amount of extra burden of time,⁵⁸⁰ time that is especially scarce in a model interested in keeping a high level of monitoring power over a large number of cases.⁵⁸¹ Also, the court of error normally does not review disputes of high complexity or public impact only.⁵⁸² The majority of its cases will be routine error-checking.⁵⁸³ If the mistake (or the lack of one) is clear – *i.e.*, the omission of a certain antecedent or the overestimation of a precise requirement – there is little room for different perspectives.⁵⁸⁴ The court of error does not need to make dissenting

of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself ...').

⁵⁷⁴ GOLDSTEIN 1998, p. 329; MACCORMICK & SUMMER 1997B, p. 536.

⁵⁷⁵ MACCORMICK & SUMMER 1997B, p. 537; MITIDIERO 2015, p. 215.

⁵⁷⁶ *infra* Chap. III.B.8 (b,c); MACCORMICK & SUMMERS 1997B, p. 536-537.

⁵⁷⁷ *supra* Chap. III.B.4 (c).

⁵⁷⁸ *supra* Chap. III.B.6 (c).

⁵⁷⁹ *supra* Chap. III.B.6 (c).

⁵⁸⁰ GOLDSTEIN 1998, p. 330; NORKUS 2015, p. 6.

⁵⁸¹ *supra* Chap. III.B.4 (c).

⁵⁸² *supra* Chap. III.B.3 (c).

⁵⁸³ BOBEK 2009, p. 33.

⁵⁸⁴ SUNSTEIN *et al.* 2006, p. 59-61.

opinions explicit because, unlike in a court of precedents, in the easy cases there is no significant dialectic tension between strong interpretation theories in the first place. When a simple problem with a clear solution is at stake, dissenting opinions naturally will not emerge. As a consequence, in a model of court that deals with routine mistakes, a short and summary judgment, signed collectively by the whole panel, can be enough.⁵⁸⁵

Additionally, the limited effects of each court of error judgment⁵⁸⁶ allows reducing the length. The court of error can write shorter judgments because it does not need to engage in the consequentialist reasoning proper of the courts of precedents;⁵⁸⁷ nor in convincing the reader about the legitimacy of its policy determinations,⁵⁸⁸ as the constitutional court needs to. More detailed and longer decisions can be present in a court of error, but they will remain exceptional for those few disputes in which the error under review has a high level of complexity.

(d) *Dispute resolution*. The trial courts have to be willing to hear repetitive and minor disputes⁵⁸⁹ that do not require extended and detailed reasoning for each case. Some level of more detail could be expected in the analysis of the evidence, which is a characteristic of the scope of review in this model.⁵⁹⁰ However, summary and repetitive formulas can be applied, in an industrial manner, to save time in a large proportion of the workload.⁵⁹¹

Furthermore, in a first instance trial court model the cases will be decided by a single judge to improve efficiency.⁵⁹² Obviously, when the disputes are resolved by just one judge there is no space at all for dissenting opinions because there is no other judge in the first place. But even in the most high-value complex cases that could be assigned to a panel of three in the first instance trial courts, dissenting opinions would remain rare. The internal delegation to a reporting judge may have the same consequence, as in a court of error, of minimising dissenting opinions to save time and increase the capacity to resolve more disputes. But even if dissenting opinions were present in a trial court, their relevance for the purely private interest of this model will be related to the recourse to a higher court. The dissenting opinion can be cited by the losing litigant, aiming at the higher court to adhere to the lower court minority vote.⁵⁹³ But if the court of last resort is repeating the first instance dispute resolution function, dissenting opinions become of little practical use for the losing litigant because, by definition, no further recourse can be brought against the court of last resort's final-word power,⁵⁹⁴ at least at a domestic level.⁵⁹⁵

⁵⁸⁵ RICHMAN & REYNOLDS 2013, p. 29.

⁵⁸⁶ *supra* Chap. III.B.2 (c).

⁵⁸⁷ *supra* Chap. III.B.6 (b).

⁵⁸⁸ GOLDSTEIN 1998, p. 329-330; *supra* Chap. III.B.8 (a).

⁵⁸⁹ *supra* Chap. III.B.2 (d).

⁵⁹⁰ *supra* Chap. III.B.1 (d).

⁵⁹¹ NORKUS 2015, p. 7.

⁵⁹² *supra* Chap. III.B.6 (d).

⁵⁹³ SCALIA 1998, p. 20; BROWN 2013, p. 31

⁵⁹⁴ See again, GARNER 2009, p. 407, 1578; BROWN 2013, p. 31; *supra* Chap. I.E.1 (ii).

i. *Supreme courts*

In the US, the US Supreme Court's judgments are lengthy. The shortest one may have around eight pages, especially when they are rendered *per curiam* (as a single court).⁵⁹⁶ But the general rule is the opposite. They can extend to more than fifty pages in politically sensitive issues, where many dissenting opinions will be expressed.⁵⁹⁷ This extended length is needed to explain the interpretation of the pertinence of earlier case law.⁵⁹⁸ But it also leads, to an important degree, to a more political style of debate about the moral, social or economic implications of the decision, issues that may appear as 'extra-legal' to a civil law observer.⁵⁹⁹

The US Supreme Court also allows dissenting and concurring opinions.⁶⁰⁰ The dissenting opinions can be written separately too.⁶⁰¹ Each judge who disagrees may write his or her own separate opinion, or the minority judges may join together in one common dissenting opinion.⁶⁰² However, the US practice seems to be less individualistic than that of the UK Supreme Court, as we shall see, as regards the majority vote.⁶⁰³ In the US, the judges in the majority have a process by which one of them is responsible for writing a single majority opinion for all of them.⁶⁰⁴ Therefore, the majority opinion will not be expressed as the sum of individual and separate opinions in the same direction – unlike in the UK court of last resort, as we shall see – but as just one common writing.⁶⁰⁵ In that context, those who agree with the majority decision, but who have some different grounds for it, may add the specific grounds in a concurring opinion.⁶⁰⁶ But if the judge has nothing special to add, he or she will just sign the single draft for the majority vote.⁶⁰⁷

From the times of the House of Lords, the UK court of last resort judgments are lengthy, as well.⁶⁰⁸ A typical reasoning can extend to more than 300 paragraphs.⁶⁰⁹ Most of that extended length is used for the discussion of the

⁵⁹⁵ On international forums of litigation, see again, MACKENZIE *et al.* 2010; *supra* Chap. I.E.1 (v).

⁵⁹⁶ For example, *Woods v. Donald*, 575 U.S. ___ (2015).
www.supremecourt.gov/opinions/14pdf/14-618_4357.pdf.

⁵⁹⁷ For example, *Young v. United Parcel Service Inc.*, 575 U.S. ___ (2015).
www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf.

⁵⁹⁸ See, for example, *Nelson v. Colorado* 581 U.S. ___ (2017).

⁵⁹⁹ HOURQUEBIE 2012, p. 28-30; for the evolution of the US Supreme Court's opinion style, POPKIN 2007.

⁶⁰⁰ REHNQUIST 2002, p. 265. On the US history of dissenting opinions, UROFSKY 2015.

⁶⁰¹ BAUM 2010, p. 112.

⁶⁰² REHNQUIST 2002, p. 265; BAUM 2010, p. 112 ('When more than one justice dissents, the dissents usually join in a single opinion – most likely the one originally assigned.').

⁶⁰³ BAUM 2010, p. 110 (The judges in the majority 'initiate a process of explicit or implicit negotiation in which the assigned justice tries to gain the support of as many colleagues as possible').

⁶⁰⁴ REHNQUIST 2002, p. 259-260.

⁶⁰⁵ REHNQUIST 2002, p. 264-265.

⁶⁰⁶ BAUM 2010, p. 113.

⁶⁰⁷ BAUM 2010, p. 110-113; REHNQUIST 2002, p. 265, p. 264.

⁶⁰⁸ BLOM-COOPER 2009, p. 159-160; GOUTAL 1976, p. 46; *cfr.*, LAWSON 1977, p. 364-371.

⁶⁰⁹ For example, *Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773 (HL).

pertinence of prior precedents to the current case.⁶¹⁰ The UK Supreme Court's lengthy style has led some English authors to criticise that they are, indeed, too long, advocating for a more condensed reasoning.⁶¹¹

Dissenting and concurring opinions are also allowed in the UK Supreme Court.⁶¹² The former House of Lords had, in some appeals, judgments written down collectively, with one voice for the whole court.⁶¹³ But the new UK Supreme Court has not settled on a different practice from the traditional individual opinions yet.⁶¹⁴ This means that the dissenting opinions will be written down separately but also that even the judges who are part of the majority prefer to express their full reasoning, one by one, despite all of them having arrived at the identical conclusion.⁶¹⁵ Therefore, in the UK Supreme Court usually the majority opinion is not written as a single shared draft for all (as in the US Supreme Court),⁶¹⁶ but as the sum of individual writings in the same direction.⁶¹⁷

ii. Cassation chambers

In France, the general style of the decisions of the *Court de cassation* is one of 'extreme conciseness'.⁶¹⁸ As a result, the typical length of the chamber's judgments is between two and three paragraphs,⁶¹⁹ which fits onto one or two pages.⁶²⁰ For a foreign observer it is hard to imagine how the French Cassation Court's decisions can be grounded properly in that limited length.⁶²¹ In fact, the motivation of the judgments is affected by this briefness of space.⁶²² The legal reasoning of the cassation chamber will be reduced to two or three lines in which the pertinent article of the code is cited.⁶²³ Supposedly, according to some French authors, that limited space is enough for a precise deductive reasoning.⁶²⁴ However, the extreme conciseness creates difficulties for litigants, judges and scholars when trying to understand the repercussions of the cassation decision. For example, for TROPER, GRZEGORCZYK & GARDIES:

French judicial opinions are extremely concise, often not longer than a few lines ... Only main arguments are discussed, or rather mentioned,

⁶¹⁰ ANDREWS 2017, p. 42 ('The main source of prolixity is minute analysis of earlier decisions, with copious citation of earlier judicial formulations.').

⁶¹¹ BLOM-COOPER 2009, p. 160-161; ANDREWS 2017, p. 42 ('The "duty to give reasons" has become a tyrannical procedural precept.').

⁶¹² BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 317; BLOM-COOPER 2009, p. 153; in general, BROWN 2013, p. 29-38.

⁶¹³ BLOM-COOPER 2009, p. 153-154.

⁶¹⁴ ANDREWS 2017, p. 43.

⁶¹⁵ ANDREWS 2017, p. 44.

⁶¹⁶ See again, BAUM 2010, p. 110; REHNQUIST 2002, p. 259-260.

⁶¹⁷ For example, *Scott (FC) v. Southern Pacific Mortgages Limited and another* [2014] UKSC 52.

⁶¹⁸ TROPER, GRZEGORCZYK & GARDIES 1991, p. 197; GILLET 2012, p. 173-174.

⁶¹⁹ ELLIOTT, JEANPIERRE & VERNON 2006, p. 159.

⁶²⁰ For example, *Cour de cassation, Arrêt n° 510 du 12 mai 2016 (15-13.435)*.

⁶²¹ LASSER 2004, p. 31-32.

⁶²² LASSER 2004, p. 33.

⁶²³ LASSER 2004, p. 32; GOUTAL 1976, p. 45.

⁶²⁴ GILLET 2012, p. 169-170.

in very short and elliptic formulas, very carefully styled, so that there is an important and difficult task for the scholar to interpret the text of the decision.⁶²⁵

Besides its briefness, cassation decisions, and the judgments of the rest the French judiciary too, are characterised by the absence of dissenting opinions and concurring ones.⁶²⁶ In such short judgments, there is certainly no space for dissenting opinions but just one (concise) opinion for the whole court. Also, the voting process remains strictly secret and there is a presumption that decisions are taken based on unanimity.⁶²⁷ Therefore, there is no possibility to know, officially, whether a judge on the panel had a different criterion.

In Italy, cassation chambers' judgments are also short, but certainly not as brief as in France. A chamber decision on a cassation recourse in Italy can have between four and eight pages.⁶²⁸ In that relatively longer space, the Italian cassation chambers can include more than the citation of articles. In fact, Italian cassation chambers try to follow an extended step-by-step reasoning based on consecutive syllogisms.⁶²⁹ Also, an important part of its extension will be devoted to re-evaluate the reasoning in the judgment of the lower court.⁶³⁰

However, the reader should remember that, normally, Italian cassation judgments are not published in their full text.⁶³¹ The general public will have access only to a part of the judgment: to the 'principle of law' or 'legal principle' (*massima legale*) identified by the *Ufficio Massimario*. This principle of law is a brief and abstract extract of the legal reasoning on the interpretation of a precise rule, omitting the surrounding facts.⁶³² As a result, the five or ten lines of an Italian legal principle (*massima*),⁶³³ which is the only part of the cassation judgments that the general public will know, can be as succinct as French cassation chamber *arrêts*.

In Italy, there are no dissenting opinions either.⁶³⁴ Even if disagreement may occur, it is never explicitly stated in judicial decisions.⁶³⁵ Therefore, cassation judgments are issued by the *Corte di Cassazione* as a whole and not as the sum of the opinions of individual judges. This situation is even clearer if we consider that not the full text of the judgment but only the concise legal principles (*massima*) are widely published in Italy. Even if separate dissenting opinions per judge are not allowed, the full text of the Italian cassation judgment perhaps has some rudimentary form of discussion on the conflicting interpretations. Still, that interpretation dialectic that could exist will be ignored in the publication of

⁶²⁵ TROPER, GRZEGORCZYK & GARDIES 1991, p. 172.

⁶²⁶ TROPER & GRZEGORCZYK 1997, p. 110, 122.

⁶²⁷ TROPER & GRZEGORCZYK 1997, p. 110; TROPER, GRZEGORCZYK & GARDIES 1991, p. 199.

⁶²⁸ For example: *Cass. Prima Sezione. Ordenanza interlocutoria n. 6127 of 13/05/2015*.

⁶²⁹ TARUFFO & LA TORRE 1997, p. 147.

⁶³⁰ In detail, ROSELLI 2015, p. 451-462.

⁶³¹ TARUFFO & LA TORRE 1997, p. 148; *supra* Chap. III.B.3 (ii).

⁶³² LIVINGSTON, MONATERI & PARISI 2015, p. 224.

⁶³³ TARUFFO & LA TORRE 1997, p. 148.

⁶³⁴ TARUFFO & LA TORRE 1997, p. 145.

⁶³⁵ TARUFFO & LA TORRE 1997, p. 160.

the principle of law (*massima*), which will consist only in one theory of interpretation of certain a rule (omitting the conflicting ones). Therefore, through the restricted system of publishing the precise legal principle exclusively, Italian litigants have no easy access to the interpretation dialectic that the case could have involved.

iii. *Horizontal comparison*

From a horizontal perspective, we can observe two main asymmetries in this last attribute. The first asymmetry regards the length of opinions (*infra* a). The US and UK supreme courts tend to write lengthy judgments of between twenty and forty pages.⁶³⁶ The decisions of the chambers of a cassation court under study, on the other hand, rarely exceed ten pages. They are usually five pages or fewer: the French extreme can be a couple of paragraphs.⁶³⁷ The second asymmetry regards dissenting opinions (*infra* b). The US and UK supreme court judgments frequently reveal the dissenting opinions of their judges;⁶³⁸ while the French and Italian cassation courts omit them.⁶³⁹ These two differences in the style of opinions will require a separate explanation. Let us start with the length of the judgments.

(a) *Opinion length*. The first main asymmetry can also be explained by the different functions of the court models. The lengthy judgments in the US and UK supreme courts are consistent with the model of a court of precedents. In this model, each judgment has a strong force in guiding future cases.⁶⁴⁰ Therefore, detailed descriptions of the facts of the case, the pertinence of previous case law and the legal reasoning invoked to resolve the current dispute are necessary in order to clarify the type of dispute that will be governed by each precedent.⁶⁴¹ Precisely, we observed that an important part of the extended length in the US and UK supreme courts' judgments is devoted to a meticulous discussion about the pertinence of similar prior precedents or the particularities of the current case which make it unique (distinguishing).⁶⁴² US and UK supreme courts devote an important part of their judgments to consequentialist reasoning, that is to say, to analysing the consequences or repercussions of adopting one criterion or another, to their judgments.⁶⁴³ This detailed reasoning, in which the pros and cons are actively debated, will be a key element for US and UK litigants when analysing the legal grounds of their subsequent disputes. Furthermore, the reduced number of cases that a court of precedents hears – *i.e.*, 150 in the US or no more than seventy in the UK⁶⁴⁴ – makes it possible to spend sufficient time on the writing of extended reasoning in each dispute.

⁶³⁶ *supra* Chap. III.B.8 (i); GOLDSTEIN 1998, p. 329.

⁶³⁷ *supra* Chap. III.B.8 (ii).

⁶³⁸ *supra* Chap. III.B.8 (ii).

⁶³⁹ *supra* Chap. III.B.8 (ii).

⁶⁴⁰ *supra* Chap. III.B.2 (b).

⁶⁴¹ *supra* Chap. III.B.8 (b).

⁶⁴² *supra* Chap. III.B.8 (i).

⁶⁴³ *supra* Chap. III.B.6 (b); HOURQUEBIE 2012, p. 30-33.

⁶⁴⁴ *supra* Chap. III.B.4 (i).

In a constitutional court model it is also necessary to have extended judgments. Constitutional issues raise profound political debates that require addressing several ideological sides of the same issue.⁶⁴⁵ Due to the constitutional review on legislation, as we observed,⁶⁴⁶ the US Supreme Court appears more politicised than its UK counterpart.⁶⁴⁷ In fact, as HOURQUEBIE acknowledges,⁶⁴⁸ an important part of the US Supreme Court's judgments deal with 'extra legal' issues – such as moral, social and economic implications – which, in reality, are political debates. Therefore, part of the US Supreme Court's opinions' length could be explained based on the extended political debates within a constitutional court model.

In a court of error such lengthy judgments are, in principle, not necessary. Most of the cases in this model will involve simple mistakes, which can be decided just by showing the plain error and the correct solution.⁶⁴⁹ This is consistent with the purely deductive style of the reasoning in the French and Italian cassation chambers, where there is no active debate between contradictory positions,⁶⁵⁰ no dialectic, but just a linear narrative that prevails as the single correct answer.⁶⁵¹ This linear style is the deductive syllogism which, supposedly, characterises not only the cassation chambers of France and Italy, but also the civil law tradition in general.⁶⁵² Moreover, the court of error cannot have extended judgments as a court of precedents for practical reasons.⁶⁵³ French and Italian cassation chambers resolve thousands of cases per year.⁶⁵⁴ In that context, to write down forty-page-long judgments in each case, as is done in the UK and the US supreme courts, is simply unfeasible if they want to keep the backlog within reasonable proportions. Finally, due to the lack of precedential force of the court of error's decisions,⁶⁵⁵ a detailed reasoning for future litigants is not necessary either, because cassation judgments were not made to be binding precedents in the first place.⁶⁵⁶ In that sense, for example, the criticism against the extreme conciseness of the French cassation judgments (which do not allow future legal agents to build a meaningful interpretation) seems not to count as a serious problem because, in either situation, cassation judgments cannot be invoked in future disputes anyway.

In a trial court, shorter decisions are also useful. In this model it is more important to resolve, and therefore to pacify, the greatest number of disputes.⁶⁵⁷

⁶⁴⁵ *supra* Chap. III.B.8 (a).

⁶⁴⁶ *supra* Chap. III.B.8 (c).

⁶⁴⁷ See again, DARBYSHIRE 2011, p. 400-402; GOLDSTEIN 1998, p. 289; *supra* Chap. II.D.2 (iii).

⁶⁴⁸ HOURQUEBIE 2012, p. 28-30.

⁶⁴⁹ *supra* Chap. III.B.8 (c).

⁶⁵⁰ In France, according to LASSER 2004, the *Cour de cassation* 'makes no effort to present countervailing arguments or to address alternative points of view' (p. 33).

⁶⁵¹ *supra* Chap. III.B.8 (ii). MITIDIERO 2013, p. 35.

⁶⁵² SIEMS 2014, p. 46-47; TARUFFO 1997, p. 448-449; or 'logical legalism' in DAMAŠKA 1986, p. 21-23, 54-56.

⁶⁵³ *supra* Chap. III.B.8 (c).

⁶⁵⁴ *supra* Chap. III.B.4 (ii).

⁶⁵⁵ *supra* Chap. III.B.2 (c).

⁶⁵⁶ *supra* Chap. III.B.2 (ii).

⁶⁵⁷ *supra* Chap. III.B.4 (d).

Such priority of quantity relaxes the need for having detailed judgments in each case. Repetitive and easy disputes can be resolved by succinct decisions,⁶⁵⁸ and the peaceful resolution of disputes function will be equally satisfied. Contrasted to that model, the lengthy judgments of the supreme courts of the US and the UK appear as impractical for the daily work of a first instance trial court.

The shorter decisions of the cassation courts could be more suitable for a court repeating the dispute resolution function of the first instance trial court. However, extremes such as that of the French *Cour de cassation* will be too short for the purposes of this trial court model. A proper first instance trial court will need extra length in its judgments for something that is outside the scope of review in a cassation court: the questions of fact.⁶⁵⁹ The cassation court's judgments can be shorter because the discussion on the facts does not need to be repeated. In a proper trial court, quite the contrary, an important part of the length of the judgment would be needed to evaluate the evidence.⁶⁶⁰ Therefore, the limited length of the French cassation judgments will be insufficient for the discussion on facts that a trial court needs.

This additional extended length of judgments in the model of (third) trial court can explain the difference between France and Italy in this attribute. We observed that both jurisdictions have cassation courts, in principle banned from reviewing questions of fact.⁶⁶¹ However, the cassation full judgments in Italy are usually longer than those in France.⁶⁶² This is consistent with the complaint that Italian scholars make, that in practice the Italian *Corte di Cassazione* has become more like a third degree of full jurisdiction (a third trial court in a broad sense).⁶⁶³ The model of third trial court requires longer judgments in order to include the questions of fact and evidence in its scope of review.⁶⁶⁴ Therefore, Italian cassation judgments could have become longer because, surreptitiously, they discuss the facts and evidence, as well. This is a good explanation as to why Italian cassation judgments are consistently longer than the French ones. Despite both being cassation courts with similar scopes of review in theory, Italian judgments are longer because the court is in practice closer to the model of a third trial court. The Italian chamber's judgments are longer because, in practice, they are reviewing the law and, more or less explicitly, could also review the facts, especially when the lower court did not resolve them; while the French judgments are shorter because the cassation chambers remain close to a purer court of error model, reviewing the law exclusively.

In Italy, however, this extended style of a judgment, which could be compatible with a trial court model, is usually available only for the parties in dispute. To the general public, however, the Italian *Corte di Cassazione* reveals only the extract of a principle of law. As we observed, Italian legal principles (*massima*)

⁶⁵⁸ *supra* Chap. III.B.8 (d).

⁶⁵⁹ *supra* Chap. III.B.1 (d).

⁶⁶⁰ *supra* Chap. III.B.8 (d).

⁶⁶¹ *supra* Chap. III.B.1 (ii).

⁶⁶² *supra* Chap. III.B.8 (ii).

⁶⁶³ See again, TARUFFO 1991, p. 104-105; SILVESTRI 2017, p. 239-240.

⁶⁶⁴ *supra* Chap. III.B.1 (d).

can be as concise as the French *arrêts*, and they also exclude the factual context (something that a trial court model, quite the contrary, may have required to be included). As a result, at the internal level of the litigants of the current dispute, the Italian *Corte di Cassazione* shows a style of opinions which subtly discuss the facts. Therefore, *Corte di Cassazione* reveals its trial court's opinion style only for the parties in dispute. At the external level of the general public, however, the same court only publishes the principle of law without that factual context. Therefore, the exclusion of the facts in the publication of the legal principle helps the Italian *Corte di Cassazione* to keep the appearance in front of the general public that it is not a third trial court on facts and evidence but a pure court of error in law.

(b) *Dissenting opinions*. The second main asymmetry on opinion style between these courts of last resort from a horizontal perspective is the different approaches on dissenting opinions. This is a difference usually highlighted by comparative scholars.⁶⁶⁵ In the civil law jurisdictions, they say, judgments are written down as a shared opinion, one draft for the whole court.⁶⁶⁶ In the common law jurisdictions, in contrast, judgments can be the sum of several perspectives, a separate and individual reasoning for each judge.⁶⁶⁷ This divergence between legal traditions certainly holds true as regards the courts of last resort under study here, at least from a horizontal perspective.⁶⁶⁸ In the US and the UK, the supreme courts' dissenting and concurring opinions are frequently used.⁶⁶⁹ While in the cassation chambers of France and Italy, judgments are always presented as an apparently unanimous decision with one opinion signed by all the judges.⁶⁷⁰ This asymmetry as regards dissenting opinions can be observed based on the four different models of courts, allowing us to explain more nuances.

The lack of dissenting opinions in the French and Italian chambers of their cassation courts is compatible with two models, trial court and court of error. In the model of a trial court, the losing litigant aims at reaching the court of last resort mainly because there is a new chance to win the case.⁶⁷¹ But for the losing party in the final recourse, in the court of last resort itself, the presence of dissenting opinions is no longer useful because the final-word power cannot be further challenged with a recourse. From the perspective of the purely private interest of the losing litigant, the presence of a dissenting opinion in the cassation chambers' judgments, if any, would have a mere moral purpose, to make the loss less painful because he or she did not lose by unanimity.

⁶⁶⁵ MUNDAY 2002, p. 321.

⁶⁶⁶ SHAPIRO 1980, p. 653; GINSBURG 2010, p. 2; HEAD 2010, p. 218.

⁶⁶⁷ MUNDAY 2002, p. 321; GINSBURG 2010, p. 2.

⁶⁶⁸ In the next chapter we will see that this difference as regards dissenting opinions starts to become blurred when switching from the horizontal to the diagonal perspective, *infra* Chap. IV.C. (iii).

⁶⁶⁹ *supra* Chap. III.B.8 (i). In general, GOLDSTEIN 1998, p. 324.

⁶⁷⁰ *supra* Chap. III.B.8 (ii). In general, TARUFFO 1998, p. 125.

⁶⁷¹ *supra* Chap. III.B.8 (d).

In a court of error, the lack of dissenting opinions is certainly useful too. Within a large caseload to control, the absence of dissenting opinions can be the result of optimisation measures, such as the internal delegation of writing drafts to a single judge.⁶⁷² By having just one opinion for the whole court, time and human resources can be saved in order to maintain a higher level of surveillance over the lower courts.⁶⁷³ Therefore, the lack of dissenting opinions in the French and Italian cassation chambers is functional to increase the error-monitoring capacity. But besides that practical reason, the French and Italian cassation chambers do not need dissenting opinions because, as courts of error, the vast majority of their cases involve relatively simple mistakes.⁶⁷⁴ When a clear error is under review, the decision will probably not admit of more than one reading.⁶⁷⁵ The lack of dissenting opinions in the cassation chambers of France and Italy can also be seen as a consequence of reviewing errors of a low level of complexity that do not deserve dissenting opinions in the first place. In the absence of a serious interpretation dialectic, the cassation chambers' single opinion appears as enough.

In a court of precedents, quite the contrary, to make dissenting opinions explicit is better for its judicial function. In this model, the court is dealing with a serious dialectic of contradictory interpretations.⁶⁷⁶ These interpretation dialectics could be the result not of a mere mistake of a certain lower court in the application of well-settled law but of reasonable disagreements between competent judges.⁶⁷⁷ In that context, the lack of dissenting opinions, as in the French and Italian cassation chambers, will create the illusion that such complex interpretation problems only admit of one single and unanimous correct answer.⁶⁷⁸ In other words, prohibiting dissenting opinions creates – in GINGSBURG's term – a 'façade' of unanimity that hides from the general public the underlying balance between conflicting positions that exist within the court.⁶⁷⁹ In reality, however, the case law problems that a court of precedents reviews are about two or more sound answers that need to be addressed openly.⁶⁸⁰ According to the model of a court of precedents, therefore, when the US and UK supreme courts make their dissenting opinions explicit, that helps to identify the reasonable positions under dispute, and which one has been favoured or discharged by the court in the interpretation dialectic at stake. In that sense, a dissenting opinion can be as helpful as the majority vote for the US and UK litigants.⁶⁸¹ The dissenting opinion clarifies the scope of application of the precedent in an *a contrario sensu* manner: unless there is a change in the court's majorities, the dissenting opinion helps to identify precisely the position

⁶⁷² *supra* Chap. III.B.6 (c).

⁶⁷³ *supra* Chap. III.B.8 (c).

⁶⁷⁴ *supra* Chap. III.B.6 (c).

⁶⁷⁵ *supra* Chap. III.B.8 (c).

⁶⁷⁶ *supra* Chap. III.B.1 (a).

⁶⁷⁷ DWORKIN 1975, p. 1089-1090; MITIDIERO 2013, p. 55; BROWN 2013, p. 34.

⁶⁷⁸ MITIDIERO 2013, p. 35.

⁶⁷⁹ GINGSBURG 2011, p. 543; also, LASSER 2004, p. 33-34

⁶⁸⁰ MITIDIERO 2013, p. 55; *supra* Chap. III.B.8 (a).

⁶⁸¹ See again, SCALIA 1998, p. 21.

that *should not* be applied in the future based on that precedent.⁶⁸² Furthermore, courts of precedents do not have the practical obstacle that cassation courts have of including dissenting opinions: control over the caseload.⁶⁸³ A court of precedents is not overburdened, thanks to its discretionary and restrictive preliminary screening.⁶⁸⁴ Therefore, the judges in the court of precedents model can have enough time to write more than one opinion per case, the majority vote plus the dissenting ones.

However, as we have observed, the practice of dissenting opinions is slightly different between the US and the UK supreme courts. In the UK Supreme Court each judge, even if a member of the majority, writes a separate opinion; while in the US Supreme Court, such an individualistic approach is moderated by the adherence of several judges to a common majority draft, and the judges in the minority in a common dissenting opinion.⁶⁸⁵ This can be explained by the political counterweight function of the US Supreme Court, which is absent in its UK counterpart, as follows.

The prevailing aspect of a constitutional court model, as in the US Supreme Court, is the precaution taken for its internal political balance.⁶⁸⁶ Therefore, in this model the court is not just the sum of individuals, but two blocs of contradictory ideological positions – *e.g.*, Republican *vs.* Democrat, conservative *vs.* liberal, right-wing *vs.* left-wing. In that political struggle, each bloc is stronger to the extent that it acts as one team, coordinated as a political coalition. If the political coalition divides, it loses power. In fact, if the winning coalition in the US Supreme Court does not reunite at least five judges, the judgment will not have the power of binding precedent.⁶⁸⁷ In a constitutional court model, therefore, judges will make clear their political alliance with the other judges of the same ideological view. The reason why in the US Supreme Court the judges frequently group themselves in a common majority or minority is because they are making clear their political alliances, their partisan coalition.⁶⁸⁸ That political tension explains why, according to GOLDSTEIN, in the US Supreme Court there ‘appears to be a virtually uncontrollable impulse to express clearly who agrees with whom and on what specific grounds’⁶⁸⁹ by joining in majoritarian or dissenting opinions. Joint majority and joint minority opinions represent the struggle between two compact political blocs within the US Supreme Court.

The UK Supreme Court, quite the contrary, aims to be not a constitutional court as such, but just a court of precedents.⁶⁹⁰ This court does not have the strong power of judicial review of legislation that can motivate that kind of political

⁶⁸² *cfr.*, BRENNAN 1986, p. 430 (stating that the dissenting opinion limits the scope of application of the majoritarian opinion).

⁶⁸³ *supra* Chap. III.B.4 (b).

⁶⁸⁴ *supra* Chap. III.B.5 (b).

⁶⁸⁵ *supra* Chap. III.B.8 (ii).

⁶⁸⁶ *supra* Chap. III.B.6 (a).

⁶⁸⁷ GOLDSTEIN 1998, p. 331.

⁶⁸⁸ SCALIA 1998, p. 21.

⁶⁸⁹ GOLDSTEIN 1998, p. 331-332.

⁶⁹⁰ *supra* Chap. II.D.4 (i,iii).

strategy.⁶⁹¹ The interpretation problems of ordinary law, the task of a pure court of precedents as in the UK Supreme Court, are less politically sensitive.⁶⁹² Therefore, the judges of the UK Supreme Court are not that concerned about maintaining strong ties with their ideological mates, they do not ‘gang up’ – in DICKSON’s words – as in the US Supreme Court.⁶⁹³ In the context of the lack of strong political tension, judges can allow themselves to refrain from grouping together in rigid ideological blocs, but to have separate perspectives on the same dispute. A less politicised court, like the UK Supreme Court, does not pressure for internal partisan coalitions and, therefore, allows more freedom of the individual expression of each judge’s personal opinion.

C. Summary tables

The general purpose of Chapter III was to analyse, from a horizontal perspective – *i.e.*, 3rd vs. 3rd court level⁶⁹⁴ – whether a set of procedural and organisational attributes of the courts of last resort correspond or not with the models and functions of the courts. As a result of this analysis, the chapter found a general asymmetry between the supreme courts of the US and England (UK), and cassation chambers of France and Italy, from a horizontal perspective. Table III.1 summarises the horizontal asymmetries found in each attribute under analysis in this chapter. In the final Chapter VI the reader will find a written summary of the comparison of these horizontal asymmetries between the parallel third level courts of last resort.⁶⁹⁵

⁶⁹¹ GOLDSTEIN 1998, p. 319.

⁶⁹² GOLDSTEIN 1998, p. 325 (“The cases determined by the House of Lords are much more heavily concerned with private law issues than is true in the United States Supreme Court ...; and it is in the area of public law where policy oriented judicial decisions are more prominent.”). *supra* Chap. III.B.6 (b).

⁶⁹³ DICKSON 2013A, p. 378.

⁶⁹⁴ See again, Figure III.1, *supra* Chap. III.A.

⁶⁹⁵ *infra* Chap. VI.D.1.

PART TWO: *DIAGONAL PERSPECTIVE*
**CHAPTER IV: COURTS OF
PRECEDENTS**

CHAPTER IV: COURTS OF PRECEDENTS.....	185
A. Introduction	185
B. What is a plenary session?.....	187
1. Plenum in France.....	190
2. Plenum in Italy	195
C. Diagonal comparison.....	198
1. Scope of Review	200
2. Judgment effects.....	204
3. Exposure	212
4. Panel composition.....	217
5. Total size.....	222
6. Opinion style.....	227
7. Number of cases	235
8. Preliminary screening.....	240
D. Summary tables.....	246

A. Introduction

Part Two of this study – *i.e.*, Chapters IV and V – continues the comparison between the same four jurisdictions, but now from a diagonal point of view. The method of comparison is no longer called ‘horizontal’ because, from now on, this study is not comparing the same third level of the court systems in the two pairs of jurisdictions. This new perspective, to be developed in Part Two, is

called ‘diagonal’ because now the study is comparing courts that are at different levels of each judicial pyramid. This change in the object of comparison will lead us to another conclusion. Part Two will suggest – as the main thesis of this study – that similarities rather than differences become apparent when switching from a horizontal to a diagonal perspective. These diagonal similarities will lead us to replace the ‘horizontal asymmetry’ (shown in Part One) with the new thesis of a ‘diagonal symmetry’.¹ That is to say, both pairs of jurisdictions perform similar judicial functions with courts of similar attributes but at different levels of their court system. To prove this point this study will analyse the same eight attributes that were analysed when the horizontal comparison was made in Chapter III but now from a diagonal point of view.

In this chapter the diagonal perspective implies a switch in the object of comparison in the jurisdictions of France and Italy. Instead of comparing the US and UK supreme courts *vis-à-vis* the ‘chambers’ of the courts of cassation of France and Italy – as this study did in Chapter III – now the comparison is made *vis-à-vis* the ‘plenary sessions’ (also called ‘plenum’) of the same cassation courts. In a metaphorical sense, the plenary session in a court of cassation can be seen not as the third but as a (hidden) fourth level, an even higher echelon in the court system but internal to the cassation court itself.² Therefore, this chapter will compare, on the one hand, the *third* level in the US and England (the supreme courts) and, on the other hand, the *fourth* level in France and Italy (the plenary sessions in the cassation courts). The main conclusion of this chapter is that in France and Italy a hidden fourth court level is created – *i.e.*, the cassation courts’ plenary sessions³ – with similar attributes to perform an equivalent judicial lawmaking function as the US and UK supreme courts. Figure IV.1 points out the court levels that will be compared in this chapter.

Figure IV.1 : *Courts of Precedents - Perspective*

US + ENGLAND		FRANCE + ITALY	
4°		Cassation Plenum	4°
3°	Supreme Court	Cassation Chamber	3°
2°	Court of Appeal	Court of Appeal	2°
1°	First Instance	First Instance	1°

This chapter is structured in four sections. The first section introduces the change from the horizontal to the diagonal perspective that guides Chapters IV

¹ An introduction to the ‘diagonal symmetry’ thesis in this study, *supra* Chap.I.B.2.

² *infra* Chap. IV.B.

³ *infra* Chap. IV.D.

and V (*supra* A). The second section explains in general terms what a plenary session is and how it works (*infra* B). After this overview, the same section explains in detail the types of plenary sessions, and the alternatives to convening them, in the French and Italian courts of cassation (*infra* B.1 and B.2). In the third section of this chapter a comparison will be made between the eight functional attributes of these plenary sessions from a third level versus a fourth level perspective (*infra* C):⁴ scope of review,⁵ judgment effects,⁶ exposure or publication of the decisions,⁷ panel composition,⁸ total size of the court,⁹ opinion style,¹⁰ number of cases¹¹ and preliminary screening.¹² The final section (*infra* D) presents tables that summarise the main findings of this chapter, highlighting the diagonal symmetries.

B. What is a plenary session?

Like a Russian matryoshka doll, the cassation plenum is a court-inside-the-court. Plenary sessions are a coordination device that is necessary when the cassation court becomes big. The French and Italian courts of cassation are comprised of hundreds of judges,¹³ and they review thousands of cases per year.¹⁴ Therefore, to bring all together these hundreds of judges to hear each one of those thousands of cases becomes impractical. Instead, big courts of last resort such as the French and Italian ones organise their work otherwise. They are structured in multiple chambers, each specialised in certain matters: civil, criminal, labour, among others.¹⁵ These chambers are further divided into smaller units, usually panels of five or three judges each.¹⁶ As a result, the French and Italian courts of cassation can easily have sixteen or more of these small panels working at the same time.

⁴ Methodology note: Chapters IV and V will analyse the same eight attributes as in Chapter III, but not in the exact same order. These eight attributes are closely interconnected, and in certain chapters the particularities of some attributes are more prominent than in other chapters. Therefore, instead of keeping the same strict order throughout this book, each chapter opts for analysing first the attributes that are more prominent according to the current court under analysis, regardless of whether the same attribute was analysed in an earlier or later section in the other chapters. Still, the comparative tables in the final summary of each chapter (Table III.1, Table IV.1 and Table V.2) will keep the same order as in Chapter III.

⁵ *infra* Chap. IVC.1.

⁶ *infra* Chap. IVC.2.

⁷ *infra* Chap. IVC.3.

⁸ *infra* Chap. IVC.4.

⁹ *infra* Chap. IVC.5.

¹⁰ *infra* Chap. IVC.6.

¹¹ *infra* Chap. IVC.7.

¹² *infra* Chap. IVC.8.

¹³ *supra* Chap. III.B.7 (ii).

¹⁴ *supra* Chap. III.B.4 (ii).

¹⁵ TARUFFO 1998, p. 113.

¹⁶ *supra* Chap. III.B.6 (ii).

As in any human organisation, several teams working in parallel give rise to the problem of coordination. Having not just one but many teams of judges on the court of cassation, working on similar issues, can have the advantage of allowing a high number of cases to be heard faster.¹⁷ But the disadvantage is that each panel might develop its own interpretation criteria.¹⁸ According to DAMAŠKA, in these big courts of last resort ‘the danger was always present that separate panels would deliver themselves of conflicting opinions on the same point of law’.¹⁹ The risk is that if the panels do not use the same criteria to adjudicate each recourse, the court of cassation will no longer be a true single tribunal at the apex.²⁰ Naturally, this problem of coordination needs to be solved because it betrays one of the main manifest functions of a cassation court: judicial uniformity.²¹ If the court of cassation’s panels have different decision criteria, the recourse of last resort will no longer be useful for guaranteeing equal application of the law among disputes because the criteria within the cassation court itself will be unequal.²²

The plenary sessions are established to solve this problem of coordination.²³ They are a broader, integrated meeting comprising judges from the different chambers or panels.²⁴ If the court of cassation is of a medium size – as in Chile, where it has twenty-one members²⁵ – the plenary session still may comprise all the members of each chamber, in a sitting of, literally, the full bench.²⁶ But if a court of cassation exceeds that size, the plenary session can no longer be a proper full court.²⁷ If the court has, for example, fifty members or more, it becomes unfeasible to bring together all the judges and require that they work as a unit even if it is only for exceptional occasions.²⁸ When the cassation court becomes bigger still, the plenary session will be just a selection of certain judges

¹⁷ PASUTTI 2011, p. 187; MIDÓN 2011, p. 212.

¹⁸ TARUFFO 1997, p. 448; MIDÓN 2011, p. 214.

¹⁹ DAMAŠKA 1991, p. 37 (footnote 39).

²⁰ TARUFFO 1997, p. 447; MIDÓN 2011, p. 213.

²¹ *supra* Chap. II.D.3 (i,ii); and Chap. II.D.4 (i,ii).

²² In Brazil, for example, MARINONI 2010, p. 101.

²³ TARUFFO 1997, p. 448 (‘The usual device to deal with these [conflicts among judgments delivered by different chambers] is to defer the decision to a special chamber or panel composed of a higher number of judges, or in extreme cases (and in some countries) to the *plenum* of the court.’).

²⁴ *infra* Chap. IV.C.3 (i,ii).

²⁵ BRAVO-HURTADO 2017, p. 155.

²⁶ *Código de Procedimiento Civil*, Art. 780; MOSQUERA & MATURANA 2010, p. 312. In the Netherlands, the court of last resort (*Hoge Raad*) is of a medium size, with 46 members who work divided in chambers, but it does not have a formal plenary session for civil matters; rather, it has weekly meetings called ‘consultations in chambers’, in which judges exchange opinions about the cases (VERKERK & VAN RHEE 2017, p. 83). However, former judges of the Dutch court of last resort nowadays raise their voices in favour of establishing a formal cassation plenum. For example, DRION 2016, p. 785 (‘... *zou wat mij betreft zeer weloverwogen moeten worden of de Hoge Raad niet ook de mogelijkheid zou moeten krijgen om in bepaalde zaken, door hemzelf te bepalen, uitspraak te doen in een Grote Kamer*’.). See further lines of research, *infra* Chap. VI.F.1.

²⁷ PAILLÁS 2008, p. 51-52.

²⁸ This is the case in France, for example, *infra* Chap. IV.B.1.

of higher rank from each chamber – *i.e.*, the president of each panel or chamber, with the president of the whole court presiding.²⁹

The main mechanism to perform this coordination role is the referral of the recourse petition to the plenary session.³⁰ Imagine, for example, a dispute that raises a point of law that has had contradictory criteria among the several panels inside a big cassation court. If that recourse is decided once more by a cassation chamber of the same level, the contradictory criteria might end up being replicated. Instead, the recourse will be brought before an even higher chamber, a ‘super-panel’ as DAMAŠKA calls it.³¹ This plenary session will have a higher authority to take a stand in that interpretation conflict.³² And the stand that the cassation plenum takes is meant to be followed, *de iure* or *de facto*, at least by the rest of the chambers and panels of the cassation court.³³

Therefore, the power of having the final word (what defines a court as ‘of last resort’)³⁴ is normally at the level of the cassation chambers. But the *exceptional* final-word power in these cassation courts is, in reality, at the plenary sessions.³⁵ The problems of coordination between the cassation court panels make it necessary to establish such a fourth level of adjudication, some sort of supreme-supreme court. But to keep the appearance that the litigation ends at the third level of the court system, the cassation plenum cannot look like a totally separate tribunal with its own courthouse. Accordingly, French and Italian scholars and judges will deny that these plenary sessions may count as a separate ‘court’.³⁶ In France, they say that the plenary sessions are just a more ‘solemn formation’ (*formations solennelles*) of the same *Cour de cassation*.³⁷ In Italy, the Court of Cassation had to deliver an explicit judgment arguing that their plenary session (*sezioni unite*)³⁸ is not a separate jurisdictional organ from the *Corte di Cassazione* (even if it looks like one).³⁹ In this sense, the plenary session will be described in this study as a kind of internal higher court within the court of cassation that, however, is kept hidden.⁴⁰

What counts as a ‘court’ should not depend on its local denomination, but on its distinctive functions.⁴¹ Therefore, the relevant question is: Do plenary sessions

²⁹ *infra* Chap. IV.C.4 (i,ii).

³⁰ See again, TARUFFO 1997, p. 448.

³¹ DAMAŠKA 1991, p. 37-38 (‘...if a panel of the court of last resort (also a panel of an intermediate appellate court) wished to deviate from an opinion already announced by any panel of the supreme court, the matter had to be certified to a superpanel [a ‘plenary session’ in our terms] for a decision binding an all judges of the supreme court’).

³² In France, JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 23.

³³ *infra* Chap. IV.C.2 (i,ii).

³⁴ *supra* Chap. I.E.1 (ii).

³⁵ On the exceptional vs. normal final-word power, *supra* Chap. I.E.1 (iii).

³⁶ In Italy, for example, CHIARLONI 2012, p. 24.

³⁷ WEBER 2010A, p. 70.

³⁸ *infra* Chap. IV.B.2 (i).

³⁹ *Cass. Sez. Un.*, 22 agosto 2007, n. 17822. Cited by AMOROSO 2012, p. 540.

⁴⁰ On the definition of ‘court’, see again, COTTERRELL 1992, p. 205; *supra* Chap. I.B.1 (i).

⁴¹ *supra* Chap. I.D.2.

have the specific attributes, according to the ideal models of courts, to perform at least one of the judicial functions (dispute resolution, error-monitoring, judicial lawmaking or political counterweight)? In this chapter we will observe that they do. In fact, plenary sessions have the functional attributes of a court of precedents model.⁴² From a comparative law functionalism perspective, therefore, we should not become confused because the plenary session simply has a bigger meeting room on the same premises of the court of cassation's building. The plenary session is a decision maker itself, an even higher functional court but internal to the court of cassation's bigger structure. The metaphor of the Russian matryoshka doll is, in many ways, accurate. The plenary session can be seen as a smaller replica of a cassation court, nested within a larger body.

In the next subsections the chapter will go deeper into these mechanisms of coordination. The rules of referral to the plenary session will be analysed in detail for the jurisdictions under study which have big courts of cassation: France (*infra* B.1) and Italy (*infra* B.2). As we shall see, there are many types of plenum, the referral can be done at different moments of the proceedings and it can be convened by various legal actors. However, the main criteria for convening the plenum are not that different among these jurisdictions. With their own wordings, these referral procedures point at problems of general interpretation of the law between the chambers of the cassation court, or between courts of lower hierarchies.⁴³ After this overview of the cassation plenum in France and Italy, the diagonal comparison of the eight specific attributes will be analysed in the next section (*infra* C).

1. Plenum in France

In the French Court of Cassation, over the ordinary chambers there are three types of plenary sessions:⁴⁴ the *assemblée plénière*,⁴⁵ the *chambre mixte*⁴⁶ and the bench for preliminary opinions (*avis*).⁴⁷ First, the *assemblée plénière* is the major plenary session that brings together judges from every chamber of the *Cour de cassation*. This plenum is in charge of external coordination, that is to say, contradictions between the lower courts or between them and the cassation court.⁴⁸ Second, the *chambre mixte* is a plenary session smaller than the *assemblée plénière* and includes members of at least three chambers.⁴⁹ This plenum is

⁴² *infra* Chap. IV.D.

⁴³ *infra* Chap. IV.C.8 (i,ii).

⁴⁴ Here I am excluding some other kinds of plenary sessions that do not have a proper jurisdictional or adjudicative role, but an administrative one, such as the *Assemblées générales* or the *Bureau* of the Court of Cassation. On these administrative plenums, BORÉ & BORÉ 2015, p. 63.

⁴⁵ *infra* Chap. IV.B.1 (i).

⁴⁶ *infra* Chap. IV.B.1 (ii).

⁴⁷ *infra* Chap. IV.B.1 (iii).

⁴⁸ CADIET 2011A, p. 189 ('*A la différence des chambres mixtes, l'assemblée plénière est surtout à usage externe, à destination des juridictions du fond.*').

⁴⁹ *Code de l'organisation judiciaire*, Art. L421-4.

devoted to internal coordination: contradictions between the chambers of the *Cour de cassation* itself.⁵⁰ And third, the *ad hoc* plenary session that gives preliminary opinions (*avis*) when a lower court asks for the interpretation on a new point of law.⁵¹ As we shall see, the division between ordinary chambers, *chambre mixte* and *assemblée plénière*, arose gradually as the French Court of Cassation grew in size. But the explicit task of these plenums towards coordinating the judicial interpretation among the cassation chambers' panels evolved during the second half of the twentieth century.

i. Assemblée plénière

Let us begin with the current major plenum of the French Court of Cassation. The *assemblée plénière* (or plenary assembly) is a meeting of only the judges of higher rank from all chambers.⁵² It was created in 1947 in order to solve the problem of divergences in the legal interpretation between the three new civil chambers introduced in the same reform.⁵³ Before the *assemblée plénière*, the French Court of Cassation had a full bench plenary session, named *chambres réunies*, a meeting of almost all the judges of each chamber (and not only the ones of higher rank).⁵⁴ However, over time the total number of judges of the French Court of Cassation became numerous to the extent that reuniting all of them in one meeting became impractical.⁵⁵ As a result, the jurisdictional tasks of the comprehensive *chambres réunies* (renamed *assemblée générale*) were finally reallocated to the more selective *assemblée plénière* in the reform of 1967.⁵⁶

To convene this *assemblée plénière*, the pertinent provision in the *Code de l'organisation judiciaire* states:

Article L431-6. The referral to the plenary assembly [*assemblée plénière*] may be ordered when the case has a *question of legal principle* [question de principe], particularly if there exist different solutions between lower courts [judge du fond] or between the lower courts and the Court of Cassation; it shall be [referred] if, after quashing the first decision or judgment, the decision taken by the second lower court to which the case was remanded [jurisdiction de renvoi] infringes the law by the same means.⁵⁷

⁵⁰ BORE & BORE 2015, p. 64 ('*La Chambre mixte apparaît principalement comme un instrument de régulation intérieure de la jurisprudence des diverses chambres de la Cour, destiné à éviter la naissance entre elles de doctrines divergentes.*').

⁵¹ *infra* Chap. IV.B.1 (iii).

⁵² For the details of the *assemblée plénière* composition, *infra* Chap. IV.C.4 (i).

⁵³ BORE & BORE 2015, p. 17.

⁵⁴ WEBER 2010A, p. 71.

⁵⁵ BORE & BORE 2015, p. 18; WEBER 2010A, p. 71.

⁵⁶ BORE & BORE 2015, p. 18.

⁵⁷ *Code de l'organisation judiciaire*, Art. L431-6 [emphasis added]: '*Le renvoi devant l'assemblée plénière peut être ordonné lorsque l'affaire pose une question de principe, notamment s'il existe des solutions divergentes soit entre les juges du fond, soit entre les juges du fond et la Cour de cassation; il doit l'être lorsque, après cassation d'un premier arrêt ou jugement, la décision rendue par la juridiction de renvoi est attaquée par les mêmes moyens.*'

There are basically two hypotheses upon which to convene the *assemblée plénière*. The first is that the case has been quashed and impugned a second time due to the persistence of the lower court in deciding against the law (*résistance de la Cour de renvoi*).⁵⁸ This is a well-known aspect that comparatists highlight when describing the distinctive features of the French Court of Cassation.⁵⁹ The French cassation has been an influential model in comparative perspective; however, this second referral system has been used only on a few occasions in practice,⁶⁰ and has rarely been followed by other cassation jurisdictions.⁶¹

The second hypothesis upon which to convene the *assemblée plénière* – where our attention will be focused because of its increasing importance⁶² – is when the case raises a *question de principe*.⁶³ In the quotation just given above, French procedural law gives an explanation about the kind of question of principle that the *assemblée plénière* could hear: ‘particularly [*notamment*] if there exist different solutions either between the lower courts or between the lower courts and the Court of Cassation’.⁶⁴ Therefore, the typical question of principle that the *assemblée plénière* may hear concerns those points of law that involve contradictions of interpretation but at an external level (between the lower courts or between them and the *Cour de cassation*).⁶⁵

ii. *Chambre mixte*

The *chambre mixte* (or mixed chamber) is the second type of plenary session in the French Court of Cassation. It was created in 1967 to alleviate the tasks of the *assemblée plénière* because the same reform also increased the number of civil chambers in the *Cour de cassation* from three to five.⁶⁶ The *chambre mixte* is smaller than the *assemblée plénière*. It comprises a selection of the judges of higher rank not from all the chambers (as the *assemblée plénière* does) but usually from three chambers only.⁶⁷ To convene the *chambre mixte*, the *Code de l’organisation judiciaire* provides that:

Article L431-5. The referral to the mixed chamber [*Chambre Mixte*] may be ordered when a case has a question normally within the attributions of several chambers or if the question has received or is likely to receive

⁵⁸ BORÉ & BORÉ 2015, p. 65-66; WEBER 2010A, p. 71-72; JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 22.

⁵⁹ e.g., example, CADIET 2008, p. 25; TARUFFO 1998, p. 116.

⁶⁰ BORÉ & BORÉ 2015, p. 741

⁶¹ In other cassation jurisdictions, such as Italy, Belgium, Spain and the Netherlands, there is no equivalent to the French second referral to the plenary session because either the court of cassation itself dictates the decision on the merits (Spain) or the new lower court is bound by the decision of the court of cassation (Italy, Belgium). TARUFFO 1998, p. 116.

⁶² JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 22.

⁶³ BORÉ & BORÉ 2015, p. 66; WEBER 2010A, p. 72.

⁶⁴ See again, *Code de l’organisation judiciaire*, Art. L431-6.

⁶⁵ CADIET 2011A, p. 189.

⁶⁶ BORÉ & BORÉ 2015, p. 18, 64.

⁶⁷ For the details of the *chambre mixte* composition, *infra* Chap. IV.C.4 (i).

*different solutions in the chambers; it shall be [referred] in case of a tie in the vote.*⁶⁸

We can observe three hypotheses upon which to convene the *chambre mixte*. The first is when in the voting process the judges reach a draw result.⁶⁹ Here the intervention of the *chambre mixte* will be mandatory to break that tie.⁷⁰ The second hypothesis is when a case involves the competences of more than one chamber.⁷¹ Each civil chamber is further specialised in different fields— *e.g.*, real property, tort law, contracts, among others.⁷² It could be that certain disputes merge problems of various legal fields at the same time, calling for the competence of more than one chamber.⁷³ In order to resolve such merged cases, here the *chambre mixte* will comprise a combination of judges specialised in each legal field involved.⁷⁴

The third hypothesis upon which to convene the *chambre mixte* – where our attention will be focused because of its predominant relevance⁷⁵– is similar to the one to convene the *assemblée plénière*: problems of case law contradiction.⁷⁶ However, the *chambre mixte* is in charge of the contradictions between the chambers of the *Cour de cassation* itself (internal coordination).⁷⁷ This plenary session can be called not only when a contradictory interpretation has actually happened ('... *a reçu* ...'), but also when an actual contradiction has not taken place yet, but might potentially arise ('... *ou est susceptible de recevoir* ...').

Both types of plenary sessions – *i.e.*, *assemblée plénière* and *chambre mixte* – can be called by the ordinary chamber, the public attorney (*procureur général*) or the President of the Court.⁷⁸ However, it is the President of the Court who has the final decision on whether or not to convene these plenums for conflicting case law,⁷⁹ a decision delivered without the requirement of providing the reasons for it.⁸⁰

⁶⁸ *Code de l'organisation judiciaire*, Art. L431-5 [emphasis added]: '*Le renvoi devant une chambre mixte peut être ordonné lorsqu'une affaire pose une question relevant normalement des attributions de plusieurs chambres ou si la question a reçu ou est susceptible de recevoir devant les chambres des solutions divergentes; il doit l'être en cas de partage égal des voix.*'

⁶⁹ WEBER 2010A, p. 70; see again, *Code de l'organisation judiciaire*, Art. L431-5: '*... il doit l'être en cas de partage égal des voix.*'

⁷⁰ BORE & BORE 2015, p. 64.

⁷¹ See again, *Code de l'organisation judiciaire*, Art. L431-5: '*... affaire pose une question relevant normalement des attributions de plusieurs chambres ...*'.

⁷² WEBER 2010A, p. 66.

⁷³ BORE & BORE 2015, p. 64.

⁷⁴ BORE & BORE 2015, p. 65.

⁷⁵ JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 24.

⁷⁶ See again, *Code de l'organisation judiciaire*, Art. L431-5: '*... si la question a reçu ou est susceptible de recevoir devant les chambres des solutions divergentes.*'

⁷⁷ CADIET 2011A, p. 189; WEBER 2010A, p. 70.

⁷⁸ *Code de l'organisation judiciaire*, Art. L431-7; BORÉ & BORÉ 2015, p. 545.

⁷⁹ In questions of conflicting case law, on which this study is focused, to convene these plenums is a matter of permission or option ('... *peut être* ...') – it is not mandatory. But for the second referral to the plenum, due to a resistance of the lower court to apply the court's criterion, to break a tie vote at the *Chambre Mixte*, or when the public attorney

iii. *Preliminary opinion (avis)*

In 1991, a new mechanism of coordination was created in France: the *saisine pour avis*,⁸¹ which this study will translate as preliminary opinion (*avis*) by the Court of Cassation. When facing a case that involves a difficulty of interpretation of *new* law,⁸² the lower court judge (first instance or intermediate appellate court) may formulate a question to the *Cour de cassation* on a precise point.⁸³ This mechanism is ‘preliminary’ because the enquiry is formulated before the lower instance judgment is rendered.⁸⁴ In this sense, the *saisine pour avis* is not, properly speaking, a recourse since it is not formulated to impugn a decision after it has been made,⁸⁵ but to prepare a decision before it is taken.⁸⁶

The preliminary opinion (*avis*) will be delivered in a similar form as the judgments of the *assemblée plénière*.⁸⁷ Later on, the lower court judge will decide the case taking into account the answer that the *Cour de cassation* gave, but the judge is not strictly obliged to follow it.⁸⁸ In practice, however, it is unlikely that the lower court judge will depart from the advice (*avis*) of the *Cour de cassation*.⁸⁹

The bench at the *Cour de cassation* that answers these types of lower instance court enquiries can be considered a plenary session too. It is also a selection of judges of higher rank among the different chambers, but of a smaller size than the *assemblée plénière* and the *chambre mixte*.⁹⁰ To ask for a preliminary opinion (*avis*) of the *Cour de cassation*, the *Code de l'organisation judiciaire* states the following:

Article L441-1. Before deciding on a *question of new law, which presents a serious difficulty that can arise in numerous disputes*, the courts of the judiciary may, by a decision not subject to recourse, ask the opinion of the Court of Cassation.⁹¹

requests it, the referral is mandatory ('... doit ...'). BORE & BORE 2015, p. 64-65; WEBER 2010A, p. 70-71.

⁸⁰ *Code de l'organisation judiciaire*, Art. L431-7: 'Le renvoi devant une chambre mixte ou devant l'assemblée plénière ... est décidé par ordonnance non motivée du premier président ...'

⁸¹ CADJET 2011A, p. 189-190; BORÉ & BORÉ 2015, p. 75; WEBER 2010A, p. 73; FERRAND 2017, p. 192.

⁸² BORÉ & BORÉ 2015, p. 75-76.

⁸³ BORÉ & BORÉ 2015, p. 76; WEBER, 2010A, p. 74; FERRAND 2017, p. 192.

⁸⁴ The details of the *avis* procedure, BORÉ & BORÉ 2015, p. 77-78.

⁸⁵ On the definition of 'recourse' in this study, *supra* Chap. I.E.7.

⁸⁶ The debate on its procedural nature, BORÉ & BORÉ 2015, p. 78-79.

⁸⁷ TROPER & GRZEGORCZYK 1997, p. 111.

⁸⁸ *Code de l'organisation judiciaire*, Art. L441-3: 'L'avis rendu ne lie pas la juridiction qui a formulé la demande.' WEBER 2010A, p. 74.

⁸⁹ TROPER & GRZEGORCZYK 1997, p. 111-112; BORE & BORE 2015, p. 79 ('Mais il est douteux, en pratique, que le juge ... désavoue l'interprétation qu'il a sollicitée et se montre indifférent à cette unité.').

⁹⁰ In detail of the preliminary opinion (*avis*) composition of the panel, *infra* Chap. IV.B.4 (i).

⁹¹ *Code de l'organisation judiciaire*, Art. L441-1 [emphasis added, Author's translation]: 'Avant de statuer sur une question de droit nouvelle, présentant une difficulté sérieuse et se posant dans de nombreux litiges, les juridictions de l'ordre judiciaire peuvent, par une décision non susceptible de recours, solliciter l'avis de la Cour de cassation.'

In many ways, the criteria to convene the plenum for preliminary opinions (*avis*) are similar to those of the *assemblée plénière* and the *chambre mixte*. Only points of law, no questions of fact, can be directed to the *avis* plenum.⁹² But this is restricted to certain questions of case law, namely, those in which there is no settled precedent since it is a new law (*question de droit nouvelle*).⁹³ The question asked should be relevant, not only for the current dispute, but also for many others that might come in the future (*se posant dans de nombreux litiges*).⁹⁴

2. Plenum in Italy

Italy does not have one plenum for the whole *Corte di Cassazione*, but two separate ones (*sezioni unite*).⁹⁵ On the one hand, there is the plenary session for civil matters, which brings together a number of members of the six civil chambers (*sezioni unite civili*).⁹⁶ And, on the other hand, there is the plenary session for criminal affairs that, accordingly, brings together a number of members of the seven criminal chambers (*sezioni unite penali*).⁹⁷

There are basically three ways to reach the plenary session in Italy: first, the general referral to the *sezioni unite*;⁹⁸ second, the cassation in the interest of the law;⁹⁹ and, third, the new mandatory referral for overrule that should be made by the chamber itself.¹⁰⁰ In the same order, each will be explained below.

i. *Sezioni unite*

The *sezioni unite* procedure is regulated by the *Codice di Procedura Civile*.¹⁰¹ Setting apart situations regarding conflicts of jurisdiction (Arts. 360.1 and 362),¹⁰² the main criteria to convene the *sezioni unite* are defined as follows:

Article. 374. Paragraph 2. In addition, the first president may dispose that the Court settle in plenary sessions [*sezioni unite*] on recourse that have a question of law that had been decided in a different manner by

⁹² BORÉ & BORÉ 2015, p. 76.

⁹³ BORÉ & BORÉ 2015, p. 76.

⁹⁴ BORÉ & BORÉ 2015, p. 78.

⁹⁵ In this aspect Italy is similar to Germany. The German ordinary court of last resort (*Bundesgerichtshof*) also does not have one comprehensive plenary session, unlike in France. Instead, the German court of last resort is divided into separate plenary sessions, one for civil matters (*Großen Zivilsenate*) and another for criminal affairs (*Große Senat für Strafsachen*). *Gerichtsverfassungsgesetz*, §132 (1).

⁹⁶ *Ordinamento giudiziario*, Art. 67, para. 2: ‘Il collegio a sezioni unite in materia civile è composto da magistrati appartenenti alle sezioni civili.’

⁹⁷ *Ordinamento giudiziario*, Art. 67, para. 2: ‘[I]n materia penale [le sezioni unite] è composto da magistrati appartenenti alle sezioni penali.’

⁹⁸ *infra* Chap. IV.B.2 (i).

⁹⁹ *infra* Chap. IV.B.2 (ii).

¹⁰⁰ *infra* Chap. IV.B.2 (iii).

¹⁰¹ In general, AMOROSO 2012, p. 538-548.

¹⁰² AMOROSO 2012, p. 540-542; COCCIA 2015, p. 26-27.

the ordinary chambers [*sezioni semplici*], and those that have a legal principle [*questione di massima*] of particular importance.¹⁰³

In Italy, intervention of the plenary session is regulated in a way similar to that in France. The main criteria to convene the *sezioni unite* are, on the one hand, case law contradictions between the ordinary chambers.¹⁰⁴ These cases of internal coordination of the Italian cassation court are called *composizione di contrasto* (contradicting panels of judges).¹⁰⁵ On the other hand, the *sezioni unite* can also be convened when the case has an important question that involves a ‘legal principle’¹⁰⁶ of particular importance (*questione di massima di particolare importanza*).¹⁰⁷ In any of these situations, the decision about whether to convene the plenum or not finally lies in the hands of the President of the Court.¹⁰⁸

ii. *Cassation in the interest of the law*

Another way contemplated in the *Codice di Procedura Civile* to reach the plenary session in Italy is through what is called cassation ‘in the interest of the law’ (*nell’interesse della legge*).¹⁰⁹ This term comes from the fact that such a mechanism will not be driven by the parties; it is not in their private interest (*ius litigatoris*).¹¹⁰ Instead, here the recourse will be requested by the public attorney,¹¹¹ or initiated *ex officio* by the Court.¹¹² These two organs may request it when there is no private interest to be represented – because the parties have waived their right to cassation, for example – but only the relevance of the case for the interpretation of the law in general (*ius constitutionis*).¹¹³ The pertinent disposition of the *Codice di Procedura Civile* states:

Article 363. (Legal principle in the interest of the law).- When the parties have lodged no recourse within the time limits, have renounced lodging it or when the decision cannot be subject of cassation nor appealed in another way, the Public Attorney of the Court of Cassation may require that the Court enunciate, in the interest of the law, the legal principle that the lower judge on the merits [‘giudice di merito’] shall follow.¹¹⁴

¹⁰³ *Codice di Procedura Civile*, Art. 374, para. 2: ‘Inoltre il primo presidente può disporre che la Corte pronunci a sezioni unite sui ricorsi che presentano una questione di diritto già decisa in senso difforme dalle sezioni semplici, e su quelli che presentano una questione di massima di particolare importanza.’

¹⁰⁴ COMOGLIO, FERRI & TARUFFO 2011, p. 725.

¹⁰⁵ AMOROSO 2012, p. 542.

¹⁰⁶ Previously explained at *supra* Chap. III.B.2 (ii).

¹⁰⁷ COMOGLIO, FERRI & TARUFFO 2011, p. 725-726; AMOROSO 2012, p. 544.

¹⁰⁸ FERRARIS 2015, p. 213.

¹⁰⁹ In general, AMOROSO 2012, p. 146-156; however, we need to bear in mind that in Italy the word ‘legge’ (translated here as ‘law’) does not include precedents as in the common law. DE FRANCHIS 1996, p. 925-956.

¹¹⁰ AMOROSO 2012, p. 147-148.

¹¹¹ AMOROSO 2012, p. 149-151.

¹¹² AMOROSO 2012, p. 151-153.

¹¹³ AMOROSO 2012, p. 147.

¹¹⁴ *Codice di Procedura Civile*, Art. 363, para. 1 [emphasis added]: ‘Principio di diritto nell’interesse della legge. Quando le parti non hanno proposto ricorso nei termini di legge o vi

Based on the Public Attorney's application, the President of the Court, having the final say, may decide to refer the case to the *sezioni unite*,¹¹⁵ if the dispute has a question of exceptional importance.¹¹⁶ Likewise, the court itself may enunciate a legal principle *ex officio* if the cassation recourse was declared inadmissible but, even so, the case has an exceptional importance that cannot be left unattended.¹¹⁷

The purpose of this mechanism is to protect the uniformity of the law (*nomofilachia*).¹¹⁸ However, here the underlying concept is that this goal goes beyond the parties' initiative.¹¹⁹ In the uniform application of the law a public interest (*ius constitutionis*) prevails instead.¹²⁰ Therefore, the principle of party disposition was set aside as regards cassation in the interest of the law, and *ex officio* initiative is contemplated.¹²¹

This mechanism has existed since the enactment of the Italian Code of Civil Procedure;¹²² though it fell into almost total disuse.¹²³ It has been invoked on only two occasions since its existence.¹²⁴ The reform of 2006 tried to increase the use of this cassation in the interest of the law.¹²⁵ However, Italian scholars are sceptical about the effectiveness of this reform for reviving this institution, pejoratively calling it a mere 'restyling'.¹²⁶

iii. Mandatory referral for overruling

As we have observed, the calling of a plenary session is usually optional rather than mandatory. But a recent reform (2006)¹²⁷ introduced in Italy an exceptional hypothesis of referral that is indeed mandatory.¹²⁸ The new text of the *Codice di Procedura Civile* states:

hanno rinunciato, ovvero quando il provvedimento non è ricorribile in cassazione e non è altrimenti impugnabile, il Procuratore generale presso la Corte di cassazione può chiedere che la Corte enunci nell'interesse della legge il principio di diritto al quale il giudice di merito avrebbe dovuto attenersi.'

¹¹⁵ AMOROSO 2012, p. 150.

¹¹⁶ *Codice di Procedura Civile*, Art. 363, para. 2: 'La richiesta del procuratore generale, contenente una sintetica esposizione del fatto e delle ragioni di diritto poste a fondamento dell'istanza, è rivolta al primo presidente, il quale può disporre che la Corte si pronunci a sezioni unite se ritiene che la questione è di particolare importanza.' Here the Italian expression 'particolare importanza' does not necessarily mean 'private concern' but other types of exceptional or outstanding relevance, AMOROSO 2012, p. 544; see the discussion at *infra* Chap. IV.C.8 (ii).

¹¹⁷ AMOROSO 2012, p. 152.

¹¹⁸ COMOGLIO, FERRI & TARUFFO 2011, p. 712.

¹¹⁹ COMOGLIO, FERRI & TARUFFO 2011, p. 712.

¹²⁰ FERRARIS 2015, p. 153.

¹²¹ COMOGLIO, FERRI & TARUFFO 2011, p. 712.

¹²² COMOGLIO, FERRI & TARUFFO 2011, p. 711-722; AMOROSO 2012, p. 148.

¹²³ BARSOTTI & VARANO 1998, p. 219; AMOROSO 2012, p. 148.

¹²⁴ ZOPPELLARI 2010, p. 672.

¹²⁵ COMOGLIO, FERRI & TARUFFO 2011, p. 712.

¹²⁶ e.g., ZOPPELLARI 2010, p. 672.

¹²⁷ On the 2006 reform, AMOROSO 2012, p. 33-35.

¹²⁸ AMOROSO 2012, p. 545.

Article 374, paragraph 3. If the ordinary chamber [*sezione semplice*] decides to disregard the legal principle formulated by the plenary session [*sezioni unite*], it will refer to the plenary session the decision of the recourse with supporting reasons.¹²⁹

The new hypothesis points to a chamber that aims to deviate from, or overrule, a precedent settled by the *sezioni unite*. If an ordinary chamber plans such an overruling, it is obliged to refer the case to the plenary session, instead of deciding the overruling by itself.¹³⁰ The rule implies a principle of hierarchy within the cassation court, that is to say, that a precedent of a (higher) plenum can no longer be overruled directly by a (lower) ordinary chamber.¹³¹ Also, a decision with supporting reasons is required to make the referral.¹³² This means that any chamber that aims at deviating from the plenum's precedent has a burden to claim good reasons for the overruling,¹³³ and later on refer the case to the plenum.

It seems clear that this reform was not intended to facilitate the overruling of out-dated precedents but to act as a deterrence mechanism. The contradictory interpretations inside the cassation court remained even after the plenary session intervened. The chambers, in practice, did not respect the unifying precedent settled by the plenary session.¹³⁴ Without an effective sanction, they just ignored it.¹³⁵

With the new mandatory referral, however, the chambers will need to be transparent as regards their overruling intentions. If they aim at not following the precedent, the chamber will have to reveal this beforehand to the plenary session.¹³⁶ In the absence of good reasons to refer such overruling, we could expect that the chamber will be deterred from departing from the plenum's precedent in the first place. However, Italian scholars remain sceptical about the effectiveness of this other mechanism, too.¹³⁷

C. Diagonal comparison

When making a horizontal comparison in Chapter III, we arrived at the conclusion that the supreme courts and courts of cassation are almost opposites as regards the eight specific attributes under study.¹³⁸ In the third level of the US and England (UK), the supreme courts – according to the court of

¹²⁹ *Codice di Procedura Civile*, Art. 374, para. 3: 'Se la sezione semplice ritiene di non condividere il principio di diritto enunciato dalle sezioni unite, rimette a queste ultime, con ordinanza motivata, la decisione del ricorso.'

¹³⁰ AMOROSO 2012, p. 546.

¹³¹ AMOROSO 2012, p. 543; discussed at *infra* Chap. IV.C.2 (ii,iii).

¹³² AMOROSO 2012, p. 546.

¹³³ RORDORF 2015B, p. 547.

¹³⁴ ZOPPELLARI 2010, p. 673.

¹³⁵ CHIARLONE 2012, p. 25.

¹³⁶ AMOROSO 2012, p. 546.

¹³⁷ ZOPPELLARI 2010, p. 674.

¹³⁸ *supra* Chap. III.D. (Summary tables).

precedents model – tend to have a panel composition of a single but larger and interdisciplinary team of judges,¹³⁹ who hear a small number of exemplary cases,¹⁴⁰ issuing judgments with more detailed reasoning which may include dissenting opinions,¹⁴¹ where each judgment has general effects for the future decision criteria over the whole court system.¹⁴² Whereas in the same third level of France and Italy, the cassation *chambers* – according to the court of error model instead – constitutes a numerous court, with several smaller panels of judges,¹⁴³ capable of hearing a large number of disputes,¹⁴⁴ with judgments of succinct reasoning in which no dissenting opinions are needed,¹⁴⁵ and where it is sufficient that each judgment has particular effects over the current case only.¹⁴⁶

But, as explained before, when the horizontal point of view is abandoned, our conclusions need to be revisited, because a different pair of courts will be compared. Accordingly, the purpose of the next eight sections in this chapter is to analyse whether the functional attributes that characterise the model of a court of precedents are present (or not) in the *plenum* of the French and Italian cassation courts. As discussed in Chapter III, the judicial lawmaking function of a court of precedents model requires a scope of review focused on general problems of interpretation (*infra* C.1),¹⁴⁷ strong precedential force of its judgments (*infra* C.2),¹⁴⁸ a high level of exposure through a wide publication of its decisions (*infra* C.3),¹⁴⁹ a detailed style of its judgments that allows dissenting opinions (*infra* C.6),¹⁵⁰ a single but larger and interdisciplinary team of judges (*infra* C.4 and C.5)¹⁵¹ and a reduced number of cases to hear per year (*infra* C.7)¹⁵² as the result of a preliminary screening stage which excludes cases without public relevance (*infra* C.8).¹⁵³ Here I will argue that these eight functional attributes of a court of precedents model are met not by the chambers (3rd level) but by the plenary sessions (4th level) of the French and Italian cassation courts. Therefore, the cassation plenary sessions are the functional equivalent to the court of precedents model (inside the cassation court) that brings together the attributes adequate to perform the judicial lawmaking function in the jurisdictions of France and Italy.

¹³⁹ *supra* Chap. III.B.6 (b).

¹⁴⁰ *supra* Chap. III.B.4 (b).

¹⁴¹ *supra* Chap. III.B.8 (b).

¹⁴² *supra* Chap. III.B.2 (b).

¹⁴³ *supra* Chap. III.B.6 (b).

¹⁴⁴ *supra* Chap. III.B.4 (b).

¹⁴⁵ *supra* Chap. III.B.8 (b).

¹⁴⁶ *supra* Chap. III.B.2 (b).

¹⁴⁷ *supra* Chap. III.B.1 (b).

¹⁴⁸ *supra* Chap. III.B.2 (b).

¹⁴⁹ *supra* Chap. III.B.3 (b).

¹⁵⁰ *supra* Chap. III.B.8 (b).

¹⁵¹ *supra* Chap. III.B.6 (b); Chap. III.B.7 (b).

¹⁵² *supra* Chap. III.B.4 (b).

¹⁵³ *supra* Chap. III.B.4 (b).

1. Scope of Review

According to the judicial lawmaking function, in the jurisdictions of the US and England (UK) the supreme courts are characterised by a restricted scope of review, focused on general problems of interpretation as such.¹⁵⁴ Besides some other constitutional competences (more relevant in the US Supreme Court),¹⁵⁵ their main task is to take a stand when different interpretations of the law are competing, to fill the gaps in the fields where there is no settled criteria and to keep the case law updated to the current context of society.¹⁵⁶ Because their scope is focused on such case law problems only, these supreme courts will not review any other potential mistakes in the application of the law in particular disputes,¹⁵⁷ just those that involve more general complexities of interpretation. Also, the procedural violations committed at the lower instances are usually excluded from their scope of review, as well.¹⁵⁸ Even if these supreme courts may have the power to review the facts of the case, they will exercise that power rarely due to an extreme deference to the work done by the lower courts.¹⁵⁹

In the French and Italian jurisdictions, from a horizontal perspective, the chambers of the cassation courts usually do not have such a restricted scope of review, but a broader one.¹⁶⁰ They do not focus their attention on broad problems of interpretation in the case law alone.¹⁶¹ Additionally, they will review violations of the law on a case-by-case basis, regardless of whether they include a general case law problem or not. The main scope of review in cassation chambers will be misapplications of legislation, especially the codes, in every particular dispute.¹⁶² Procedural mistakes of the lower court are usually included in their review as well.¹⁶³ Only the credibility of the evidence may be outside their scope because, compared to the lower courts, the cassation chambers are more distant from the production of evidence and, thus, have a worse perspective to (re-)evaluate the facts.¹⁶⁴ The legal qualifications of the same facts, however, are an important aspect of the reviewing task in a cassation chamber.¹⁶⁵

However, we will observe that the plenum of the same courts of cassation does have a much more specific scope of review than the ordinary chambers. The plenum is not open to reviewing every misapplication of the law or procedural mistake as the chambers are. Instead, cassation plenums focus their attention on

¹⁵⁴ *supra* Chap. III.B.1 (iii,c).

¹⁵⁵ *supra* Chap. III.B.1 (i,e).

¹⁵⁶ *supra* Chap. III.B.1 (i,a).

¹⁵⁷ *supra* Chap. III.B.1 (i,b).

¹⁵⁸ *supra* Chap. III.B.1 (i,c).

¹⁵⁹ *supra* Chap. III.B.1 (i,d).

¹⁶⁰ *supra* Chap. III.B.1 (iii,c).

¹⁶¹ *supra* Chap. III.B.1 (ii,a).

¹⁶² *supra* Chap. III.B.1 (ii,b).

¹⁶³ *supra* Chap. III.B.1 (ii,c).

¹⁶⁴ *supra* Chap. III.B.1 (ii,d).

¹⁶⁵ *supra* Chap. III.B.1 (ii,b).

general problems of interpretation as well. In addition to other miscellaneous tasks, these plenary sessions will review contradictory case law that arose in the lower courts (external coordination), between its own chambers (internal coordination), to fill a gap when there is no legal criteria settled in a certain field (lacuna), or they will review case law that may need to be updated (overruling), as we shall see.

i. France

The scope of review of the plenary sessions in France is restricted in this way. The scope of the *assemblée plénière* is defined as ‘a question of principle, particularly if there are existing differences either between the lower courts [*juges du fond*] or between the lower courts and the Court of Cassation ...’.¹⁶⁶ In other words, this plenary session focuses its attention on general points of law (*question de principe*) when a controversy arises at an external level,¹⁶⁷ that is to say, between the court of cassation and the lower courts, or among the lower courts themselves.¹⁶⁸ In the terminology of this study, therefore, this means that the *assemblée plénière* does not have a broad scope of review on every particular misapplication of the law (as the chambers do), but only on general problems of interpretation.

The scope of review of the *chambre mixte* is defined as ‘... a matter it has received or is likely to receive divergent solutions before the chambers ...’.¹⁶⁹ According to our terminology, this also counts as a scope focused on general problems of interpretation and not the broad review of any particular misapplication of well-settled law. The difference with the *assemblée plénière* is that the *chambre mixte* operates not at an external level but at an internal level. In other words, the *chambre mixte* solves general problems of interpretation too, but when they arise between the own chambers of the *Cour de cassation*.¹⁷⁰

The plenary session for preliminary opinions (*avis*) revises general problems of interpretation, as well. Its scope is defined as ‘... [a] question of new law, which has a serious difficulty that can arise in numerous disputes ...’.¹⁷¹ The difference with the *assemblée plénière* and the *chambre mixte* is that the preliminary opinion (*avis*) is concentrated in problems of interpretation that arise from new legislation that may have lacunas of case law due to its novelty.¹⁷² However, the preliminary opinions (*avis*) are not meant to review any particular application of these new laws; its scope is not defined as a (new) point of law solely. It has to be a point of law that may be replicable in multiple future cases.¹⁷³ In that

¹⁶⁶ See again, *Code de l'organisation judiciaire*, Art. L432-6; *supra* Chap. IV.B.1 (i).

¹⁶⁷ CADIET 2011A, p. 189.

¹⁶⁸ BORÉ & BORÉ 2015, p. 66.

¹⁶⁹ See again, *Code de l'organisation judiciaire*, Art. L432-5; *supra* Chap. IV.B.1 (ii).

¹⁷⁰ CADIET 2011A, p. 189 (*‘La réunion d’une chambre mixte est donc essentiellement un moyen de prévenir ou de résoudre les conflits de jurisprudence au sein même de la Cour de cassation.’*).

¹⁷¹ See again, *Code de l'organisation judiciaire*, Art. L441-1; *supra* Chap. IV.B.1 (iii).

¹⁷² BORÉ & BORÉ 2015, p. 76.

¹⁷³ BORÉ & BORÉ 2015, p. 77.

sense, the problem of interpretation meant to be solved by the preliminary opinion (*avis*) also needs to be a general problem.

In sum, neither the *assemblée plénière* nor the *chambre mixte* nor the bench for preliminary opinions (*avis*) has a broad scope of review with regard to any particular misapplication of the law as the cassation chambers do. The French plenary sessions focus their attention only on disputes that involve general problems of interpretation, at an external (*assemblée plénière*), internal (*chambre mixte*) level or for new law (*avis*). As we can observe, the re-evaluation of facts and the constitutional review are not part of the scope of review of these plenary sessions either.¹⁷⁴ As regards the procedural missteps, they are not reviewed at the plenary sessions on a particular basis as the chambers do. Procedural missteps could be reviewed by the French plenary sessions if and only if they involve a general problem of interpretation as well.¹⁷⁵

ii. Italy

In Italy, the review of the *sezioni unite* is restricted in similar terms. Its scope is where ‘the appeal has a question of law that was decided in different ways by the chambers [*sezioni semplici*] ...’.¹⁷⁶ Also, with the reform of 2006, it is mandatory to refer the cassation recourse before the plenum if the ordinary chamber does ‘not share the legal principle formulated by the plenary session’.¹⁷⁷ Therefore, the Italian plenum also has a scope more restricted than the chambers. Its focus is on hearing only general problems of interpretation – for example, contradictions and overruling of case law at an internal level – and not every possible misapplication of the law on a particular case-by-case basis. The same restriction on the particular misapplication of the substantive law applies to the formal law of procedure. Procedural missteps will be out of the plenum’s scope if they only have relevance for the particular case. The reason is, according to RORDORF, that the Italian plenum reviews procedural law matters only if they are of general interest for all the chambers.¹⁷⁸ Finally, the re-evaluation of evidence is out of the scope of the Italian plenary session too. This restriction comes from the clause to convene the plenum, which is limited to the discussion of ‘questions of law’ (*questione di diritto*),¹⁷⁹ or principle

¹⁷⁴ After the 2008 reform, the French Court of Cassation is competent for the so-called priority question of constitutionality (*question prioritaire de constitutionnalité*), ROUSSILLON & ESPULGAS 2015. However, this is not a proper constitutional review made by the Court of Cassation itself. Here, the role of the Court of Cassation is limited to deciding whether to forward the case to the *Conseil Constitutionnel*. But the Court of Cassation itself cannot declare a piece of legislation null due to its unconstitutionality.

¹⁷⁵ JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 22.

¹⁷⁶ *Codice di Procedura Civile*, Art. 374, para. 2 (‘*Inoltre il primo presidente può disporre che la Corte pronunci a sezioni unite sui ricorsi che presentano una questione di diritto già decisa in senso difforme dalle sezioni semplici ...*’).

¹⁷⁷ *Codice di Procedura Civile*, Art. 374, para. 3; *infra* Chapter 3.D.3.

¹⁷⁸ RORDORF 2015B, p. 546.

¹⁷⁹ See again, *Codice di Procedura Civile*, Art. 374, para. 2; COCCIA 2015, p. 26.

of law (*questioni di massima*),¹⁸⁰ which are also considered as questions of law.¹⁸¹ Because the scope is limited to the questions of law as such, *a contrario sensu*, the questions of fact are excluded from the Italian plenum review.

iii. *Diagonal comparison*

Switching from a horizontal to a diagonal comparison changes our conclusions as regards the scope of review. As we can see, these rules point in the same direction: that the plenary sessions in the French and Italian cassation courts hear general case law problems, mainly if there are contradictory interpretations between the chambers of the court of cassation itself or among the lower courts. This restricted scope of review of the court of cassation's plenum has a clear similarity to the scope of review of the supreme courts under study. The US Supreme Court explicitly defines decisions of lower courts (federal courts of appeals or state courts of last resort) that are in conflict with judgments of another lower court or with the Supreme Court itself (circuit split) as grounds for a writ of certiorari.¹⁸² The UK Supreme Court restricts its scope of review to general problems of legal interpretation, as well.¹⁸³ Thus the first point of diagonal symmetry is that the US and the UK supreme courts have a scope of review of a similar type of case law coordination as the French *assemblée plénière* and the Italian *sezioni unite* do.

From a diagonal perspective, therefore, the scope of review does not mark a point of major difference anymore. When comparing the US and UK supreme courts *vis-à-vis* the plenum of the French and Italian cassation courts (and not just with one of their chambers), we can observe an interesting symmetry between the two pairs of jurisdictions as regards their scope of review. Both reserve the very top of their court system to the resolution of general interpretation problems in the case law. The jurisdictions of the US and England (UK) reserve their third level for that kind of review, while in France and Italy a 'hidden' fourth level is created with the same scope. Therefore, this restricted review of the plenary sessions in French and Italian cassation courts is the first specific attribute, among others, that makes it appropriate to perform the judicial lawmaking functions as the US and UK supreme courts also perform them.

However, it could be argued that this scope of review focused on case law conflicts does not mean, necessarily, a proper judicial lawmaking function in a court of cassation. When the plenary session untangles an interpretation contradiction, it can be argued, it is not properly 'creating' a new legal norm.¹⁸⁴ If there are two interpretations – one stating X and the other non-X – both cannot be logically true at the same time; necessarily, one of the two has to be

¹⁸⁰ See again, *Codice di Procedura Civile*, Art. 374, para. 2 ('... e su quelli che presentano una questione di massima di particolare importanza'). DE FRANCHIS 1996, p. 962.

¹⁸¹ AMOROSO 2012, p. 544.

¹⁸² See again, *Rules of the Supreme Court of the United States*, Rule 10 (a,b,c); *supra* Chap. III.B.1 (i)(a).

¹⁸³ See again, *UK Supreme Court's Practice Directions 3*, Rule 3.3.3; *supra* Chap. III.B.1 (i)(a).

¹⁸⁴ MITIDIERO 2015, p. 214-215.

incorrect. In that context, when the plenary session decides it is only ‘discovering’ the correct version of the law.¹⁸⁵ When the cassation plenum resolves the contradiction, thus, it is just declaring invalid the interpretation that has always been incorrect and, properly speaking, never existed. Therefore, the plenary session does not create norms, the objection could conclude, because it is not changing the content of the law but discarding the wrong opinions about what the law, as it is, really commands.

This objection presupposes that a clear-cut distinction between right and wrong interpretations can be made. Such a presupposition involves a complex theoretical debate in the field of legal reasoning, which goes beyond the ambitions of this study.¹⁸⁶ However, just a minimal scepticism is needed to realise that the law, as it is, does have ambiguities.¹⁸⁷ Therefore, when the cassation plenum is resolving a contradiction it is properly creating law because it replaces an ambiguous norm with a new one in which that ambiguity is untangled.¹⁸⁸ As explained in the next section, however, to explicitly acknowledge this judicial lawmaking function in France and Italy will clash with strong legal traditions or constitutional restrictions.¹⁸⁹ Despite this local denial, from the perspective of comparative law functionalism the judicial lawmaking function of the cassation plenums, at a manifest or latent level, should be demonstrated based on not just this specific attribute but on a combination of this and other attributes working together.

2. Judgment effects

A starting point to characterise common law and civil law legal traditions is to emphasise their differences as regards the effects of their judgments.¹⁹⁰ Common law jurisdictions recognise binding force in them. Each court decision may count as a ‘precedent’, that is to say, a single judgment with the potential to change, by itself, the decision criteria in future cases.¹⁹¹ In civil law jurisdictions, on the contrary, the orthodox view states that judgments are not a proper precedent in a common law fashion, they do not count as an authoritative (formal) source of law.¹⁹² In the civil law jurisdictions, the orthodox view continues, a court’s single decision cannot by itself change the future decision criteria (as a common law precedent does),¹⁹³ but only when many judgments in the same direction come together and form a ‘*jurisprudence constante*’ (permanent case law).¹⁹⁴

¹⁸⁵ MUNSON 1910, p. 365-366.

¹⁸⁶ On this debate, AARNIO 1987; GUASTINI 2011; PECZENIK 2009, among others.

¹⁸⁷ MITIDIERO 2015, p. 204 (In terms of Law’s equivocality.).

¹⁸⁸ MITIDIERO 2015, p. 215; in general, BARAK 2002B, p. 23.

¹⁸⁹ *infra* Chap. IV.C.2 (c).

¹⁹⁰ See again, MERRYMAN & PÉREZ-PERDOMO 2007, p. 20-26; SIEMS 2014, p. 46-47.

¹⁹¹ MACCORMICK & SUMMERS 1997B, p. 538; LEGARRE & RIVERA 2006, p. 110.

¹⁹² HEAD 2011, p. 163.

¹⁹³ LEGARRE & RIVERA 2006, p. 111.

¹⁹⁴ GLENDON, CAROZZA & PICKER 2008, p. 133 ff.; MACCORMICK & SUMMERS 1997B, p. 538.

When making a horizontal comparison, this general difference tends to be extended at the third (and supposedly last) level of each court system. Accordingly, as to the judicial lawmaking function, the judgments of the US and UK supreme courts have binding force, and that is precisely why they are characterised as courts ‘of precedents’ in the first place.¹⁹⁵ The chambers of the cassation courts of France or Italy, quite the contrary, issue judgments that do not count as proper precedents, due to the lack of such binding effect.¹⁹⁶ From a horizontal perspective, it is certainly true that the ordinary chamber judgments in these courts of cassation have considerably less force or influence over future cases when compared to the judgments of the US and UK supreme courts.¹⁹⁷ However, the court of cassation’s plenums are different as regards the effects of their judgments. Traditionally, they have been considered an especially higher authority than the chambers’ judgments.¹⁹⁸ To the cassation plenum judgments usually apply some kind of exception to the rule or practice that, in more implicit or explicit ways, contradicts the general rule of denial of any binding force in France and Italy, as we shall see.

i. France

France has a strong tradition of denying that judgments count as binding precedents in a common law fashion.¹⁹⁹ The prestigious *Code civil* states that judges are forbidden to issue general rules when resolving disputes.²⁰⁰ To cite prior cases in the current judgment seems forbidden, and the very words ‘precedents’ and ‘*jurisprudence*’ (case law) end by being eradicated from the local legal language.²⁰¹

However, the situation changes when it comes to the *assemblée plénière*.²⁰² Instead of talking of ‘precedents’, the French legal culture prefers to make a distinction between specific decisions (*arrêts d’espèces*) and decisions on principles (*arrêts de principes*).²⁰³ On the one hand, the ‘specific decisions’ are the ones that only matter for the particular circumstances of the current dispute.²⁰⁴ On the other hand, the ‘decisions on principles’ are defined as ‘litigious

¹⁹⁵ *supra* Chap. III.B.2. (i). For the US, FLETCHER & SHEPPARD 2005, p. 79; for England, CROSS & HARRIS 1991, p. 3-4.

¹⁹⁶ *supra* Chap. III.B.2 (ii). For France, WIJFFELS 2013C, p. 80; for Italy, ALVAZZI DEL FRATE 2013, p. 60.

¹⁹⁷ *supra* Chap. III.B.2 (iii).

¹⁹⁸ HERZOG & WESER 1967, p. 162-163.

¹⁹⁹ For example, GARAPON & PAPADOPOULOS 2003, p. 50-52; BELL 2001, p. vii (‘[In France] there is not a cult of precedent, as in the common law.’).

²⁰⁰ See again. *Code Civil*, Art. 5; *supra* Chap. III.B.2 (ii).

²⁰¹ TROPER & GRZEGORCZYK 1997, p. 115.

²⁰² BORE & BORE 2015, p. 702 (‘*En réalité, les arrêts rendus par une Assemblée plénière ou une Chambre mixte ont une autorité doctrinale plus forte car ils marquent l’adhésion de plusieurs chambres à la solution consacrée.*’).

²⁰³ CORNU 2007, p. 720.

²⁰⁴ CORNU 2007, p. 370.

questions whose offered solution has consequences beyond the current case [*l'espèce*], where a general interest for the application of the law arises'.²⁰⁵

French scholars indeed recognise – and this is a relevant point for the diagonal symmetry in France – that the so-called *arrêts de principes* can be considered similar to a precedent.²⁰⁶ For example, some French authors state that 'it is perfectly safe to say that in France, what is really a precedent is the formulation of a principle'.²⁰⁷ Therefore, if the judgments of the *Cour de cassation's* plenum are normally recognised as *arrêts de principes* (decisions on principles and not just specific decisions), they will be quite closer to a common law definition of precedent, as well. TROPER & GRZEGORCZYK are keen to demonstrate this point:

Among the criteria currently used to classify a decision in one or the other category [*i.e.*, decision on principles or specific decision] is the composition of the court making the decisions. - Naturally, those decisions of the Court of Cassation that have been rendered by the plenary assembly [*assemblée plénière*] are easy to identify and label as decisions of principle [*arrêts de principes*], because that assembly is only convened for particularly important cases.²⁰⁸

The scope of review of the *assemblée plénière* focuses mainly on questions of principle or case law contradictions, as discussed in the previous section,²⁰⁹ and its judgments are recognised as 'decision on principles', as well. The syllogism is clear. Major premise: in France decisions on principles are similar to common law precedents. Minor premise: judgments issued by the *assemblée plénière* are considered decisions on principles (*arrêts de principes*) of this kind. Ergo: the French plenum judgments count as 'precedents' in a similar way as the common law precedents (but with different labels).

The extraordinary force of the French plenum judgments is also recognised when a preliminary opinion (*avis*) is requested.²¹⁰ This seems a contradiction because the *Code de l'organisation judiciaire* explicitly states that the *avis* are not binding, even for the lower court judge who asked for it.²¹¹ However, at the same time, French scholars admit that the preliminary opinion (*avis*) of the *Cour de cassation*, even if it is not properly binding, 'in fact it obviously has

²⁰⁵ CORNU 2007, p. 751 ('*Question litigieuse dont la solution offre par ses conséquences, au-delà de l'espèce où elle surgit, un intérêt de portée générale pour l'application du Droit.*'); see also, MALINVAUD 2008, p. 162.

²⁰⁶ TROPER & GRZEGORCZYK 1997, p. 120 ('French scholars make a distinction, in regard to decisions of the Court of Cassation, between leading cases (*arrêts de principes*) and specific decisions (*arrêts d'espèces*). Only the former [*i.e.*, *arrêts de principes*] can be considered similar to a precedent.').

²⁰⁷ TROPER & GRZEGORCZYK 1997, p. 127.

²⁰⁸ TROPER & GRZEGORCZYK 1997, p. 120.

²⁰⁹ *supra* Chap. IV.C.1 (i).

²¹⁰ BORE & BORE 2015, p. 79.

²¹¹ *Code de l'organisation judiciaire*, Art. L441-3: '*L'avis rendu ne lie pas la juridiction qui a formulé la demande.*'; MALINVAUD 2008, p. 163; JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 26.

considerable force. It can even be assimilated to a *leading case ...*.²¹² In England, a leading case is defined as ‘a judicial decision or precedent settling the principles of a branch of law’.²¹³ In the US, *Black’s Law Dictionary* defines a leading case as ‘[a]n important, often the most important, judicial precedent on a particular legal issue’.²¹⁴ The French contradiction lies in that, on the one hand, the strong legal culture and the prestigious codes deny explicitly any binding force of the cassation judgments (of the *assemblée plénière* or any other); but, on the other hand, scholars do recognise that the judgments of the *assemblée plénière*, *chambre mixte* and preliminary opinion (*avis*) are equivalent to a leading case in practice, that is to say, equivalent to the strongest binding force that a common law precedent could ever have.

This raises an interesting question about why in France there is such strong resistance to admit in its own words any binding force of precedents, or their proper character as a formal source of law, not even to the judgments delivered by the plenary sessions of their highest *Cour de cassation*.²¹⁵ It seems that any similarity with the common law jurisdictions will be emphatically denied. We can find a good example of this cultural contradiction in CADIET. The author does recognise that the *assemblée plénière* have a higher authority which justifies that its interpretation of the law is imposed on the lower courts, but only for the current case.²¹⁶ However, when future disputes raise a similar point of law – CADIET says – the lower instance judge:

... retains *total freedom* to interpret the applicable norm differently [from the judgment of the *assemblée plénière*], *even if it later raises, yet it is not said, the wrath of the Court of Cassation*.²¹⁷

It seems unlikely that in a court system highly hierarchical, as in France, lower court judges would be willing to raise the wrath of their superiors very often. Like the freedom of jumping out of a skyscraper, deviating from the *assemblée plénière* precedents is an apparent total freedom that, in theory, every French judge may have. But it is also a total freedom that, in practice, only a few judges would actually dare to exercise.²¹⁸ In the US and England (UK) the obedience to

²¹² JOBARD-BACHELLIER & BACHELLIER, 1994, p. 17-18 [emphasis added], cited by TROPER & GRZEGORCZYK 1997, p. 112.

²¹³ WOODLEY 2009, p. 246.

²¹⁴ GARNER 2009, p. 969.

²¹⁵ BELL 2001, p. vii (‘... French writers have used many curious theoretical constructions in order to explain how judicial developments of the law can take place without judicial decision being a source of law.’).

²¹⁶ CADIET 2011A, p. 189 [emphasis added] (*‘La solennité et l’autorité particulières qui s’attachent à la réunion de l’assemblée plénière sont exprimées par le fait que tout arrêt rendu par elle s’impose à la juridiction de renvoi sur les points de droit qu’elle a jugés. La règle signifie que la juridiction saisie sur renvoi après cassation -et seulement elle- ne peut pas interpréter la loi autrement que l’a décidé l’assemblée plénière.’*).

²¹⁷ CADIET 2011A, p. 189 (*‘En revanche, si la même question de droit venait à se poser à l’occasion d’un autre litige, le juge de fond, celui-ci ou tout autre, conserverait le liberté totale d’interpréter différemment la norme applicable, quitte à encourir ensuite, mais ce n’est pas dit, les foudres de la Cour de cassation.’*).

²¹⁸ According to BORE & BORE 2015 (p. 747) the active rebellion of the lower court judge to a second cassation decision of the *assemble pleniére* is just a hypothetical situation because

the supreme courts' precedents is not absolute either. In these common law jurisdictions we can also find judges and cases that are exceptions to *stare decisis*.²¹⁹ Thus, the resistance to admit in France any common law-like binding force seems to come, on the one hand, from an over-optimistic view about their lower courts' 'freedom' of interpretation or, on the other hand, an exaggerated idea about what counts as a 'binding' precedent in the common law.²²⁰ But if such an exaggerated conception of bindingness is abandoned, or their freedom of interpretation is relativised, it becomes easy to have a comparative understanding about the similar level of binding force (or restricted interpretation freedom) between the precedents of the US and the UK supreme courts *vis-à-vis* the French cassation plenum's *arrêt de principe*.

ii. *Italy*

Italy also follows the civil law tradition where, as a general rule, judgments are not recognised as having the same binding or obligatory force as common law precedents.²²¹ But unlike in France, in Italy the civil code does not explicitly deny the case law as a formal source of law in certain dispositions; the *Codice Civile* simply does not mention it when listing the sources of law at the beginning.²²² In Italy, the denial of a binding force of judgments properly comes from the Italian Constitution. Particularly, Article 101 states that judges will be subject only to the legislation.²²³ *A contrario sensu*, they are not subject to any other source, including case law. According to Italian legal culture, moreover, the legislature should be the first and the only one that can make law.²²⁴

However, for a long time Italian scholars have been discussing the force that, in practice, their *Corte di Cassazione*'s judgments have. They readily admit that the plenum's judgments have a 'superior' or 'higher' authority than the ones of the ordinary chambers.²²⁵ One may wonder, however, is this superior authority high enough to make them comparable to a common law precedent? TARUFFO & LA TORRE, for example, have explicitly recognised that the plenary session judgments indeed count as proper precedents. They stated that:

A decision of the higher court is considered more influential when it has been delivered by a special panel [*e.g.*, *sezioni unite*] of the *Corte di Cassazione* ... One reason is that these courts deal with especially

no examples can be found in practice ('*Quant à l'hypothèse d'une résistance active, elle ne vaut guère que comme hypothèse d'école, car la pratique n'en offre pas d'exemple.*').

²¹⁹ For example, CROSS & TILLER 1998, p. 2155-2176 (analysing empirically to what extent the federal appellate courts followed the US Supreme Court's *stare decisis* doctrine in the *Chevron* case).

²²⁰ MERRYMAN & PÉREZ-PERDOMO 2007, p. 47 ('Those who contrast the civil law and the common law traditions by a supposed non-use of judicial authority in the former and a binding doctrine of precedent in the latter exaggerate on both sides.')

²²¹ LIVINGSTON, MONATERI & PARISI 2015, p. 224-225; ALVAZZI DEL FRATE 2013, p. 60; LEGARRE & RIVERA 2006, p. 111-113.

²²² See again, *Codice Civile*, Art. 1 (1,2,3, 4).

²²³ See again, *Costituzione della Repubblica Italiana*, Art. 101.

²²⁴ LIVINGSTON, MONATERI & PARISI 2015, p. 224.

²²⁵ COMOGLIO, FERRI & TARUFFO 2011, p. 726; BARSOTTI & VARANO 1998, p. 227.

important issues of law, and resolve conflicts among the ordinary chambers. In such situations the court is expected to deliver a judgment that should influence subsequent cases. *At any rate, these are the situations [e.g., cassation plenum judgments] in which the higher courts deliver judgments that are clearly intended to serve as precedents.*²²⁶

As usual, these authors start by denying that, as a general rule, in their jurisdiction formal binding force of precedents exists.²²⁷ This general rule also applies to the plenary session and, therefore, its judgments have formal authority only in the current case, not in future disputes.²²⁸ However, later on they add that the judgments of the *Corte di Cassazione*, as a whole, have a higher degree of force than those of the intermediate appellate courts or the first instance court judges. Finally, they admit that the judgments issued by the cassation plenary session, particularly, have an even stronger force ('more influential') compared to the ordinary chambers of the same *Corte di Cassazione*. This stronger force of the plenum has the result that '[t]he judgments delivered by the *sezioni unite* ... are usually considered as precedents in the proper sense, that is, as judgments that should be taken into account in a later case'.²²⁹ Thus, the high degree of authority, equivalent to a common law precedent, that is normatively denied at the lower court levels is admitted in practice as regards the Italian cassation plenum.²³⁰

This debate on the force of precedents in Italy had an important episode in 2006 with the introduction of the mandatory referral for overruling.²³¹ Since then, an ordinary panel of the *Corte di Cassazione* no longer has real freedom to depart from the plenary session rulings.²³² The lower cassation chamber will be 'negatively bound' – *i.e.*, *vincolo negativo* in Italian terminology – to the cassation plenum's precedent.²³³ Since the reform, only the Italian plenum has the authority to overrule its own precedents.²³⁴ Therefore, if the panel of an ordinary chamber intends to deviate from a plenum precedent, it cannot do so by itself, but must refer the recourse to the plenary session, and give reasons for such overruling.²³⁵ If there are no good reasons for overruling, *a contrario sensu*,

²²⁶ TARUFFO & LA TORRE 1997, p. 159 [emphasis added].

²²⁷ TARUFFO & LA TORRE 1997, p. 151 ('[I]n Italy the precedent has no formally binding force.').

²²⁸ BARSOTTI & VARANO 1998, p. 227 ('[W]e like to emphasize that *formally* no special weight is attached to the decisions of the plenary session; like any other judicial decision, they are formally binding only in the case in which they are rendered.').

²²⁹ TARUFFO & LA TORRE 1997, p. 151 [emphasis added].

²³⁰ The statements of the following Italian authors are especially clarifying on this point. BARSOTTI & VARANO 1998, p. 227 ('However, since they [the plenary session] fulfil particularly the role of the *Corte di Cassazione* ..., they ultimately attain a higher degree of authority in practice.'). In the same direction, ALVAZZI DEL FRATE 2013, p. 60 ('[T]he decisions reached by the full court, whereby different sections are sitting together, increasingly tend to have "persuasive authority" for the lower courts.').

²³¹ *supra* Chap. IV.B.2 (iii); COMOGLIO, FERRI & TARUFFO 2011, p. 726.

²³² COCCIA 2015, p. 27; RORDORF 2015B, p. 545.

²³³ AMOROSO 2012, p. 546.

²³⁴ AMOROSO 2012, p. 543 ('*solo le sezioni unite possono essere chiamate a pronunciarsi in ordine al richiedo overruling della giurisprudenza delle stesse sezioni unite ...*').

²³⁵ AMOROSO 2012, p. 546.

the rule implies that the chamber may not be able refer the case to the plenary session, nor to deviate from its precedent. This new procedural rule seems to reinforce the conclusion that, like the US and UK supreme courts' precedents, in Italy the cassation plenum judgments have a binding force which cannot be defeated by courts of a lower hierarchy, such as the cassation chambers, at least not without the burden of the reasoning for overruling or distinguishing.

iii. *Diagonal comparison*

When we switch from a horizontal to a diagonal comparison the distance between the US and England (UK), on the one hand, and France and Italy, on the other, as regards the effects of the judgments, is considerably reduced. The judgments of a plenary session in the French and Italian cassation courts certainly have a higher degree of force or influence than those of the ordinary chambers. This stronger force of the judgments of the cassation plenums is great enough to be comparable to a precedent of the US and UK supreme courts. France and Italy do not recognise a binding force of the judgments as a general rule, nor to the judgments of the cassation chambers. But, at the same time, they usually have an exception to that general rule when it comes to the cassation plenum. In more explicit or implicit ways, legal scholars from France and Italy do recognise that the judgments issued by the plenary session of their cassation courts count as proper precedents, in a common law fashion, recognition that is normally denied to the lower courts and chambers.²³⁶

For a common law observer, this might look like an intricate path to reach something that is quite simple from the perspective of the *stare decisis* doctrine. The principle of hierarchy commands adherence to the precedents of higher courts.²³⁷ Lower courts shall not deviate from them unless there are good reasons for a distinction. Only the same court that settled the precedent, or one even higher, has the authority to overrule the precedent. In practice, the plenary session is a type of higher court over the ordinary chambers and, therefore, the principle of hierarchy in the force of precedents also applies among them.

Some Italian scholars, however, deny that the 2006 reform – *i.e.*, the chambers mandatory referral to the *sezioni unite* for overruling – means a proper *stare decisis*. For them, this should be seen as something different, only as a procedural device. For example, CHIARLONI argues that the reform does not imply binding precedent because we are not facing two 'separate jurisdictional organs'; there are no two different courts, where one shall follow the precedents of the other. For this author, the reforms introduced a tool for mere internal management because the ordinary chambers and the plenary session are part of the same court.²³⁸ However, it appears that CHIARLONI fails to see the Italian

²³⁶ DAMAŠKA 1986, p. 38 ('Ironically, the doctrine of the "sole" subjection to the law continued to apply only to trial judges.').

²³⁷ WARD & AKHTAR 2011, p. 72; LEGARRE & RIVERA 2006, p. 118-119.

²³⁸ CHIARLONI 2012, p. 24 ('Certo, bisogna riconoscere che non siamo in presenza di un vero e proprio vincolo al precedente, perché non siamo in tema di rapporti tra organi giurisdizionali diverse.').

Court of Cassation as a giant matryoshka doll with multiple, graduated bodies. From a functionalist perspective,²³⁹ the *sezioni unite* and the *sezione semplice* are, in fact, separate organs, one inside the other, different in their functional attributes except that they are both located within the same courthouse building. Before the 2006 reform, the ordinary chamber apparently was an autonomous decision maker with the power to overrule by itself the plenum's precedents, but not any more. Therefore, even though they share the same building premises, the 2006 reform does make one functional court subordinate to the other, the ordinary chambers subordinated to the plenary session.

According to ZOPPELLARI, as another example, the reform does not properly 'oblige' the cassation chambers to pronounce a decision according to the plenum's precedent. His argument is that, instead of a binding precedent, with the reform now the chambers 'are prevented just from pronouncing one [decision] with the contrary content'.²⁴⁰ However, it seems that ZOPPELLARI fails to realise that both ideas are the same, but with opposite wording. According to basic concepts of law, the prohibition of certain conduct is nothing more than a duty to abstain from the same conduct.²⁴¹ To state that a judge is obliged to decide X is the same as saying that the judge is prohibited from deciding non-X, but just said backwards. In the same way, the prohibition on the chamber from issuing judgments contrary to the plenum's precedents is just another way of saying that, from now on, the chamber has a duty to follow the plenum's precedents if it wants to issue judgments. The difference identified by ZOPPELLARI is not a real difference.

Therefore, CHIARLONI and ZOPPELLARI's arguments are far from convincing. Procedural devices do have substantive consequences. The question is, why do Italian scholars, the same as the French colleagues, not seem to be open to recognising explicitly such intended binding force of the plenary session rulings? The reason behind such resistance seems to be different in France and Italy. In France, the explanation for this reluctance seems to be a strong legal tradition based on the French Revolution. On the one hand, in France the denial of any (explicit) binding force of judicial precedents was a reaction against a rival judiciary in favour of the *Ancien Régime*.²⁴² On the other hand, the denial also comes from MONTESQUIEU's conception of the separation of powers, in which the judiciary should not intervene with the creation of general rules by the legislature.²⁴³ Therefore, to explicitly admit in France that cassation plenum judgments are binding precedents, in a common law fashion, would be seen as a betrayal of the inheritance from the French Revolution and MONTESQUIEU's doctrines.

²³⁹ *supra* Chap. I.E.1 (i).

²⁴⁰ ZOPPELLARI 2010, p. 674; the same argument in, AMOROSO 2012, p. 546; COCCIA 2015, p. 29.

²⁴¹ HAGE 2014, p. 45.

²⁴² ELLIOTT, JEAN PIERRE & VERNON 2006, p. 77.

²⁴³ ELLIOTT, JEAN PIERRE & VERNON 2006, p. 77.

In Italy, however, the explanation lies not only in the legal tradition,²⁴⁴ but also in constitutional restrictions.²⁴⁵ As we have seen, according to the Italian Constitution, judges are obliged to decide based only on the legislation (Art. 101).²⁴⁶ In order to solve the problem of contradictory criteria inside the *Corte di Cassazione*, it would have been easier just to state that the chambers are positively obliged to follow the plenum's precedents. According to Article 101, however, that solution would have been unconstitutional. Therefore, to escape from a declaration of unconstitutionality, Italian scholars build an argument to convince all that this new mandatory referral to the cassation plenum for overruling is far from a real *stare decisis* doctrine. If it is not seen as a proper *stare decisis*, thus, the reform should not be questioned as unconstitutional.²⁴⁷ But if such constitutional restrictions were absent, probably the Italian plenum's binding force would have been easier to admit. Yet even in that context of no constitutional constraints, probably the Italian legal culture of resistance against any judicial lawmaking power would have remained as an obstacle for acknowledging an explicit *stare decisis* binding force of their cassation plenum.²⁴⁸

3. Exposure

The level of exposure of the judgments is also an important attribute of a court of precedents. Because each precedent is meant to guide the decision criteria of all future disputes, the content of each judgment needs to be widely known.²⁴⁹ Therefore, in this model most of the court decisions will be published in a format widely accessible to the general public.²⁵⁰

In Chapter III we observed that, from a horizontal perspective, such a high priority of publication can be found at the third level of the common law jurisdictions under study. Both the US and the UK supreme courts publish almost every single judgment on their web pages.²⁵¹ Also, almost all of their decisions are included in the respective case law journals – e.g., the *United States Report* in the US and *The Law Reports* in England.²⁵² This high priority of exposure and publication is consistent with the model of a court of precedents, and the judicial lawmaking function that the US and UK supreme courts aim at performing.²⁵³ While in France and Italy, from the horizontal perspective, the

²⁴⁴ LIVINGSTON, MONATERI & PARISI 2015, p. 224.

²⁴⁵ BARSOTTI & VARANO 1998, p. 226-227 ('The judges, for their part, cannot regard previous decisions, even of the *Corte di Cassazione*, as a formal source of Law, since they are made 'subject only to the law' by Art. 101, para. 2 of the Constitution ...').

²⁴⁶ RORDORF 2015B, p. 540.

²⁴⁷ For example, COCCIA 2015, p. 29.

²⁴⁸ LIVINGSTON, MONATERI & PARISI 2015, p. 225.

²⁴⁹ See again, DEUMIER 2015, p. 98.

²⁵⁰ *supra* Chap. III.B.3 (b).

²⁵¹ For the US, www.supremecourt.gov/opinions/opinions.aspx. For England, www.supremecourt.uk/decided-cases/index.html.

²⁵² *supra* Chap. III.B.3 (ii).

²⁵³ *supra* Chap. III.B.3 (iii).

cassation chamber decisions do not enjoy a high priority of publication. Only a few and exceptionally important chamber judgments will be published in the general reports. Most of the cassation chamber decisions, however, will not be widely known, but will be accessible just for the parties in dispute or for internal databases for other judges.²⁵⁴

From a diagonal perspective, however, now our focus should be on the priority of publication not of the chambers but of the plenary session of France and Italy. As we shall see, the judgments of the French and Italian cassation plenum will have a high priority for publication too. The question here is whether the priority of publication of these cassation plenum judgments is high enough to be comparable to that of the US and UK supreme courts.

i. France

Chapter III described how the exposure through publication of judgments in the French Court of Cassation is, as a whole, selective. From all the *arrêts* that the cassation court issues, only 10 per cent of them are finally published.²⁵⁵ However, these statistics treat the *Cour de cassation* as a single unit, not separating the ordinary chambers from the plenary sessions.

This is important because of that 10 per cent of publication the plenum's judgments and the chambers' judgments are not evenly distributed.²⁵⁶ Let us remember that the French Court of Cassation has a clear plan for publishing *arrêts*.²⁵⁷ This plan recognises five levels of publication (R+I+B+P+D).²⁵⁸ In decreasing priority of publicity, they are:

1. (R) Annual report.
2. (I) Public internet website.
3. (B) General bulletin of the court.
4. (P) Civil or criminal chamber bulletin.
5. (D) Accessible only to the parties in the internal database (*jurinet*).

A lower priority of publication means that the *arrêt* will be published only in fewer and restricted formats. For example, if the *arrêt* has no publicity at all, this means that it will be available only in the internal database for the parties (D). If the court decides to grant some publicity, the lowest priority will be just P or P+B, that is to say, only in the specialised or general bulletins. A higher priority of publication means that the cassation judgment is given exposure in more and broader formats. The second highest priority, thus, is P+B+I, in which the *arrêt* will be included on the public website in addition to the bulletins. The highest

²⁵⁴ *supra* Chap. III.B.3 (ii).

²⁵⁵ See again, WEBER 2010A, p. 105-106; FERRAND 2017, p. 196-197.

²⁵⁶ On the graduation of the *arrêts* diffusion, DEUMIER 2015, p. 98-100.

²⁵⁷ See:

www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/p._b._11926.html.

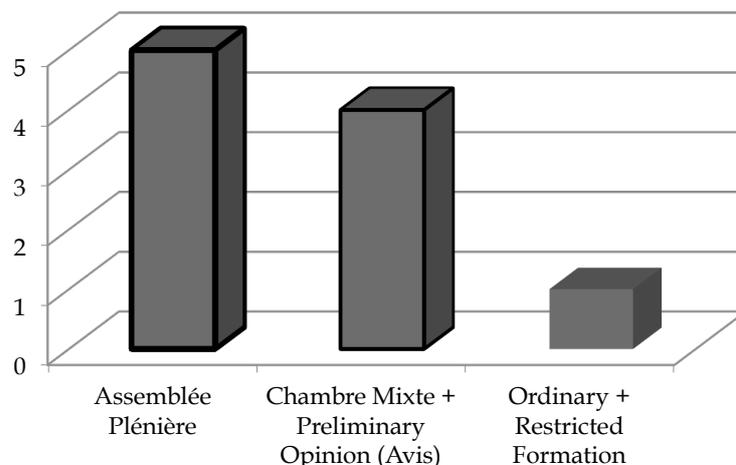
²⁵⁸ Explained in LACABARATS 2007, p. 889-890; JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 54.

priority of publication is P+B+I+R, which implies that, besides all the lower formats, the *arrêt* will be mentioned in the annual report.²⁵⁹

These four priorities of publication depend on the hierarchy of the judgment. According to the previously mentioned publication plan, the judgment's hierarchy primarily depends on the type of panel that decided the dispute, based on the complexity of the case.²⁶⁰ If the panel is of a higher rank, the judgment will receive a higher priority of publication. On the contrary, if the panel is of a lower rank, publication priority will be lower. According to these hierarchies, the highest priority for publication attaches to the *assemblée plénière* ('FP' for short). The second highest priority is when the panel comprises between nine and fifteen members 'FS' for short), that is to say, the two remaining types of plenary sessions: *chambre mixte* and the preliminary opinion (*avis*). And the lowest priority for publication attaches to the ordinary chambers or the 'restricted formation' of three judges (*formation restreinte*).²⁶¹

To demonstrate the higher priority of publicity of the plenary sessions' judgments in France, let us concentrate our attention on the two highest ranks of publication in 2014: the cases that are published in the annual report (R) and on the internet website (I) at the same time. Graph IV.1 visualises the results of these findings.

Graph IV.1 : Courts of precedents – Publication France, 2014



Source: Elaborated based on www.courdecassation.fr

From Chart IV.1 we can observe that only a few cases each year (ten) are mentioned in each annual report. Among these few cases, however, the majority are *assemblée plénière* decisions, which receive half of the annual

²⁵⁹ On the annual report, BORÉ & BORÉ 2015, p. 81-82.

²⁶⁰ LACABARATS 2007, p. 889-890.

²⁶¹ On the 'restricted formation' see again *supra* Chap. II.B.5 (ii); and Ferrand 2017, p. 200.

report's attention (five cases out of ten in 2014).²⁶² The judgments of the *chambre mixte* and the preliminary opinion are also a priority for publication, but represent a slightly smaller number than the *assemblée plénière* (three from the first civil chamber, none from the second chamber and one from the third chamber in the same year).²⁶³ But the publication of the judgments issued by the smaller panels, the ordinary and restricted formations, are minimal (in 2014 just one from the first civil chamber, none from the second or third).²⁶⁴ As a result, the plenary sessions judgments (*assemblée plénière* + *chambre mixte* + preliminary opinion) represent 90 per cent of the highest priority of publication in France. The general overview, therefore, is that the judgments of the three types of French plenary sessions get a considerably higher priority of publicity than the ordinary chambers.²⁶⁵

ii. Italy

Italy also has different priorities of publication. Most of the cassation judgments are not regularly published in a form that includes their entire content.²⁶⁶ The practice has been that, if a certain priority of publicity is given to a cassation judgment, the publication will not consist of its full text but only of the so-called '*massima*' or principle of law.²⁶⁷ As explained in Chapter III,²⁶⁸ these legal principles are an extract of the judgment of no more than five or ten lines.²⁶⁹ Italian principles of law, as edited by the *Ufficio Massimario*, omit the factual context of the case,²⁷⁰ publishing only certain general interpretation of a rule made by the court.²⁷¹

A priority of publicity higher than the precise principle of law is the publication of the judgment in its full text. The full text of a cassation judgment, and not only the extract of its legal principle, can be found in other places. Particularly, more or less specialised legal journals publish the full cassation judgments depending on their relevance for a certain legal field,²⁷² such as *Giurisprudenza Italiana*. Nowadays, however, the full text of some cassation judgments can be

²⁶² According to the code, the reader can check 'P+B+R+I' of 2014 in the *assemblée plénière* case list in:

www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/.

²⁶³ The reader can check 'FS-P+B+R+I' of 2014 in First, Second and Third Civil Chamber case list in:

(1) www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/#

(2) www.courdecassation.fr/jurisprudence_2/deuxieme_chambre_civile_570/

(3) www.courdecassation.fr/jurisprudence_2/troisieme_chambre_civile_572/.

²⁶⁴ The reader can check 'F-P+B+R+I' of 2014 in First, Second and Third Civil Chamber case list in the same links as in the previous footnote.

²⁶⁵ LACABARATS 2007, p. 890 ('*Il convient de souligner que les arrêts de l'Assemblée plénière et des Chambres mixtes, de même que les avis de la Cour, y sont systématiquement publiés.*').

²⁶⁶ TARUFFO & LA TORRE 1997, p. 148.

²⁶⁷ *supra* Chap. III.B.3 (ii).

²⁶⁸ *supra* Chap. III.B.3 (ii).

²⁶⁹ TARUFFO & LA TORRE 1997, p. 147.

²⁷⁰ LIVINGSTON, MONATERI & PARISI 2015, p. 224.

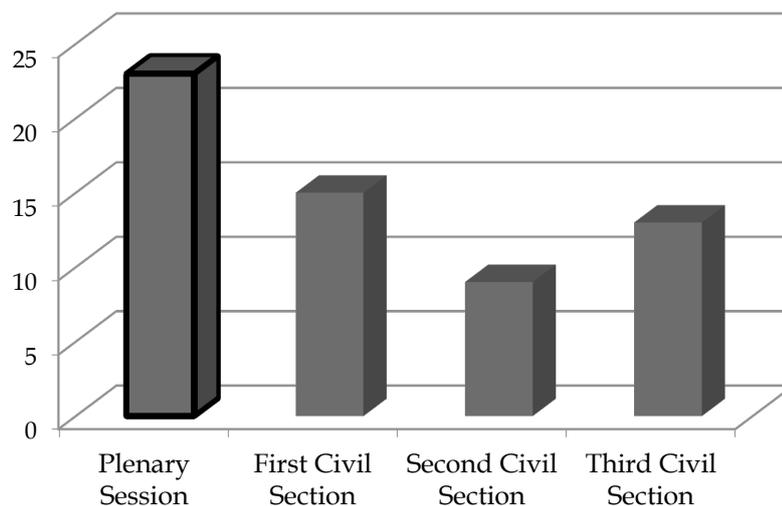
²⁷¹ TARUFFO & LA TORRE 1997, p. 147.

²⁷² TARUFFO & LA TORRE 1997, p. 148.

found directly on the Italian Court of Cassation webpage.²⁷³ The *Ufficio Massimario* is in charge of (*a cura dell*) the editorial process and choosing which judgments will be highlighted in their full text on the *Corte di Cassazione's* web page.

Therefore, to analyse the higher levels of publication in Italy, we could observe the number of judgments of each type of panel that are finally published in full text, and not only the extract of its legal principle (*massima*), on the official website.²⁷⁴ Also, even if the Italian Court of Cassation has seven sections for civil matters in a broad sense (including labour and taxes matters), for the sake of comparability with France, here the attention will be concentrated on the plenary session and the first three civil chambers *strictu sensu*. Graph IV.2 visualises the number of judgments published per each type of panel during 2014.²⁷⁵

Graph IV.2 : Courts of precedents – Publication Italy, 2014



Source: Elaborated based on www.cortedicassazione.it

As in France, in Italy we can observe that only a small number of the total judgments of the *Corte di Cassazione*, as a whole, are highlighted in their full text on the institutional web page. Among those few cases, however, the Italian plenary session receives a higher priority of publicity than the other civil

²⁷³ www.cortedicassazione.it

²⁷⁴ The following analysis covers the first year of implementation of the *Corte di cassazione's* webpage, from July to December of 2015.

²⁷⁵ Information based on the court's website (January 10 of 2016):

Plenum: www.cortedicassazione.it/corte-di-cassazione/it/sentenze.page

1st Sec.: www.cortedicassazione.it/corte-di-cassazione/it/prima_sezione.page

2nd Sec.: www.cortedicassazione.it/corte-di-cassazione/it/seconda_sezione.page

3rd Sec.: www.cortedicassazione.it/corte-di-cassazione/it/terza_sezione.page

chambers. In absolute numbers, more judgments of the cassation plenum are published on the website, reproducing the complete text of the decision (23) than of the other ordinary civil sections (15, 9, 13, respectively). Even if we can observe a clear tendency towards a higher exposure of the Italian plenum's decisions, however, that tendency is not as accentuated as it is in France.²⁷⁶

iii. Diagonal comparison

Changing from a horizontal to a diagonal comparison gives different results in this attribute. In Chapter III, from a horizontal perspective, we observed a clear asymmetry in the priorities of exposure through publication.²⁷⁷ In the French and Italian cassation *chambers*, the judgments have a low priority for publication;²⁷⁸ whereas the US and UK supreme courts' decisions have a much higher priority.²⁷⁹

But when switching from a horizontal to a diagonal perspective, this asymmetry becomes clearly attenuated. Like the US and UK supreme courts, the French and Italian cassation *plenums* also exhibit a higher priority of publicity. In the different systems and levels of publication that these courts of cassation have, more plenum decisions in their full text are published than chambers decisions.

This similarity of publication priorities confirms the diagonal symmetry found in the previous section on the effects of the judgments.²⁸⁰ As discussed, the exposure of judgments could be seen as a proxy of their precedential force.²⁸¹ Judgments of a court of precedents with a stronger force need to be widely known,²⁸² while for judgments of a court of error with purely particular effects the open publication of the decision is less relevant.²⁸³ For that reason the high precedential force of the US and the UK supreme courts' judgments is strongly tied to a higher priority for publication.²⁸⁴ In a similar manner, the higher priority for publication of the cassation plenums' decisions confirms the underlying stronger precedential force of their judgments according to their judicial lawmaking function.

4. Panel composition

From a horizontal perspective in Chapter III we noted that even if the cassation courts of France and Italy appear bigger in their total size, they are, in fact, smaller than the US and UK supreme courts from the point of view of the panel

²⁷⁶ *supra* Chap. IV.B.3 (i).
²⁷⁷ *supra* Chap. III.B.3 (iii).
²⁷⁸ *supra* Chap. III.B.3 (ii).
²⁷⁹ *supra* Chap. III.B.3 (i).
²⁸⁰ *supra* Chap. IV.C.2 (iii).
²⁸¹ See again, TARUFFO 1997, p. 451-452.
²⁸² *supra* Chap. III.B.2 (b).
²⁸³ *supra* Chap. III.B.2 (c).
²⁸⁴ *supra* Chap. III.B.3 (i).

composition that will actually hear each case.²⁸⁵ The French and Italian cassation courts are too big to work as a whole. Therefore, they are internally divided into several smaller and specialised teams of judges that work in parallel. This explains why the major proportion of the caseload in a court of cassation is handled by chamber panels of just five members or even three judges, all sharing a similar specialisation in the same field of law.²⁸⁶ US and UK supreme courts, on the other hand, are too small to be separated into many permanent and specialised teams. They usually work undivided as a whole court (US),²⁸⁷ or in changing, overlapping combinations of their members (UK),²⁸⁸ combining judges with specialisations in not just one but in several fields of law. The final result is that – from the point of view of the horizontal comparison – the composition of the panel that will hear each case in the US and UK supreme courts tends to be larger, and more interdisciplinary, than that in French and Italian cassation chambers.²⁸⁹ Not five or fewer with a similar specialisation, as in the chamber of the courts of cassation of France and Italy; but five or more in an interdisciplinary combination of judges with specialisations from different fields, such as the growing tendency towards seven in the UK Supreme Court²⁹⁰ or nine judges in its US counterpart.²⁹¹

The explanation for this horizontal asymmetry lies in the higher or lower complexities of the legal reasoning that judgments of general or particular effects respectively have. The US and UK supreme courts create precedents with general effects over future disputes.²⁹² According to a court of precedents model, the complexity of consequentialist reasoning makes necessary more judges of different specialisations forecasting the potential repercussions of the precedent in future cases and in other fields of law.²⁹³ The French and Italian chamber judgments, on the other hand, do not (or should not) have such general consequences in future cases nor in other legal fields. Instead, they are binding only for the current case and only for the current field of law (although in practice they have more or less weak influence for other judges).²⁹⁴ Therefore, in the court of error model of the French and Italian cassation chambers, the same consequentialist reasoning is not of a major importance. Fewer judges sharing a similar specialisation in the same field of law could be enough to decide each case.²⁹⁵ That is why the chambers of the cassation courts usually hear cases in panels not of seven or nine (as in the US and UK supreme courts), but in smaller ones of five or even three judges from the same specialised

²⁸⁵ *supra* Chap. III.B.6 (iii).

²⁸⁶ *supra* Chap. III.B.6 (ii).

²⁸⁷ BAUM 2010, p. 12; WHEELER 2004, 254.

²⁸⁸ BURROWS 2013, p. 305-309; DARBYSHIRE 2011, p. 372.

²⁸⁹ *supra* Chap. III.B.6 (ii).

²⁹⁰ PATERSON 2013, p. 72.

²⁹¹ WHEELER 2004, p. 254.

²⁹² *supra* Chap. III.B.2 (i).

²⁹³ *supra* Chap. III.B.6 (b).

²⁹⁴ *supra* Chap. III.B.2 (ii).

²⁹⁵ *supra* Chap. III.B.6 (c).

chamber.²⁹⁶ However, the plenary sessions of a court of cassation are different in this functional attribute as well.²⁹⁷ The cassation plenum convenes in a more numerous bench than the ordinary chamber of five, also with a more interdisciplinary composition of legal specialisations, as we shall see.

i. France

In France, the *assemblée plénière* is a large panel of nineteen members in total.²⁹⁸ This panel size results from the rule which defines its composition.²⁹⁹ The *assemblée plénière* comprises the President of the whole Court of Cassation or, in case of his absence, the most senior President of a Chamber (+1), plus three members of each of the six chambers (+18): the President of the Chamber, the most senior member (*doyen*) and one extra judge of the chamber (*conseiller*).³⁰⁰

The *chambre mixte* tends to be smaller than the *assemblée plénière*. It is usually composed not of nineteen but thirteen judges,³⁰¹ because its rule of composition is different as well.³⁰² The *chambre mixte* comprises the President of the whole *Cour de cassation* or, in case of his absence, the most senior President of a Chamber (+1), plus four members of at least three chambers (+12): the President of the Chamber, the older member of each (*doyen*) and two other judges (*conseillers*) of the respective chambers.³⁰³

²⁹⁶ *supra* Chap. III.B.6 (ii).

²⁹⁷ TARUFFO 1998, p. 113.

²⁹⁸ WEBER 2010A, p. 71. It should be noted that BORÉ & BORÉ, in their 2015 edition, had a miscalculation when they stated that the *assemblée plénière* number of judges is twenty-five, not nineteen ('... *l'assemblée plénière compte vingt-cinq magistrats du siège.*', p. 78 [emphasis added]). However, this calculation is not up to date. Twenty-five was the total number before the reform of 1997, which, besides the president and senior judge, required two extra judges per each chamber. After the reform of 1997 (*Loi n°97-395 du 23 avril 1997*), instead, not two but only one extra judge per chamber is required, which reduced the size of the *assemblée plénière* by six members, from 25 to 19. The same miscalculation in TARUFFO 1998, p. 114.

²⁹⁹ *Code de l'organisation judiciaire*, Art. L421-5: '*L'assemblée plénière est présidée par le premier président, ou, en cas d'empêchement de celui-ci, par le plus ancien des présidents de chambre.- Elle comprend, en outre, les présidents et les doyens des chambres ainsi qu'un conseiller de chaque chambre.*'

³⁰⁰ BORÉ & BORÉ 2015, p. 66; JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 22.

³⁰¹ WEBER 2010A, p. 70. In theory, the *chambre mixte* could have not just 13 but up to 25 judges (which could be even larger than the *assemblée plénière*) if not only three chambers but all six chambers were convened. However, that remains impractical. If all the chambers need to be reunited, it is more convenient to call the *assemblée plénière* of just 19 judges instead of a full *chambre mixte* of 25.

³⁰² *Code de l'organisation judiciaire*, Art. L421-4: '*Lorsqu'une chambre mixte doit être constituée, elle est composée de magistrats appartenant à trois chambres au moins de la cour.- La chambre mixte est présidée par le premier président, ou, en cas d'empêchement de celui-ci, par le plus ancien des présidents de chambre.- Elle comprend, en outre, les présidents et doyens des chambres qui la composent ainsi que deux conseillers de chacune de ces chambres.*'

³⁰³ BORE & BORE 2015, p. 64-65.

The bench for preliminary opinion (*avis*) is even smaller when compared to the two previous French plenary sessions.³⁰⁴ According to its rule of composition,³⁰⁵ it has nine members in total.³⁰⁶ It comprises the President of the whole *Court de cassation* (+1), the presidents of all the chambers (+6) and two more judges (*conseillers*) of the chambers that are specially involved, which is usually only one chamber (+2).³⁰⁷ Even if the three types of plenary sessions in France are not of the same size, all of them are larger than the ordinary chamber panels of five or just three.³⁰⁸

In France, finally, these three types of plenary sessions have in common a more interdisciplinary composition than the chambers. The panels at the chambers level are comprised of judges with a relatively similar specialisation because they come from the same specialised chamber.³⁰⁹ At the level of plenary sessions, instead, representatives of the different specialisations are included. As we observed, the *assemblée plénière*, the *chambre mixte* and the preliminary opinion (*avis*) include at least the judge president of each one of the six chambers. Therefore, every case that reaches a French plenary session will be covered by at least one specialist in the six fields of law in which the *Cour de cassation* is internally divided.

ii. Italy

The Italian plenary session (*sezioni unite*) is comprised of nine judges.³¹⁰ Compared to France, the plenary session in Italy is of the same size as the French plenary session that issues the preliminary opinions (*avis*), which has nine judges too.³¹¹ But even after such reduction, the Italian plenum is still larger than the ordinary chambers of five judges of the *Corte di Cassazione*.³¹²

The Italian plenum comprises the President of the Court plus eight other judges-*consiglieri*. Compared to the chambers, however, the Italian plenum exhibits a more interdisciplinary composition as regards the specialisation of its judges in different fields of law. In fact, the *sezioni unite* is comprised of judges from all the different civil chambers of the *Corte di Cassazione*.³¹³ Therefore, the Italian cassation plenum reunites specialist judges from all the fields of law

³⁰⁴ BORE & BORE 2015, p. 78 ('... cette composition est plus restreinte que celle d'une assemblée plénière ...').

³⁰⁵ Code de l'organisation judiciaire, Art. R441-3: 'La formation appelée à se prononcer sur une demande d'avis dans une matière autre que pénale comprend, outre le premier président, les présidents de chambre et deux conseillers désignés par chaque chambre spécialement concernée.'

³⁰⁶ BORE & BORE 2015, p. 78 ('... réunit habituellement neuf magistrats du siège ...').

³⁰⁷ BORÉ & BORÉ 2015, p. 78; WEBER 2010A, p. 74.

³⁰⁸ *supra* Chap. III.B.6 (ii).

³⁰⁹ *supra* Chap. III.B.6 (ii).

³¹⁰ Ordinarmento giudiziario, Art. 67: 'La corte suprema di cassazione ... [g]iudica in sezioni unite con il numero invariabile di nove votanti.'; COCCIA 2015, p. 26; COMOGLIO, FERRI & TARUFFO 2011, p. 725.

³¹¹ *supra* Chap. IV.B.4 (i); BORÉ & BORÉ 2015, p. 78.

³¹² *supra* Chap. III.B.6 (ii); AMOROSO 2012, p. 537.

³¹³ See again, Ordinarmento giudiziario, Art. 67: 'Il collegio a sezioni unite in materia civile è composto da magistrati appartenenti alle sezioni civili.'

which are considered ‘civil law’ in a broad sense (including labour and tax law). Unlike the French *assemblée plénière*, however, this Italian cassation plenum for civil matters does not include judges specialised in criminal law, which forms a separate plenum among the criminal chambers exclusively.³¹⁴

iii. *Diagonal comparison*

Once again, our conclusions change if we switch from a horizontal to a diagonal comparison. From the horizontal perspective, the panel composition of an ordinary chamber of the French and Italian cassation courts tends to be smaller than the panels of the US and UK supreme courts.³¹⁵ However, from the diagonal perspective, when comparing these supreme courts *vis-à-vis* the cassation plenum, we notice that plenary sessions of the French and Italian cassation courts do not have fewer members. Instead, the plenum in these cassation courts could be of exactly the same size: nine judges as currently in the Italian *sezioni unite* and the French preliminary opinion (*avis*) compared to the US Supreme Court.³¹⁶ They also could be of a similar size: as when compared to the twelve members of the exceptional full bench in the UK Supreme Court and the thirteen members of the French *chambre mixte*; or even larger, as the nineteen members of the *assemblée plénière*. Therefore, from a diagonal perspective, both pairs of jurisdictions have a close symmetry that at the very top of their court system – *i.e.*, the supreme court in the US and England (UK) and the cassation plenum in France and Italy – the most important cases will be heard by a panel that tends to be larger than the one of the lower court, usually of seven or more judges.

The US and UK supreme courts, on the one hand, and the plenary session of France and Italy, on the other, also share the interdisciplinary composition of panels. The supreme courts of the US and the UK, as we observed in Chapter III, combine judges with specialisations in different fields of law.³¹⁷ From a horizontal perspective, the cassation chambers appear less interdisciplinary because they are comprised of judges of the same chamber, which normally share a specialisation in the same legal field of the respective chamber.³¹⁸ But when we switch from a horizontal to a diagonal perspective, a similar interdisciplinary composition can be observed, as well. Unlike the panel in an ordinary chamber, the plenary sessions of the French and Italian cassation courts comprise judges from the different specialised chambers. Therefore, these cassation plenums reunite judges with specialisations in different fields of law, in a way that resembles the internal diversity of the US and UK supreme courts.

³¹⁴ See again, *Ordinamento giudiziario*, Art. 67: ‘[I]n materia penale [le sezioni unite] e’ composto da magistrati appartenenti alle sezioni penali.’

³¹⁵ *supra* Chap. III.B.6 (iii).

³¹⁶ *supra* Chap. III.B.6 (i); GREENHOUSE 2012, p. 25.

³¹⁷ *supra* Chap. III.B.6 (i).

³¹⁸ *supra* Chap. III.B.6 (ii).

This diagonal similarity in the panel composition between US and UK supreme courts and French and Italian cassation plenums can be explained by the shared judicial lawmaking function. The chamber of a court of cassation can be smaller because the lack of general effects in its judgments makes it unnecessary to have more judges working at the same time on the task of forecasting consequences.³¹⁹ But, as we saw in the previous section, the cassation plenum judgments do have those general effects that are usually lacking at the level of the cassation chambers.³²⁰ Therefore, at the plenum level of France and Italy it is necessary to have more judges to perform the consequentialist reasoning that their judgments of general effects require.³²¹

Moreover, the consequences beyond the current case in a court of precedents require combining judges with different legal specialisations in order to forecast how the current precedent may have an impact in different fields of law.³²² For that reason, in a model of a court of precedents, a more interdisciplinary composition of its panel is necessary. That is why the US and UK supreme courts and the cassation plenums of France and Italy, as well, need to hear each case by a panel combining judges of different legal specialisations. In both pairs of jurisdictions, but at different court levels, they are dealing with complex issues of consequentialist reasoning that require judges from several legal fields in order to be resolved properly.

One difference remains to be noted in this attribute, however, even from a diagonal perspective. In France and Italy, the composition of their courts of precedents' panel – *i.e.*, cassation plenary sessions – tends to be even bigger than the panel composition in the US and UK supreme courts. For example, the French *assemblée plénière* and the *chambre mixte* are comprised of nineteen and thirteen judges, respectively, while in the US Supreme Court there are only nine. The Italian *sezioni unite* is always comprised of nine judges, while the panel of the UK Supreme Court will be comprised of nine judges only exceptionally. Instead, the UK Supreme Court panel can be smaller (in proportion to the Italian plenum), deciding cases in panels of seven or even five judges.

5. Total size

Comparing the total size of a court of last resort is something different from comparing the composition of its panels. In Chapter III we observed that the panel of judges that hears each case in the US and UK supreme courts tends to be larger and more interdisciplinary – usually there are seven or nine judges from different legal fields³²³ – than the panels in the cassation chambers, where

³¹⁹ *supra* Chap. III.B.6 (c,iii).

³²⁰ *supra* Chap. IV.C.2 (i,ii).

³²¹ NORKUS 2015, p. 6.

³²² *supra* Chap. III.B.6 (b).

³²³ *supra* Chap. III.B.6 (i).

there are five or three judges from the same field.³²⁴ Instead, when compared as to the total size of the court of last resort, adding all the judges of each panel of every specialisation, the US and UK supreme courts are remarkably smaller than the cassation courts of France and Italy.³²⁵

However, let us remember that the important aspect in the comparison of the total sizes is not only the current absolute number, but also the evolution of that total size. In the model of a court of error, like the French and Italian cassation chambers, the total size of the court needs to grow over time, in proportion to the growth of the potential mistakes that need to be monitored in their judicial system as a whole;³²⁶ whereas the model of a court of precedents does not exhibit a similar proportional growth rate as the courts of error.³²⁷ The courts of precedents usually do not add more judges in order to cope with the increasing caseload. Instead, they make their preliminary screening more restrictive.³²⁸ As a result, the total size of the courts of precedents, as in the US and the UK supreme courts, has remained constant over recent decades.³²⁹

If we consider the cassation plenary session as a separate court,³³⁰ a basic assumption to make the diagonal comparison in this study,³³¹ the composition of the plenum panel is the same as the total size of the plenum court. As in the US Supreme Court, the panel of judges that hears each case in the cassation plenums is the full bench. And, therefore, the total size of the cassation court plenum will be the same full bench of the plenum too. The aspect on which we need to focus our attention when comparing the attribute of total sizes of the cassation plenums (as something different from comparing the panel composition) is not only the absolute number but the *evolution* of that size. Does the cassation plenum's total size exhibit a growth rate as the cassation chambers do? The answer is no.

i. France

The current absolute number of the French plenary session was explained in the previous section: *assemblée plénière* (19), *chambre mixte* (13) and preliminary opinion (9).³³² As regards the evolution of that size, the French plenary sessions have not grown in proportion to the cassation chambers. The reality is the opposite, as we shall see, they have been reduced over time.

One decade after the French Revolution,³³³ the French court of last resort established a meeting of the literally full court, named *chambres réunies*.³³⁴ The

³²⁴ *supra* Chap. III.B.6 (ii).

³²⁵ *supra* Chap. III.B.7 (iii).

³²⁶ *supra* Chap. III.B.7 (c).

³²⁷ *supra* Chap. III.B.7 (iii).

³²⁸ *supra* Chap. III.B.7 (c).

³²⁹ *supra* Chap. III.B.7 (i).

³³⁰ On the functional definition of 'court', *supra* Chap. I.E.1 (i).

³³¹ See the initial discussion in this Chapter, *supra* Chap. IV.B. (*What is a plenary session?*).

³³² *supra* Chap. IV.C.4 (i).

³³³ WEBER 2010A, p. 71

³³⁴ HERZOG & WESER 1967, p. 163.

minimum quorum was thirty-five judges, although most of the judges tended to be present.³³⁵ Originally, the *chambres réunies* had, among others, the role of avoiding inconsistencies in the decision criteria of the chambers.³³⁶ As a result of the reforms of the 1940s and 1960s (which will be analysed in the next paragraph) the *chambres réunies* was renamed *assemblée générales* and assigned to meet twice a year on ceremonial occasions, such as the first and last session of the year,³³⁷ and for the appointment of new cassation judges, among others.³³⁸ In the 1960s, for example, according to the total size that the *Cour de cassation* had during those years, the *assemblée générales* – the successor to the former *chambres réunies* – was a ‘rather imposing spectacle’ of seventy-odd judges meeting in the same courtroom.³³⁹

Over time, the French Court of Cassation became numerous to the extent that the original complete full bench (*chambres réunies*) was impractical, and a more selective plenary session was needed.³⁴⁰ In 1947, accordingly, a plenary session smaller than the *chambres réunies*, named *assemblée plénière civile* was created.³⁴¹ This new type of plenary session of that time was comprised only of judges of the civil chambers (unless the dispute included some criminal aspect), with a minimum quorum of less than half of the *chambres réunies*. The *assemblée plénière civile* required not thirty-five but fifteen judges only.³⁴² The reform of 1967 included criminal matters in the jurisdiction of the *assemblée plénière civile* and, therefore, the adjective ‘*civile*’ was removed from its name. From then on, the new ‘*assemblée plénière*’ absorbed the jurisdictional tasks of the *chambres réunies* – and the meetings for the remaining tasks of the *chambres réunies* were renamed *assemblée générales*.³⁴³ But because the renewed *assemblée plénière* had to include members of both civil and criminal chambers its size increased with the reforms that instituted more chambers.³⁴⁴ As a result, until 1996 the *assemblée plénière* was comprised of twenty-five judges. Its growth to twenty-five judges, however, was also seen as an impractical size. Therefore, the reform of 1997 reduced the size of the *assemblée plénière* from twenty-five to nineteen.³⁴⁵

In 1967, in the same reform that expanded the jurisdiction of the *assemblée plénière* to both civil and criminal matters, an even smaller plenary session was instituted in France: the *chambre mixte*.³⁴⁶ Its minimum composition is not

³³⁵ HERZOG & WESER 1967, p. 163.

³³⁶ HERZOG & WESER 1967, p. 163.

³³⁷ HERZOG & WESER 1967, p. 163-164.

³³⁸ BORE & BORE 2015, p. 63.

³³⁹ HERZOG & WESER 1967, p. 163.

³⁴⁰ WEBER 2010A, p. 71; BORE & BORE 2015, p. 18.

³⁴¹ BORÉ & BORÉ 2015, p. 17.

³⁴² HERZOG & WESER 1967, p. 162.

³⁴³ BORÉ & BORÉ 2015, p. 18.

³⁴⁴ For example, the reform of 1967 included three more chambers, BORÉ & BORÉ 2015, p. 17.

³⁴⁵ Before the reform of 1997, two judges-*conseillères* were required per each chamber. In 1997, that requirement was reduced from two to just one (*Loi n°97-395 du 23 avril 1997*). Because the Court of Cassation had six chambers, since that reform the *assemblée plénière* will have six fewer members.

³⁴⁶ BORÉ & BORÉ 2015, p. 18, 64.

nineteen, as with the *assemblée plénière*, but thirteen instead.³⁴⁷ The smaller plenary session of all was created even later. The bench for preliminary opinions (*avis*) was instituted in 1991,³⁴⁸ with a composition of nine judges only.³⁴⁹ In sum, it can be observed how the size of the plenary sessions available in France has been reduced over time. From the thirty-five of the original *chambre réunies*, to the twenty-five (1967) then nineteen (1996) of the *assemblée plénière*; the thirteen of the *chambre mixte* (1967); and, finally, the nine judges of the preliminary opinion (1991).

ii. Italy

The Italian cassation plenum does not grow in size together with the growth of the chambers either. In fact, the tendency is the opposite too. Beginning in 1941, the *sezioni unite* was comprised of fifteen judges.³⁵⁰ Therefore, the original Italian plenum was of a size in between the French *assemblée plénière* and the *chambre mixte*.³⁵¹ In the reform of 1977,³⁵² however, the size of the Italian plenum was reduced by six judges, from fifteen to the current nine.³⁵³ As a result, the tendency of the Italian cassation plenum is towards reducing its total size.

Probably similar reasons as in France motivated this reduction in Italy. To frequently separate fifteen judges from their daily tasks could be impractical in the context of an extremely overloaded court, such as the Italian *Corte di Cassazione*, which needs all its possible workforce dealing with the regular cassation petitions. Up to today, the *sezioni unite* is still composed of nine judges. Therefore, after its reduction in the 1970s, the total size of the *sezioni unite* has not grown in more than three decades.

iii. Diagonal comparison

From a horizontal perspective, we observed in Chapter III that the chambers in a cassation court of France and Italy have a pattern of a growth in total size over time.³⁵⁴ The supreme courts of the US and England, on the other hand, do not have that growth tendency of the total number of judges; rather, they have

³⁴⁷ WEBER 2010A, p. 70.

³⁴⁸ CADJET 2011A, p. 189-190; BORÉ & BORÉ 2015, p. 75; WEBER 2010A, p. 73; FERRAND 2017, p. 192.

³⁴⁹ BORÉ & BORÉ 2015, p. 78.

³⁵⁰ *Ordinamento giudiziario*, Art. 67 (before the reform of 1977): ‘*La corte suprema di cassazione ... [g]iudica a sezioni unite col numero invariabile di quindici votanti.*’

³⁵¹ *supra* Chap. IV.C.4 (i).

³⁵² The reform comes from the law of 8 August 1977, n° 532, *Provvedimenti urgenti in materia processuale e di ordinamento giudiziario*. Art. 3.

³⁵³ AMOROSO 2012, p. 539. However, AMOROSO has an *errata*: the previous number of judges of the plenary session was not five (*cinque*), as he mentions, but fifteen (*quindici*). See again the original version of the *Ordinamento giudiziario*, Art. 67. Royal Decree of 30 January 1941. n° 12.

³⁵⁴ *supra* Chap. III.B.7 (ii).

remained constant in the last two decades.³⁵⁵ In this sense the evolution of the total size, between these horizontal courts of last resort, marks a point of asymmetry when we compare third level against third level.³⁵⁶

From a diagonal perspective, however, that asymmetry disappears or is even contradicted. Cassation plenums do not follow the growth pattern of the cassation chambers. The cassation plenary sessions in France and Italy have not grown in total size in the recent decades, just as the US and UK supreme courts did not grow either.

The explanation as to why these cassation plenums did not grow could be the same as that for the US and UK supreme courts: the presence of a restrictive preliminary screening. The supreme courts of the US and the UK do not need to increase their number of judges over time because they can use their respective preliminary screening (writ of certiorari or permission to appeal, respectively) as a tool to keep their caseload fairly constant over time.³⁵⁷ If due to the restrictive preliminary screening the caseload will not grow, then the total size of their supreme courts does not need to grow either. As we will observe in the following sections, the cassation plenums of France and Italy do have a preliminary screening of a similar restrictive nature as those of the US and UK supreme courts.³⁵⁸ Therefore, the French and Italian plenary sessions do not need to grow in their total size either because they also have the tool to keep their caseload relatively constant.

Even if the French and Italian plenums share with the US and the UK supreme courts the lack of a tendency to grow, from a diagonal perspective they still show a difference. The total size of these cassation plenums was actually reduced in the second half of the twentieth century: from 35 to 19 in France (1967) and from 15 to 9 in Italy (1977). In this sense, the cassation plenums not only do not follow the growth pattern of the cassation chambers in their total size, but they go in the opposite direction of reducing it. From a diagonal perspective, however, in the supreme courts of the US and the UK we cannot observe a similar tendency of reduction in their total size,³⁵⁹ unlike the cassation plenums under study.

However, this could be explained by the fact that the French and Italian cassation plenums were originally larger than the US and UK supreme courts. We have seen throughout this chapter that the cassation plenums of France and Italy share the model of a court of precedents with the US and UK supreme courts. Therefore, the thesis of a diagonal symmetry of functions could suggest

³⁵⁵ *supra* Chap. III.B.7 (i).

³⁵⁶ *supra* Chap. III.B.7 (iii).

³⁵⁷ *supra* Chap. III.B.5 (i).

³⁵⁸ *infra* Chap. IV.C.8 (iii).

³⁵⁹ Exceptionally, in the US the total size of the Supreme Court was reduced only for a period of six years during the second half of the nineteenth century. In 1863 it was increased from 9 to 10 judges. Later on, in 1866, the US Supreme Court was reduced from 10 to 7. In 1869, however, the Supreme Court recovered its previous size of nine (HALL, ELY & GROSSMAN 2005, p. 544-548), which remains its size today, HALL 2008, p. 129.

that these two pairs of courts are moving towards the same ideal size and composition according to the court of precedents model, but approaching that ideal destination from opposite starting points. Therefore, the tendency of total size reduction at the ‘hidden’ fourth level of France and Italy (a reduction that is absent at the third level of the US and UK supreme courts) can be seen as an approximation, from above, of the cassation plenums to that ideal panel size in a court of precedents model. The reduction in the total size of the Italian cassation plenum actually matched that court of precedents size of the US Supreme Court (from fifteen to nine). Compared to the Italian plenum, the *assemblée plénière* has not been reduced to the same extent (from 35 to 19), and this larger plenum in France still is much bigger than the courts of precedents at the third level in the US and England (UK). But the situation is not that different as regards the other two types of French plenums. The *chamber mixte* has thirteen judges, just one more than the UK Supreme Court’s exceptional full bench. And the French plenum for preliminary opinions (*avis*) has nine judges, exactly like the US Supreme Court and the Italian *sezioni unite*.

In sum, the total size of these diagonal courts of precedents tends to remain constant over time when they get closer to this ideal of approximately nine judges of interdisciplinary specialisations. The US and UK supreme courts stopped adding more judges because they had come close enough to that ideal total size; whereas the cassation plenums reduced their number of judges in order to get closer to the same ideal size.

6. Opinion style

Another important difference between the models of courts is the style of the judgment, its length and the level of detail addressed in the judges’ opinion. A court of precedents is characterised by more detailed reasoning.³⁶⁰ In this model, the judgment will have general effects, thus the court of precedents needs to write down carefully the details of the previous case law and the current factual circumstances that led to the decision.³⁶¹ Future litigants need to know such details in order to understand to which type of disputes that precedent will apply and to which others it will not.³⁶² In the model of a court of error, instead, judgments are typically brief, and succinct.³⁶³ Due to the big caseload that they have to handle,³⁶⁴ courts of error are restricted by time from preparing longer judgments. Due the absence of binding force in a court of error,³⁶⁵ detailed judgments are less necessary for future litigants. If judgments will not have authoritative force for future disputes, the lack of details in the legal reasoning will not affect much more than the current case.

³⁶⁰ *supra* Chap. III.B.8. (b).

³⁶¹ MACCORMICK & SUMMERS 1997B, p. 536-537; GOLDSTEIN 1998, p. 329.

³⁶² MITIDIERO 2015, p. 215.

³⁶³ *supra* Chap. III.B.8 (c); see again, GILLET 2012, p. 173-174; ELLIOTT, JEANPIERRE & VERNON 2006, p. 159.

³⁶⁴ *supra* Chap. III.B.4 (c).

³⁶⁵ *supra* Chap. III.B.2 (c).

In Chapter III we observed that expression of dissenting opinions is also a useful aspect of a court of precedents.³⁶⁶ The scope of review of this model focuses on case law problems, where reasonable interpretation theories collide.³⁶⁷ In that context, to make the different interpretative theories explicit in the judgment, by allowing each judge to publish his or her dissenting opinion, is a useful aspect in understanding how the interpretation debate, the dialectic tension, was settled by the court.³⁶⁸ Therefore, not only the consequentialist reasoning but also the dissenting opinions tend to make courts of precedents judgments longer. In contrast, in a court of error the scope of review focuses on more or less routine cases, where there is no relevant debate, but a clear-cut mistake.³⁶⁹ The relatively low complexity of the court of error cases implies that usually there is no serious dialectic tension between relevant interpretation theories which may deserve to be disclosed in detail. In that other context, dissenting opinions are not necessary because the correction of a simple mistake is probably clear to an extent that no relevant second interpretations may arise.³⁷⁰ Therefore, the lack of consequentialist reasoning and the absence of dissenting opinions allow the court of error to have shorter judgments,³⁷¹ in order to save time for monitoring a larger number of cases.

According to the consequentialist reasoning of a court of precedents, Chapter III demonstrated that the UK Supreme Court writes individualistic and long judgments, too long for some English scholars.³⁷² The US Supreme Court is also characterised by detailed judgments where not only the majority vote but also the dissenting opinions are written down.³⁷³ Therefore, a judgment in these supreme courts can easily exceed twenty pages.³⁷⁴ On the opposite side of the spectrum, from a horizontal perspective, the chambers of the French *Cour de cassation* will issue judgments of no more than four or five paragraphs that fit onto one or maybe two pages. The legal reasoning expressed in the judgments (*arrêts*) of the chambers in France will be little more than a transcription of the pertinent article of the respective code in two or three lines.³⁷⁵ In Italy, an average judgment issued by the cassation chambers will not be much longer, fitting on between three and six pages. However, only an extract of five to ten lines from its principle of law (*massima*) will be finally known by the general public.³⁷⁶ Unlike the opinion style of the US and UK supreme courts, cassation chamber judgments both in France and in Italy omit the individual (and potentially dissenting) opinions of each judge and are written in just one

³⁶⁶ *supra* Chap. III.B.8 (b).

³⁶⁷ *supra* Chap. III.B.1 (b).

³⁶⁸ *supra* Chap. III.B.8 (b).

³⁶⁹ *supra* Chap. III.B.3 (c).

³⁷⁰ SUNSTEIN *et al.* 2006, p. 59-61.

³⁷¹ *supra* Chap. III.B.8 (c).

³⁷² ANDREWS 2017, p. 42-43.

³⁷³ REHNQUIST 2002, p. 265.

³⁷⁴ *supra* Chap. III.B.8 (i).

³⁷⁵ TROPER, GRZEGORCZYK & GARDIES 1991, p. 172.

³⁷⁶ *supra* Chap. III.B.8 (ii).

voice.³⁷⁷ According to the court of error model, therefore, the style of the judgment of the French and Italian cassation chambers can be succinct due to the routine of their manifest error-monitoring function.³⁷⁸ However, the plenary sessions of these courts of cassation are different as regards their style of judgment.

i. France

In France, the judgments of the *assemblée plénière* will be of similar length or slightly longer than those of the ordinary chamber, but on just one or two more pages.³⁷⁹ The *chambre mixte* judgments,³⁸⁰ the same as the preliminary opinions (*avis*),³⁸¹ will be also of similar length or longer, on one page or two. Therefore, there is a slight variation if we look at the judgments alone. French scholars acknowledge that the most important judgments – such as the ones that clarify new legislation or develop the case law, typically at these plenary sessions – are concise to an extent that requires a ‘supplementary’ motivation.³⁸²

In France, the relevant difference in the opinion style is not in the judgment itself, but in the additions to it. Unlike the ordinary chambers, the judgments of the *assemblée plénière*,³⁸³ *chambre mixte*³⁸⁴ and the preliminary opinions (*avis*)³⁸⁵ are published together with other official documents meant to supplement their understanding.³⁸⁶ Normally, the preparatory report that one of the judges makes for the French Court of Cassation (*rapport du conseiller rapporteur*), an official communication of the Court clarifying the meaning and extension of the legal principle that applies (*communiqué*), and the allegations that the public attorneys made (*conclusions de l’avocat général*) are jealously kept secret as regards the judgments of the ordinary chambers.³⁸⁷ They are made public, however, when the case has been dealt with by any of the plenary sessions.³⁸⁸ Therefore, in France the judgments of the cassation plenum remain short. But

³⁷⁷ TROPER, GRZEGORCZYK & GARDIES 1991, p. 199.

³⁷⁸ *supra* Chap. III.B.8 (iii).

³⁷⁹ e.g., Arrêt n° 629 du 22 juillet 2016 (16-80.133), *Cour de cassation, Assemblée plénière*.

³⁸⁰ e.g., Arrêt n° 265 du 13 mars 2009 (07-17.670), *Cour de cassation, Chambre mixte*.

³⁸¹ e.g., Avis n° 16002 du 29 février 2016 (15-70.005), *Cour de cassation*.

³⁸² DEUMIER 2015, p. 100.

³⁸³ e.g., the same *assemblée plénière* judgment (arrêt n° 629) includes the report of one of the judges (*rapport*), available online at:

www.courdecassation.fr/IMG//20160722_AP1680133_Rapport_Durin-Karsenty.pdf.

³⁸⁴ e.g., the same *chambre mixte* judgment (arrêt n° 265) includes an official communication of the court (*Communiqué*), available online at:

www.courdecassation.fr/jurisprudence_2/chambres_mixtes_2740/arret_n_12316.html.

³⁸⁵ e.g., the same preliminary opinion (avis n° 16002) includes an explanatory note (*note explicative*), available online at:

www.courdecassation.fr/IMG//20160229_Note_Avis_format.pdf.

³⁸⁶ DEUMIER 2015, p. 99; CANIVET 2006, p. 11; WEBER 2010A, p. 74.

³⁸⁷ LASSER 2004, p. 48 (‘The *conclusions* and *rapports* are extremely rarely published ... gaining access to unpublished *conclusions* and *rapports* is exceptionally difficult ...’).

³⁸⁸ TROPER & GRZEGORCZYK 1997, p. 108 (‘Some times, for the very important decisions, an opinion of a reporting judge (*commissaire du gouvernement*) is published, together with the decision itself.’).

French litigants and scholars will rely more on these other supplementary documents, which are intentionally attached to the plenum's brief judgment, in order to interpret the applicability of the precedents that have been settled.³⁸⁹ The more detailed legal reasoning in these types of cases, more detailed reasoning that a proper court of precedents requires, will be found partially in the judgment itself, but mainly in the additional reports and communications that the cassation court includes in the publication of the plenum *arrêts*.

Furthermore, in the additional publication of these reports and communications we can observe a rudimentary form of dissenting opinion in France. It could be the case that the plenary session finally adopts a decision different than the one suggested by the reporting judge. If that happens, the publications will include the (majority) decision of the plenum and the (dissenting) report of the reporting judge. It could also happen that the plenum adopts a decision different than the allegations of the public attorney. At first sight, it could be argued that the public attorneys are not proper judges and, therefore, their disagreement will not count as a dissenting opinion of the plenum judges. However, we need to take into consideration that the public attorneys (*avocat general*) have had a role which, in reality, is a middle point between (internal) judge and (external) lawyer in France. Until 1998, the French public attorney participated in the secret deliberations of the cassation judges and had access to the drafts of judgments, after the parties' lawyers' pleadings.³⁹⁰ Traditionally, therefore, the French public attorneys can be better described as 'consultant' judges, because they had a right to a voice but not to a vote in the internal deliberations of the *Cour de cassation*. This situation ended in 1998 because of the sanction of the European Court of Human Rights against France.³⁹¹ Still, given this semi-judicial nature that the French public attorney traditionally had, the publication of their (dissenting) allegations can also be seen as another rudimentary form of dissenting opinion in France.

Finally, academia could be a safe space for dissent for both scholars and the judges themselves. On the side of scholars – GOUTAL argues – '[l]eading academics do in France what judges do in England'.³⁹² According to this author, the notes of comments to cassation *arrêts* written by French scholars resemble – in their pattern of reasoning and in the influence over case law development – English judgments.³⁹³ Therefore, a particularly critical note of comment made by a leading French scholar could have a similar impact as a dissenting opinion of an English judge.

³⁸⁹ TROPER & GRZEGORCZYK 1997, p. 108 ('Since the decision itself [of the Court of Cassation] is brief, this opinion [of the reporting judge] is very helpful to interpret the case.').

³⁹⁰ BORÉ & BORÉ 2015, p. 39-40, 549-550.

³⁹¹ ECHR *Slimane-Kaïd c. France*, req. n° 23043-93. In that case, following the *Delcourt* doctrine, the ECHR stated that the participation of the public attorney in the deliberation was an infraction of the right to an impartial and independent judge. Accordingly, the participation of the public attorney in the deliberation, and the access to the draft judgment, was abolished. BORÉ & BORÉ 2015, p. 39-40.

³⁹² GOUTAL 1976, p. 64.

³⁹³ GOUTAL 1976, p. 64.

On the side of the judges, academic environments could be used for dissenting too. Despite the rule of secrecy of deliberation proper of cassation courts, in many countries judges ‘evade’ this rule by publishing academic articles in legal journals.³⁹⁴ To avoid an open violation of the secrecy of deliberation, however, judges will be cautious about expressing their points of view not as regards the particular case but as regards addressing the same legal topic in an abstract manner. In this aspect, according to GOUTAL, France is not an exception.³⁹⁵ Even if French judges are not supposed to express individual opinions, they indeed express their (dissenting) legal opinions in academic articles, where they can express their points of view in a freer manner, without the constraints of the strict logical syllogisms proper of cassation judgments.³⁹⁶

ii. *Italy*

In Italy, an ordinary chamber judgment fits on four to eight pages,³⁹⁷ but a normal *sezioni unite* judgment will usually need more than eighteen pages.³⁹⁸ The great complexity of the types of cases that the plenary session hears seems to require the writing down of more detailed reasoning. Furthermore, the Italian Code of Civil Procedure requires that in each case of *particolare importanza* – remembering that here ‘*particolare*’ does not mean private or specific importance, but outstanding or exceptional relevance³⁹⁹ – the *Corte di Cassazione* must enunciate in its judgment the ‘legal principle’ (*principio di diritto*) that it is applying.⁴⁰⁰ To enunciate this legal principle in the plenum’s judgment does not mean just to mention the abstract norm, but also its specific interpretation for the case.⁴⁰¹ As we have seen, the main hypothesis upon which to convene the Italian plenary session is precisely that the case raises conflicting interpretations or principles of law that involve such kind of *particolare*

³⁹⁴ MERRYMAN & PÉREZ-PERDOMO 2007, p. 122-123. (‘This rule [of no separated dissenting opinions] is evaded in some countries by the occasional practice of a disgruntled judge writing an article for a publication in a legal periodical. Even if the article is put in a scientific or “scholarly” form, everyone – lawyers and fellow judges – knows that the article is a way of informing the legal community of the author’s dissenting views.’).

³⁹⁵ GOUTAL 1976, p. 64.

³⁹⁶ GOUTAL 1976, p. 64.

³⁹⁷ *supra* Chap. III.B.8 (ii).

³⁹⁸ e.g., Cass. SU Sentenza 18569 del 22/09/2016. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/18569_09_2016.pdf.

³⁹⁹ See discussion in *infra* Chap. IV.C.8 (ii).

⁴⁰⁰ *Código di Procedura Civile*, Art. 360: ‘La Corte enuncia il principio di diritto quando decide il ricorso proposto anorma dell’articolo 360, primo comma, n. 3), e in ogni altro caso in cui, decidendo su altri motivi del ricorso, risolve una questione di diritto di particolare importanza.’ Translating ‘*principio di diritto*’ as ‘legal principle’, according to DE FRANCHIS 1996, p. 1117.

⁴⁰¹ COMOGLIO, FERRI & TARUFFO 2011, p. 728 (‘Il principio di diritto non è dunque una formulazione astratta della regola di diritto, ma un’interpretazione rapportata alla particolare fattispecie che dev’essere decisa.’). Here *particolare fattispecie* means specific to the facts of the case.

importanza (exceptional relevance).⁴⁰² For that reason this article of the Code normally applies to the *sezioni unite*,⁴⁰³ and, therefore, the Italian plenum has to detail the legal principle that it is applying in its judgments. Unlike the ordinary chambers, which are allowed to issue shorter judgments omitting such a legal principle, the *sezioni unite* will systematically be obliged to issue longer judgments that explain its reasoning on the ‘legal principle’ (*principio di diritto*) with more detail.

In Italy, dissenting opinions are not allowed either.⁴⁰⁴ Therefore, we should not expect to find dissenting opinions of judges, at least in an explicit form. However, in Italy we can also find rudimentary versions of external dissenting opinions as in France. For example, LA TORRE, PATTARO & TARUFFO report that in the publication of the Italian Court of Cassation’s decisions:

Rather frequently, the judgment is published with a *note of comment*: sometimes the note is a synthetic summary of precedents and academic opinions concerning the legal issue; sometimes the note is a broad academic essay discussing the issue, *the significant precedents*, the relevant legal dogmatics and the arguments supporting or contrasting the solution that was adopted in the judgment.⁴⁰⁵

As in France, therefore, the equivalent of the dissenting opinion in Italy will not be inside the judgment itself but in the additions to it – an addition locally named ‘note of comment’. Because in Italy dissenting opinions as such are not allowed, another possibility to make explicit the contrary interpretations at stake is by deciding to add the opinion of external academic authors. Therefore, the inclusion of a note of comment that contains the opinions of legal scholars with a contrasting argument can be seen as a rudimentary form of dissenting opinion, although not authored by the judges but still added by them to the publication of the court judgment as a conscious decision. Additionally, these notes of comments include the more or less detailed discussion on the pertinent precedents. Besides the dissenting opinions, the judgments of a court of precedents become of a longer extension because of the detailed reasoning on the previous judgments that could be pertinent to the current case. Again, that additional extension due to the discussion on precedents can be found in Italy not in the plenum judgment itself, but in these notes of comments which are added to the publication of the plenum judgment.

As we discussed, the reason why a model of a court of precedents needs to make dissenting opinions explicit is that it is useful for future cases to reveal the

⁴⁰² LA TORRE, PATTARO & TARUFFO 1991, p. 252 (‘It is possible that a “full” panel of the Court [of Cassation] (the so-called Sezioni Unite) will be entrusted with the decision of the case. This happens either when the Chief Chairman of the court believes that an especially difficult and complex interpretative issue must be decided, or when an interpretative issue has been decided in different and conflicting ways by the ordinary chambers of the court.’).

⁴⁰³ AMOROSO 2012, p. 544 (‘Una tale possibile qualificazione [i.e., particolare importanza] deriverebbe della esigenza di prevenire ed evitare un contrasto di giurisprudenza che ex se facoltizza l’assegnazione del ricorso alle sezioni unite.’)

⁴⁰⁴ *supra* Chap. III.B.8 (ii); TARUFFO & LA TORRE 1997, p. 145.

⁴⁰⁵ LA TORRE, PATTARO & TARUFFO 1991, p. 151 [emphasis added].

dialectic between opposite interpretation theories.⁴⁰⁶ This interpretation dialectic, however, can be revealed without the explicit dissenting opinions of separate judges. The alternative is that motivation of the judgment, even if it is signed as a whole court, engages in an hypothetical discussion with rival interpretation theories. In Italy, the extract of five or ten lines (*i.e.*, the principle of law) which are normally published for the cassation judgments does not have enough space to detail such an interpretation dialectic.⁴⁰⁷ The judgments of the Italian plenary session, however, are usually published in their full text.⁴⁰⁸ Unlike the extracted publication of a specific legal principle, the full text of a plenum judgment does engage, to some extent, in such interpretation dialectic. Italian plenum judgments are not just a concise reasoning of a linear syllogism – as the chamber judgments supposedly are.⁴⁰⁹ Instead, Italian plenum judgments are longer also because they (internally) argue and counter-argue against a certain interpretation theory which is rejected by the court.⁴¹⁰ Besides the attached notes of comments, therefore, the *sezioni unite* can emulate the style of judgment in a court of precedents model not by the separate dissenting opinions of each judge, but through revealing the interpretation dialectic within the exceptionally published full text of the collectively signed judgment.

iii. Diagonal comparison

Together, France and Italy have in common that the plenary session judgments are more detailed than the judgments of the ordinary chambers. However, they are different as regards where they add such additional information. In Italy, the plenum's judgment itself will be considerably longer in its writing. In France, instead, the plenum's judgment will be only slightly longer than ordinary chambers *arrêts*, but will be supplemented by official documents, intentionally attached by the court, which are the ones that provide the additional information.

When the length of judgments is compared diagonally, the distances are reduced. The ordinary chamber's decisions of two or three pages look like brief summaries when compared to the twenty or thirty pages of the US and UK supreme court judgments.⁴¹¹ The length of the judgment issued by the French and Italian cassation plenums, however, could be more comparable in length to that of a court of precedents model, such as the US and UK supreme courts. In Italy, the judgment of the *sezioni unite* could be of fifteen or twenty pages as well. In France, the plenum's judgment itself will not be as long as the US and UK supreme court judgments. But together with the judges' reports and the

⁴⁰⁶ *supra* Chap. III.B.8 (b).

⁴⁰⁷ *supra* Chap. III.B.8 (ii).

⁴⁰⁸ *supra* Chap. IV.C.3 (iii).

⁴⁰⁹ TARUFFO & LA TORRE 1997, p. 147.

⁴¹⁰ See, for example, *Cass. SU. Sentenza n. 18121 del 14/09/2016*. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/18121_09_2016.pdf.

⁴¹¹ *supra* Chap. III.B.8 (iii).

court's comments, which in France are systematically attached to the plenum judgment in its publication, it can reach the same twenty pages.⁴¹² In both internal or external manners, a judgment of a court of cassation's plenum may have a level of detail about its legal reasoning more comparable to the US and UK supreme court judgments.

Also the dissenting opinions become an attenuated difference from a diagonal perspective. The supreme courts of the US and the UK include the explicit dissenting opinions of their judges within the judgment. The plenary sessions of the courts of cassation in France and Italy do not have dissenting opinions within the judgment itself. However, they do include some rudimentary forms of dissenting opinions in the additions that are published together with the judgment. In this sense, the cassation plenums do have dissenting opinions but, so to speak, they externalise them. The court of precedents model needs to make explicit the contrary interpretations on the case, the dialectic tension, because doing so is useful in understanding the debate at stake. The way to do so in cassation plenums is not by making explicit the dissenting opinions of the judges within the court judgment. They make the interpretative dialectic tension explicit in an external manner, outside the judgment.

In France, the dialectic tension is expressed by including in the publication of the judgment the preliminary reports of the reporting judge or the allegations of the public attorney. Another substitute for including the explicit dissenting opinions within the cassation judgment itself could be that dissident judges of the *Cour de cassation* publish their disagreement in a separate scientific article.⁴¹³ Both in France and in Italy, additionally, the dialectic tension is manifested by including the contrary theories of legal scholars. Even if legal scholars are not, properly speaking, judges of the cassation courts, their contrary theories may perform an equivalent function as the US and UK supreme court dissenting opinions.⁴¹⁴ According to GLENDON, CAROZZA & PICKER, from a comparative perspective:

*A critical case note by a leading author, is, in effect, like an important dissenting opinion, indicating where controversy exists and signalling the future possible direction of the law.*⁴¹⁵

Finally in Italy, even if the plenum's judgments are signed as a whole court, their more detailed reasoning does engage in a (anonymous) discussion with opposite interpretation theories. Therefore, this additional extension of the Italian plenum's judgments allows them to emulate the dialectic tension, which is the final purpose of dissenting opinions in a court of precedents model.

⁴¹² LASSER 2004, p. 43 ('What, then, do these documents [*rappports* and *conclusions*] look like? First, they are surprisingly long ... In the closed dossiers of the *Cour de cassation*, the *conclusions* and *rappports* can routinely be *fifty* pages long.' [emphasis in the original]).

⁴¹³ GOUTAL 1976, p. 64.

⁴¹⁴ GOUTAL 1976, p. 64.

⁴¹⁵ GLENDON, CAROZZA & PICKER 2006, p. 95 [emphasis added].

7. Number of cases

In a court of precedents the number of cases tends to be small. Properly speaking, this model of court does not review cases, but interpretation issues.⁴¹⁶ Therefore, its caseload will be limited to the specific problems of interpretation that certain pieces of legislation involve, regardless of the number of cases in which that legislation should be applied. The court of precedents needs to hear only a few cases because when it resolves an interpretation issue, its solution is applicable to all subsequent disputes of a similar nature. Also, according to TARUFFO's Theorem, the force of each precedent is in inverse proportion to its number.⁴¹⁷ Therefore, keeping the cases under review to a small number helps to avoid the force of each precedent ending up being diluted in an ocean of case law.

According to the model of a court of precedents, Chapter III demonstrated that the US and UK supreme courts typically hear a small number of cases.⁴¹⁸ The US Supreme Court issues between eighty and one hundred judgments on the merits per year;⁴¹⁹ whereas its UK counterpart issues between fifty and seventy judgments on the same yearly basis.⁴²⁰ The explicit doctrine of *stare decisis*, plus this reduced number of judgments, gives strong precedential force to these supreme courts, as their judicial lawmaking function requires.⁴²¹

If we continue making a horizontal comparison, and contrast the chambers of a court of cassation, the numerical difference is overwhelming.⁴²² While the caseload of the US and UK supreme courts can be counted in the hundreds or even several dozens, the chambers of the cassation courts under study review thousands of cases year after year.⁴²³ This enormous number of disputes that the French and Italian cassation chambers hear in total makes them inappropriate for the judicial lawmaking function.⁴²⁴ However, the plenum of the court of cassation is also different as regards this functional attribute. As we shall see, the plenary sessions hear a remarkably smaller proportion of cases when compared with the total of the ordinary chambers. Therefore, the plenary session caseload does not appear as dysfunctional as regards judicial lawmaking.

⁴¹⁶ *supra* Chap. III.B.4 (b).

⁴¹⁷ See again, TARUFFO 2011, p. 29-30.

⁴¹⁸ *supra* Chap. III.B.4 (i).

⁴¹⁹ WHEELER 2004, p. 248.

⁴²⁰ LE SUEUR 2004, p. 271; BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 318.

⁴²¹ *supra* Chap. III.B.4 (iii).

⁴²² JOLOWICZ 1999, p. 5.

⁴²³ *supra* Chap. III.B.4 (ii).

⁴²⁴ *supra* Chap. III.B.4 (iii).

i. *France*

In the decade 2006-2015, on average the total number of cases heard by the three types of plenum in France was, approximately, twenty-five per year.⁴²⁵ The number of judgments of the *assemblée plénière* that can be found in this period is variable, between a low of three (2012) and a high of seventeen (2006) in a year, with an average of nine.⁴²⁶ The *chambre mixte* is used less frequently than the *assemblée plénière*. The number of *chambre mixte* judgments published in a year varied from a low of zero (2011) to a high of thirteen (2013), with an average of five.⁴²⁷ The preliminary opinion (*avis*) is the most frequently used plenary session among the three. In the same period one can find a low of four *avis* (2009) and a high of seventeen (2007), with an average of eleven per year.⁴²⁸

In order to observe the evolution of the caseload, this timespan of ten years can be divided into two periods of five years. In the first period (2006-2010), on average the three plenums together delivered twenty-eight judgments per year.⁴²⁹ In the second period (2011-2015), the average number of the three plenums' judgments was twenty-one. These data show that the French plenary sessions' caseload is not growing over time, unlike that of the cassation chambers.⁴³⁰ Quite the contrary, the data seem to show that the French plenum caseload is decreasing, from twenty-eight (2006-2010) to twenty-one (2011-2015). However, if we extend our analysis to several years before the decade (*i.e.*, to 2003-2005), we will find that the average number was twenty-one again,⁴³¹ in the same way as in the five years 2006-2010. Therefore, a more accurate description of the French plenum caseload evolution is that, despite its variability, it seems to remain fairly constant.

ii. *Italy*

In order to analyse Italy, let us use the same timeframe as we used in France (2006-2015). In that decade, the *sezioni unite* for civil matters resolved on average 802 cases of different types per year.⁴³² Compared to the total in civil

⁴²⁵ Calculated based on www.courdecassation.fr. For a 2002-2011 analysis, DEUMIER 2015, p. 93.

⁴²⁶ Calculated based on: www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/.

⁴²⁷ Calculated based on: www.courdecassation.fr/jurisprudence_2/chambres_mixtes_2740/.

⁴²⁸ See also, DEUMIER 2015, p. 90; calculated based on: www.courdecassation.fr/jurisprudence_2/avis_15/integralite_avis_classes_annees_239/.

⁴²⁹ This and the next averages were calculated on the basis of the same data as in the previous paragraph.

⁴³⁰ *supra* Chap. III.B.4 (ii).

⁴³¹ Calculated from the same data sources as in the previous paragraphs. Also, DEUMIER 2015, p. 93, which also covers the 2002-2005 period.

⁴³² These results were calculated based on the statistics reports made by the Italian Court of Cassation for civil cassations; CASSAZIONE CIVILE 2006, p. 6; CASSAZIONE CIVILE 2007, p. 5; CASSAZIONE CIVILE 2008, p. 6; CASSAZIONE CIVILE 2009, p. 6; CASSAZIONE CIVILE 1/2010, p. 6; CASSAZIONE CIVILE 2/2010, p. 6; CASSAZIONE CIVILE 1/2011, p. 8; CASSAZIONE CIVILE 2/2011, p. 8; CASSAZIONE CIVILE 1/2012, p. 9; CASSAZIONE CIVILE

matters for the whole Italian Court of Cassation, the average plenum caseload in that decade was just 3 per cent of that of the chambers – *i.e.*, 802 out of 30,000 cassations in civil matters.⁴³³ If TARUFFO's Theorem is right – and the higher the number of precedents then the lower the influential force of each of them⁴³⁴ – then the lower number of Italian plenum judgments indicates that they have a considerably stronger force than those of the ordinary chambers.

Even if the *sezioni unite* hears a significantly smaller number of cases than the Italian chambers, from a diagonal point of view that number is still much larger than the courts of precedents of the common law jurisdictions under study. The US and the UK supreme courts on average review between sixty and one hundred cases per year.⁴³⁵ This means that the Italian plenum reviews ten times more cases than its diagonal counterparts in these common law jurisdictions – *i.e.*, 802 compared to an average of 80 between the US and UK supreme courts. Therefore, even if according to TARUFFO's Theorem the Italian plenum judgments have a stronger force than those of the chambers, according to the Theorem the Italian plenum judgments should be weaker than the ones of the US and UK supreme courts.

One factor for this excessive number of cases in Italy could be that the *sezioni unite* caseload is importantly mixed with other issues than resolving case law contradictions or legal principles (*questioni di massima*) of particular importance. In addition to those, a proportion of its workload is distracted to resolving conflicts of jurisdiction, admissibility of referrals to the Constitutional Court (*questione di legittimità costituzionale*) and prejudicial issues before the European Court of Justice. In 2013, for example, the Italian plenum resolved 650 cases in total.⁴³⁶ From that total in 2013, 450 reached a decision that resolves contradictory interpretations or specific legal principles of this kind.⁴³⁷ Of the approximately 200 plenum cases that remained, 650 were mainly of prejudicial issues before the European Court of Justice and admissibility referrals to the Constitutional Court.⁴³⁸ Therefore, if we exclude those types of proceedings – focusing our attention only on the ones that do involve a general problem of interpretation – the total number of judgments of the Italian plenum will be reduced by 30 per cent, from 650 to about 450.⁴³⁹ But 450 judgments still seem

2/2012, p. 9; CASSAZIONE CIVILE 1/2013, p. 9; CASSAZIONE CIVILE 2/2013, p. 9; CASSAZIONE CIVILE 1/2014, p. 8; CASSAZIONE CIVILE 2/2014, p. 10; CASSAZIONE CIVILE 1/2015, p. 10; CASSAZIONE CIVILE 2/2015, p. 10.

⁴³³ *supra* Chap. III.B.4 (ii).

⁴³⁴ See again, TARUFFO 2011, p. 29-30.

⁴³⁵ *supra* Chap. III.B.4 (i).

⁴³⁶ CORTE SUPREMA DI CASSAZIONE 2014, p. 53.

⁴³⁷ CORTE SUPREMA DI CASSAZIONE 2014, p. 53.

⁴³⁸ CORTE SUPREMA DI CASSAZIONE 2014, p. 53; it is not possible to disaggregate these types of cases for the timeframe under study because only the last statistics reports count them separately.

⁴³⁹ CORTE SUPREMA DI CASSAZIONE 2014, p. 50. Those types of cases end with an interlocutory order (*ordinanza*); whereas the cases where the *sezioni unite* resolves a contradiction or settles a legal principle (*massima*) end with a proper final decision (*sentenza*). Therefore, this calculation is made by considering the number of *ordinanza* and just counting the *sentenza*.

too many for the proper functioning of a court of precedents model. In conclusion, it seems that the general case overload that affects the chambers of the Italian Court of Cassation affects its plenary session as well.

In order to analyse the evolution of the Italian plenum caseload, the same methodology will be used as in France. Therefore, let us divide the statistics of the same decade as before into two smaller periods of five years each. In the first period (2006-2010), the Italian plenum for civil matters resolved on average 1,154 cases per year.⁴⁴⁰ In the second period (2011-2015), however, the Italian plenum resolved 449 cases on average. In the same direction as we found in France, the Italian plenum is not increasing its caseload, as the Italian cassation chambers do.⁴⁴¹ Italy, however, does show a clearer tendency than France towards reducing the caseload of its cassation plenary session. In fact, the *sezioni unite* reduced its average caseload more than half in the decade 2006-2010.

iii. *Diagonal comparison*

Chapter III showed that, from a horizontal perspective, the numeric difference in the total number of cases heard by the US and the UK supreme courts, on the one hand, and the chambers of the cassation courts of France and Italy, on the other, is overwhelming.⁴⁴² They seem to be at opposite extremes. The US and UK supreme courts review around one hundred cases per year.⁴⁴³ The French and Italian cassation chambers review thousands of cases per year.⁴⁴⁴ But those extremes move considerably closer, or they could even be inverted, from a diagonal perspective. The French cassation plenums actually review fewer cases a year than the US and the UK supreme courts. The Italian cassation plenum also reviews a number of cases that is a minor fraction compared to its chambers' caseload. However, the caseload of the Italian plenum may still seem too large when diagonally compared to the US and the UK supreme courts.

The relevant argument to prove the thesis of the diagonal symmetry, however, is not that these supreme courts and cassation plenums hear an equal number of cases. Rather, the argument is that the plenum is, relatively, a better point of reference for comparison. As regards the number of cases reviewed, it is a better point of reference not because the number for the plenary sessions in France and Italy is exactly the same as the number for the supreme courts in the US and England (UK). It is a better point of comparison because the number of cases that these cassation plenary sessions review is closer to that of the US and UK supreme courts, closer than the number of the lower cassation chambers. Therefore, if we compare, for example, the jurisdictions of Italy and the US (whose Supreme Court hears no more than one hundred cases per year) the diagonal symmetry suggests that a more pertinent point of comparison is the

⁴⁴⁰ These calculations were made in the same manner as in the previous paragraph.

⁴⁴¹ *supra* Chap. III.B.4 (ii).

⁴⁴² *supra* Chap. III.B.4 (iii).

⁴⁴³ *supra* Chap. III.B.4 (i).

⁴⁴⁴ *supra* Chap. III.B.4 (ii).

Italian plenary sessions, that is, the *sezioni unite*, which hears only four times more cases, than a comparison with the Italian cassation chambers (*sezione semplice*), which hears not just four times more but seventy times more cases than the US Supreme Court. Therefore, when changing our perspective from horizontal to diagonal, the number of cases heard by these supreme courts and cassation plenums becomes considerably closer (but not identical).

From a diagonal perspective, the French plenum average caseload in the last decade (*i.e.*, twenty-five per year) looks even smaller than the caseload of the supreme courts under study, which have between one hundred (US) and around fifty (UK). If we consider the cases decided only by the maximum plenary session in France, the *assemblée plénière*, the number of its judgments is even smaller (*i.e.*, on average nine per year) compared to the no less than forty that the UK Supreme Court consistently issues. If TARUFFO's Theorem is correct – and the force of each precedent is inversely proportional to the total number of precedents – then the diagonal symmetry thesis may suggest, contradicting the orthodox view of their legal traditions, that each judgment of the French *assemblée plénière* could reach a level of influence even stronger than that of a UK Supreme Court precedent.

Moreover, some French scholars think that the aforementioned minimal use of these referrals to the plenary sessions, particularly to the preliminary opinion (*avis*), could be proof of the failure of these devices.⁴⁴⁵ But from the point of view of TARUFFO's Theorem,⁴⁴⁶ this minimal use could be proof not of its failure, but of its success. If we see the French *avis* as a proper precedent, then its strength comes not from its extensive use but from its scarcity. Due to the inverse proportion between quantity and precedential force, such scarcity gives to each court of cassation preliminary opinion a powerful influence to settle the interpretation dispute that it aimed to resolve. Therefore, the minimal use of the preliminary opinion means that such minimal use could be enough because the fewer the *avis* the stronger their influence.

The proof of failure would have been not the scarcity of precedents but, quite the contrary, their abundance. In that sense, the situation of the Italian plenum seems more problematic than that of its French counterpart. The abundance of *sezioni unite* judgments, according to TARUFFO's Theorem, may indicate that they are not having enough power to settle the interpretation disputes in Italy. If we observe the evolution of the Italian plenum caseload, however, the situation seems to be improving. The *sezioni unite* reduced its caseload by more than half in the analysed decade, from 1,154 (2006-2010) to 449 (2011-2015). Its current average of four hundred still appears as excessive when compared to the caseload of US and UK supreme courts. But if Italy continues that trend, and

⁴⁴⁵ FERRAND 2017, p. 192 ('It was expected that this [preliminary opinion (*avis*)] would reduce the number of appeals on issues of law before the Court of cassation, especially with regard to the interpretation of new statutes. However, this kind of referral does not seem to be very successful. In 2013, only 13 took place; in 2012, 10; in 2011, 11. The number was not higher when the law came into force in 1992 (only 6 referrals; in 1993, 18).').

⁴⁴⁶ See again, TARUFFO 2011, p. 29-30.

liberates its cassation plenum from other competences than resolving case law contradictions, the *sezioni unite* caseload might get closer to the standards of a court of precedents model.

Finally, unlike the cassation chambers in France and Italy,⁴⁴⁷ their plenary sessions do not exhibit a growth pattern in their caseload. The caseload in the US and UK supreme courts is not growing over time either.⁴⁴⁸ In these supreme courts that stability of their caseloads is mainly due to their restrictive preliminary screening.⁴⁴⁹ Therefore, the diagonal symmetry suggests that the restrictive preliminary screenings which the French and Italian plenary sessions also possess, as explained in the next section,⁴⁵⁰ probably play an important role in controlling the growth of their cassation plenums' caseload, as well.

8. Preliminary screening

As discussed in Chapter III, the horizontal courts of last resort have some sort of initial procedure with simplified conditions for refusal.⁴⁵¹ The criterion to exercise such preliminary screening is related to the scope of review of their respective models of court. In a court of error, the scope of review focuses on the lower courts' errors,⁴⁵² and, thus, the preliminary screening is performed based on a preliminary evaluation of error too.⁴⁵³ Accordingly, from a horizontal perspective, the chambers in the courts of cassation exhibit preliminary screening phases based on this type of criterion, usually phrased as 'manifestly unfounded' recourse petitions.⁴⁵⁴

The courts of precedents have a different scope of review and, consequently, the preliminary screening will be different, as well. The scope of review in this model is focused on the disputes whose repercussions transcend the current case because some general problem of interpretation is at stake.⁴⁵⁵ Accordingly, in a court of precedents the preliminary screening criterion will be the 'public relevance' of the dispute to resolve such general interpretation conflicts.⁴⁵⁶ Moreover, due to the unpredictable diversity of topics that could have a public relevance in this sense, the preliminary screening in a court of precedents also exhibits an important level of 'discretion power' to select those cases.⁴⁵⁷ From a horizontal perspective, Chapter III showed that, according to the model of a court of precedents, the supreme courts under study have a criterion of

⁴⁴⁷ *supra* Chap. III.B.4 (ii).

⁴⁴⁸ *supra* Chap. III.B.4 (i).

⁴⁴⁹ *supra* Chap. III.B.5 (i).

⁴⁵⁰ *infra* Chap. IV.B.8.

⁴⁵¹ *supra* Chap. III.B.5; on the definition of 'preliminary screening', *supra* Chap. I.E.8.

⁴⁵² *supra* Chap. III.B.1 (c).

⁴⁵³ *supra* Chap. III.B.5 (c).

⁴⁵⁴ *supra* Chap. III.B.5 (ii).

⁴⁵⁵ *supra* Chap. III.B.1 (b).

⁴⁵⁶ *supra* Chap. III.B.5 (b).

⁴⁵⁷ *supra* Chap. III.B.5 (b); TARUFFO 2009, p. 95-96.

preliminary screening of this type.⁴⁵⁸ In the US, Rule 10 governing the writ of certiorari emphasises the public relevance of the case in three hypotheses consisting of splits in the circuit court rulings.⁴⁵⁹ In a similar manner, the UK Supreme Court has a screening criterion based on ‘points of law of general public importance’.⁴⁶⁰ Also, in the understanding of the UK Supreme Court, such public importance is mainly present in disputes in which there is no settled law,⁴⁶¹ but problems of interpretation that need to be solved.

From a diagonal perspective, therefore, the task here is to identify the screening criteria not at the chambers but at the level of the plenary sessions in the French and Italian courts of cassation. Among all the cases that reach the cassation courts, only a fraction of them will be referred to the plenary session. Therefore, some procedure of internal preliminary screening is needed at the cassation plenum, as well. What is the criterion according to which the referrals to the plenary session are initially screened? Are they a preliminary evaluation of error (as in the courts of error), or the discretionary selection of disputes that involve a public relevance for the case law (as in a court of precedents)?

i. France

In France, the preliminary screening for the plenary session falls within the prerogatives of the judge President of the *Cour de cassation*. The President can take the initiative of convening the *assemblée plénière* or the *chambre mixte*. The ordinary chambers, the public attorney or the lower court in the case of the preliminary opinion (*avis*) can propose to bring a case to the cassation plenum. But it will be up to the President to decide whether the plenary session will be convened or not. This intervention counts as a preliminary screening, as the term has been defined in this study,⁴⁶² because the President has simplified conditions to refuse these petitions at an initial stage, before convening the plenum. The most important simplified conditions are that the decision about whether to refer the case to the plenary sessions does not need to provide reasons for such refusal (*ordonnance non motivée*) and the decision is made without an oral hearing (*avant l'ouverture des débats*).⁴⁶³

The criterion according to which the President of the *Cour de cassation* performs the preliminary screening depends on the type of plenary session. However, the three of them have in common that they refer to case law problems of different sorts. The main criterion to convene the largest plenary session – *i.e.*, *assemblée plénière* – is when the case raises a matter of principle (*question de principe*).⁴⁶⁴ In the French legal vocabulary, as we observed when discussing the effect of the

⁴⁵⁸ *supra* Chap. III.B.5 (i).

⁴⁵⁹ GOLDSTEIN 1998, p. 305; PERRY 1994, p. 246-253.

⁴⁶⁰ UKSC Practice Direction, Rule 3.3.3.

⁴⁶¹ ZUCKERMAN 2013, p. 1139-1140.

⁴⁶² *supra* Chap. I.E.8.

⁴⁶³ *Code de l'organisation judiciaire*, Art. L431-7: ‘Le renvoi devant une chambre mixte ou devant l'assemblée plénière est décidé soit, avant l'ouverture des débats, par ordonnance non motivée du premier président, soit par arrêt non motivé de la chambre saisie.’

⁴⁶⁴ BORÉ & BORÉ 2015, p. 66.

judgments,⁴⁶⁵ a question of principle is a litigious question in which the court's decision affects not only the current case but has a general interest for the application of the law.⁴⁶⁶ When a *question de principe* is involved, therefore, the case has public relevance because at stake is the interpretation of a wide range of future cases dominated by the same legal principle. Thus, the screening criterion of a matter of principle has the result that the cassation petitions without any public relevance to solve case law problems of interpretation are screened out to avoid their reaching the *assemblée plénière*.

The convening criterion of the *chambre mixte* also refers to the public relevance of solving interpretation problems in the case law. Let us remember that the main hypothesis to convene it is 'if the question has received or is likely to receive different solutions in the chambers'.⁴⁶⁷ That a question can receive different solutions between the chambers implies that the type of case that is at stake is one that involves a legal issue that is applicable not only to that dispute but also to others.⁴⁶⁸ Therefore, screening based on such interpretation contradictions, as the *chambre mixte* does, is also a manner in which to screen out disputes without public relevance for the case law because, in the practice of the chambers, there are no contradictions in their general interpretations.

In the same way, the plenary session for preliminary opinions (*avis*) has a screening criterion of general interpretation problems. The lower court judge can query the French Court of Cassation if it is facing a 'question of new law, which has a serious difficulty *that can arise in numerous disputes*'.⁴⁶⁹ As we can observe, the preliminary opinion (*avis*) screening stage also selects based on that criterion of public relevance for the case law. The public nature of the interpretation problems is defined as a question that should be relevant for many others disputes that might come in the future (*se posant dans de nombreux litiges*).⁴⁷⁰ Quite the contrary, if the question has relevance for the current dispute only, then the case will be screened out because it lacks the public relevance required to get access to the plenary session of preliminary opinions (*avis*).

A final observation on the preliminary screening to the French plenary session is their discretionary nature in the hypotheses of solving public problems of interpretation.⁴⁷¹ It is usually stressed that the *chambers* of the court of cassation have no discretionary power to select cases at their own preliminary screening.⁴⁷² But when it comes to the French *plenary sessions*, to grant access to them is not

⁴⁶⁵ *supra* Chap. IV.C.2 (i); CORNU 2007, p. 751.

⁴⁶⁶ See again, CORNU 2007, p. 751; MALINVAUD 2008, p. 162.

⁴⁶⁷ See again, *Code de l'organisation judiciaire*, Art. L432-5.

⁴⁶⁸ BORE & BORE 2015, p. 64 ('... *une divergence de jurisprudence entre celle-ci et une autre chambre, précédemment saisie d'une question similaire à l'occasion d'un litige relevant à un autre titre ...*').

⁴⁶⁹ See again, *Code de l'organisation judiciaire*, Art. L441-1 [emphasis added].

⁴⁷⁰ BORE & BORE 2015, p. 77.

⁴⁷¹ However, to convene the plenums is not discretionary, but mandatory, in tasks different than solving general problems of interpretation. For example, it is mandatory to convene the *Chambre Mixte* in case of a tie vote; BORE & BORE 2015, p. 64.

⁴⁷² *supra* Chap. III.B.5 (ii); TROPER & GRZEGORCZYK 1997, p. 104.

an obligation but a matter of permission or option for the President of the *Cour de cassation*.⁴⁷³ The three different provisions coincide in that referral to the plenary sessions for resolving these general interpretation conflicts is something that the President ‘may’ (*peut*) decide, but it is not a ‘duty’ (it is not *doit*).⁴⁷⁴ This permission or option to convene the plenary session, rather than a mandatory rule, implies some level of discretion, particularly for the President of the *Cour de cassation*, which is recognised in the regulation of the preliminary screening to the French plenums.⁴⁷⁵

ii. *Italy*

In Italy, the *sezioni unite* preliminary screening is also a criterion of public relevance. As we saw, the *sezioni unite* perform their preliminary screening based on their scope of review, which is the presence of a case law contradiction.⁴⁷⁶ A dispute in which a case law contradiction is possible implies a public relevance, as well. In order to have a case law contradiction, we need a legal question that has already been replicated in more than one dispute, and has reached the court of cassation on more than one occasion. Case law contradictions are of public relevance, therefore, because they involve questions of law that have already been replicated in several cases.

In addition to case law contradictions among the ordinary chambers, another hypothesis for convening the Italian plenum is that the dispute ‘has a principle of law [*questione di massima*] of particular importance’.⁴⁷⁷ As discussed in Chapter III, in the Italian legal language ‘*massima giurisprudenziale*’ means the precise ‘legal principle’ derived from the court’s holdings.⁴⁷⁸ The holding of the judgment, in turn, is the general principle on a matter of law drawn from the decision of a case.⁴⁷⁹ In other words, the Italian cassation judgment has multiple arguments, and most of them could be of concern only for the current case. The Italian legal principle (*massima*), however, is a certain part of the cassation judgment (identified by the *ufficio massimario*) in which the interpretation on the point of law could be of interest not only for the current case but also applied to future disputes.⁴⁸⁰ Therefore, screening based on questions of legal principles

⁴⁷³ BORE & BORE 2015, p. 64-65 (*‘La saisine de la Chambre mixte est au contraire facultative’*); JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013, p. 22.

⁴⁷⁴ On the *assemblée plénière*, *Code de l’organisation judiciaire*, Art. L431-6 (*‘... peut ...’*); on the *chambre mixte*, *Code de l’organisation judiciaire*, Art. L431-5 (*‘... peut ...’*); on the preliminary opinions (*avis*), *Code de l’organisation judiciaire*, Art. L151-1 (*‘... peuvent ...’*).

⁴⁷⁵ TROPER & GRZEGORCZYK 1997, p. 106 (*‘[B]ut the presidents of the courts have some discretion to allocate cases either to a section [chamber] or, in hard cases, to a mixed section [chambre mixte], or to the largest assembly [assemblée plénière]’* [emphasis added]). *supra* Chap. III.B.5 (b).

⁴⁷⁷ See again, *Codice di Procedura Civile*, Art. 374, para. 2: *‘... presentano una questione di massima di particolare importanza.’*

⁴⁷⁸ See the definition of ‘*massima giurisprudenziale*’ in DE FRANCHIS 1996, p. 962.

⁴⁷⁹ According to GARNER 2009, p. 800 (*‘[Holding is] a court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision.’*).

⁴⁸⁰ *supra* Chap. III.B.3 (ii). *cfr.* TARUFFO & LA TORRE 1997, 148-149 (however, the *massima* does not correspond to a proper *ratio decidendi*).

(*massima*) is also an indirect way of screening out from the plenary session at an early stage those cases without public relevance for the interpretation. If no principle of law is at stake, that means that the cassation petition does not raise a legal argument that has been previously considered as relevant for future disputes by the *ufficio massimario*.

However, what counts as ‘particular importance’ (*particolare importanza*) not necessarily means of public concern. According to AMOROSO, a case can be of particular importance if it has a high economic value at stake.⁴⁸¹ However, a dispute of a purely private relevance, even if the economic value is high, is not enough to convene the Italian plenary session. The reason is that the requirement of ‘particular importance’ is bound to the requirement of ‘legal principle’ (*massima*) too. The typical situation of the particular importance of a legal principle is a contradiction in the case law (*contrasto di giurisprudenza*).⁴⁸² According to AMOROSO, however, a legal principle can be of particular importance even if there is no case law contradiction.⁴⁸³ In his view, a legal principle which involves a ‘widespread dispute on the merits’ (*diffuso contenzioso di merito*) will be of particular importance, as well.⁴⁸⁴ In this sense, the preliminary screening to the Italian plenum is open to cases of a public importance beyond the specific hypothesis of current case law contradictions. The screening criterion includes controversies on the merits which are ‘widespread,’ even if they have not been reflected in any contradictory case law yet.

As in France, to convene the plenary session in Italy is also conceived as a permission or option (*facoltà*).⁴⁸⁵ This means that the President of the *Corte di Cassazione* may or may not decide to convene the plenary session if the preliminary screening criterion is met (*può disporre*).⁴⁸⁶ In that sense, the plenum preliminary screening in Italy implies an important level of discretion too.⁴⁸⁷ The only situation in which the referral to the plenary session is not permission, but rather mandatory, is in the chamber’s referral for overruling.⁴⁸⁸

iii. Diagonal Comparison

From a horizontal perspective, Chapter III showed that a preliminary screening based on discretion to exclude cases without public relevance is found on the side of the US and the UK supreme courts,⁴⁸⁹ but not at the third court level of the French and Italian cassation chambers.⁴⁹⁰ If we change from a horizontal to

⁴⁸¹ AMOROSO 2012, p. 544 (‘... la controversia possa essere di particolare importanza, ad es., per l’entità degli interessi economici in gioco’.).

⁴⁸² AMOROSO 2012, p. 544.

⁴⁸³ AMOROSO 2012, p. 544.

⁴⁸⁴ AMOROSO 2012, p. 544.

⁴⁸⁵ COCCIA 2015, p. 27.

⁴⁸⁶ COMOGLIO, FERRI & TARUFFO 2011, p. 725.

⁴⁸⁷ AMOROSO 2012, p. 541.

⁴⁸⁸ AMOROSO 2012, p. 546.

⁴⁸⁹ *supra* Chap. III.B.5 (i).

⁴⁹⁰ *supra* Chap. III.B.5 (i).

a diagonal perspective, instead, a similar type of preliminary screening can be found in France and Italy but located at the hidden fourth level. Together, the plenary sessions of the cassation courts in France and Italy are similar as regards the preliminary criteria for screening cases, based on a public relevance to solve interpretation problems. The French *question de principe* can be considered similar to the Italian *questione di massima*. Both point to an abstract norm or guideline which is of a public relevance because it transcends the current dispute. The way in which the interpretation of such a principle of law is settled in the current dispute is important at a public level because it affects how they should be interpreted in future similar disputes, where the same principle of law also applies. Unlike the cassation chambers, these cassation plenums' preliminary screening based on such legal principles of law implies that cases without such public relevance for interpretation will be subject to an early rejection from the plenary session by the President of the Court of Cassation in France and Italy.

The resemblance to the UK Supreme Court's phrase – *i.e.*, 'a point of law of general public importance' – becomes self-explanatory. In order to grant a permission to appeal before the UK Supreme Court such interpretative transcendence beyond the current dispute, which is what 'public importance' means, is also necessary.⁴⁹¹ The resemblance to the screening criteria in the US Supreme Court also seems hard to question. Rule 10 refers to circuit court splits on important federal questions.⁴⁹² Again, the US 'important federal question' in a point of law (setting aside that France and Italy are not federal systems) can be seen as being similar to the French *question de principe* or the Italian *questione di massima*.

Another aspect in which the diagonal symmetry becomes apparent is in the discretionary power. The preliminary screening in the US and the UK supreme courts are characterised by a high level of discretion when it comes to selecting cases.⁴⁹³ A comparable level of high discretion can also be found in France and Italy from a diagonal perspective. As we observed, both French and Italian scholars emphasise that to convene the plenary session is, in most situations, a matter of permission or option for the President of the Court, and not an obligation. That permission implies that the President of the Court of Cassation may decide not to convene the plenary session even if the screening criterion is met. In that sense, the French and Italian 'permission' to convene the plenum appears as the functional equivalent to the US and UK supreme courts' discretionary power to select cases.

In sum, to pass the preliminary screening of the US and the UK supreme courts, on the one hand, and the preliminary screening of a plenary session in the cassation courts of France and Italy, on the other, requires selecting a case involving a public relevance for the interpretation, together with a high level of

⁴⁹¹ *supra* Chap. III.B.5 (i); see again, *UKSC Practice Direction*, Rule 3.3.3; ZUCKERMAN 2013, p. 1139.

⁴⁹² *supra* Chap. III.B.5 (i); GOLDSTEIN 1998, p. 305; PERRY 1994, p. 246-253.

⁴⁹³ *supra* Chap. III.B.5 (i).

discretionary power to exercise that selection. When comparing the preliminary screening criteria in a diagonal perspective, it can be noticed that both in the US and in the UK supreme courts as well as in the French and Italian cassation plenums what is necessary is that the recourse petition raises a legal issue (point of law, a principle of law) of public repercussions in similar ways. The diagonal symmetry of the judicial lawmaking functions, therefore, is present in this stage of preliminary screening as well.

D. Summary tables

Chapter IV was devoted to starting the diagonal comparison. The main idea behind the diagonal perspective is that the courts that perform the equivalent judicial functions between jurisdictions can be located at different levels of their court system and not necessarily at the same parallel level.⁴⁹⁴ Instead of comparing the parallel third level in both pairs of jurisdictions,⁴⁹⁵ this chapter compared the third level of the US and England (UK) – *i.e.*, the supreme courts – *vis-à-vis* the hidden fourth level of France and Italy – *i.e.*, the cassation plenums.⁴⁹⁶ Table IV.1 summarises the main findings on this diagonal pair of courts as regards the attributes under analysis.

⁴⁹⁴ *supra* Chap. II.B.5 (c).

⁴⁹⁵ See again, Figure II.1, *supra* Chap. III.A. (Introduction).

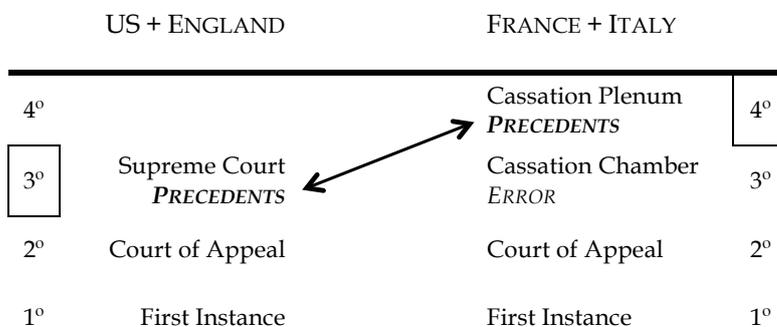
⁴⁹⁶ See again, Figure III.1, *supra* Chap. IV.A. (Introduction).

Table IV.1 : *Courts of precedents* – Diagonal symmetry

COURT ATTRIBUTES	US + England	France + Italy
	SUPREME COURT	CASSATION PLENUM
<i>Scope of Review</i>	general interpretation	general interpretation
<i>Judgments Effects</i>	binding force	binding force
<i>Exposure</i>	almost always	almost always
<i>Number of Cases</i>	few exemplary stable	few exemplary decreasing
<i>Preliminary Screening</i>	public relevance high discretion	public relevance high discretion
<i>Panel Composition</i>	seven or more interdisciplinary	nine or more interdisciplinary
<i>Total Size</i>	small stable	small decreasing
<i>Opinion Style</i>	detailed dissents (int.)	detailed dissents (ext.)
COURT LEVEL	3 RD	4 TH

This chapter demonstrated that the attributes of the US and UK supreme courts, on the one hand, and the plenary sessions in the French and Italian courts of cassation, on the other, tend to be symmetrical to an important degree. Because the specific attributes are correlated to the general judicial functions, we could suggest that the French and Italian court of cassation plenums perform a similar judicial lawmaking function as the supreme courts of the US and the UK. As represented in Figure IV.2 below, the plenary sessions at the ‘hidden’ fourth level of France and Italy are the equivalent courts of precedents *vis-à-vis* the third level supreme courts of the US and England (UK).

Figure IV.2 : *Courts of precedents* – Diagonal models



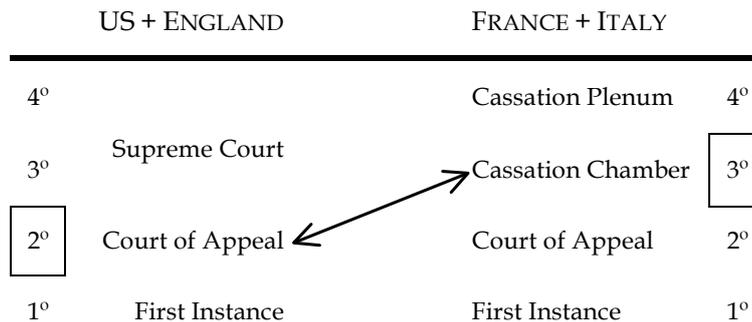
PART TWO: DIAGONAL PERSPECTIVE
CHAPTER V: COURTS OF ERROR

CHAPTER V: COURTS OF ERROR.....	249
A. Introduction	249
B. Intermediate appeal as last resort.....	252
1. United States of America	255
2. England and Wales.....	259
C. Diagonal comparison.....	264
1. Scope of review	265
2. Exposure	285
3. Judgment effects	290
4. Opinion style	299
5. Panel composition	304
6. Total size	310
7. Number of cases.....	315
8. Preliminary screening	320
D. Summary tables.....	324

A. Introduction

Chapter V will imply a switch in the object of comparison in the jurisdictions of the US and England. The object of comparison will not be the supreme courts but the

‘intermediate appellate courts’.¹ And in France and Italy, instead of the plenary session of the cassation courts, this chapter will analyse the cassation chambers. Therefore the comparative analysis will keep the diagonal perspective, but at one level lower (see Figure V.1, below). While the previous chapter compared the third court level of the US and England (UK) *vis-à-vis* the fourth court level of France and Italy (3rd vs. 4th), here the study compares, respectively, the second level *vis-à-vis* the third level of the same jurisdictions (2nd vs. 3rd).

Figure V.1 : *Courts of error* – Perspective

Comparative law literature usually approaches this topic from a horizontal perspective and not from a diagonal one.² Intermediate appellate courts are usually contrasted against what in other jurisdictions are called ‘courts of appeal’ as well: for example, analysing, on the one hand, the US and English courts of appeal and, on the other hand, the French *cour d’appel* or the Italian *corte d’appello*. In this sense, the comparative literature on intermediate appellate courts has been devoted to comparing second-level *vis-à-vis* second-level.³ The results of such a horizontal perspective of the intermediate appellate courts tend to highlight several horizontal asymmetries. Despite recent reforms that try to restrict intermediate appeals,⁴ comparative studies usually suggest that in each legal family the intermediate appellate courts perform different functions.⁵ In jurisdictions such as France and Italy, intermediate appeals are a second degree of full jurisdiction (or second trial court model)⁶ with a different judicial function than the parallel courts of appeal in the US and England.⁷ The function of the

¹ On the definition of ‘intermediate appellate court’ for this study, *supra* Chap. I.E.5.

² *e.g.*, SILVESTRI 1986; JOLOWICZ 1998; TARUFFO 1998; FERRARIS 2015; VAN RHEE & FU 2017.

³ *e.g.*, JOLOWICZ 1999, p. 8-9; UZELAC & VAN RHEE 2014, p. 3-10; MARCUS 2014A, p. 108-110; COFFIN 1994, p. 35-36; for criminal matters, see MARSHALL 2011.

⁴ For France, CADIET & LORIFERNE 2011. For Italy, FERRARI 2014, p. 259-274.

⁵ HEAD 2011, p. 219; GLENDON, CAROZZA & PICKER 2008, p. 104; MERRYMAN & PÉREZ-PERDOMO 2007, p. 121. For Germany, KOCH 1999, p. 158; MURRAY & STÜRNER 2004, p. 367. How this is seen from the common law perspective, COFFIN 1994, p. 20.

⁶ This denomination comes from JOLOWICZ 1999, p. 9.

⁷ In detail of this model, *supra* Chap. II.C.4.

French and Italian intermediate appellate courts is not just to correct specific mistakes of the lower courts but to grant the litigants a second field for a full battle.⁸ In our terminology, the French and Italian intermediate appellate courts perform not a purely error-monitoring function but a repetition of the dispute resolution function.⁹ In common law jurisdictions such as the US and England, intermediate appellate courts respond to a model of courts of error instead.¹⁰ According to this different judicial function, the US and English intermediate appellate courts limit their intervention just to the correction of only those palpable mistakes that the lower courts exceptionally may have committed (*revisio prior instantiae*).¹¹ Therefore, from the horizontal perspective an asymmetry becomes evident not only at the third level of the courts of last resort. The intermediate appellate courts of these two pairs of jurisdictions, when horizontally compared, look asymmetrical as well. However, if we find predominant differences when comparing two legal institutions, such as in these intermediate appellate courts, that should make us wonder again whether we have been comparing the right objects in the first place.

Chapter IV demonstrated that the courts that perform an equivalent judicial function – and, therefore, the ones that are properly comparable¹² – might be located at different levels.¹³ If the French and Italian cassation *chambers*, which are courts of error models, do not perform the same judicial function as the supreme courts under study, the question which follows is: Where are the courts that perform the equivalent error-monitoring function in the US and England? That is the main research question of this chapter.¹⁴ The answer, as will be demonstrated from a diagonal perspective, is that the equivalent points of comparison are the US and English intermediate appellate courts. In other words, both pairs of jurisdictions have courts of error, with similar functional attributes, but at different levels. In France and Italy, the cassation chambers perform the function of a court of error model at the third level; while in the US and England the intermediate appellate courts are the ones that perform the same error-monitoring function, but at the second level instead.

The comparative literature so far has suggested this diagonal symmetry between 2nd vs. 3rd court levels, but only in broad terms.¹⁵ Some authors have stated that the

⁸ For France, AMRANI MEKKI 2011, p. 20-22; *supra* Chap. II.D.1 (iii). For Italy, COMOGLIO, FERRI & TARUFFO 2011, p. 664-665; *supra* Chap. II.D.2. (iii).

⁹ *supra* Chap. II.D.3 (iii); Chap. II.D.3 (iii).

¹⁰ On this model, *supra* Chap. II.C.3.

¹¹ For the US, RICHMAN & REYNOLDS 2013, p. 2-3; *supra* Chap. II.D.1 (ii). For England, BLAKE & DREWRY 2004, p. 226-227; *supra* Chap. II.D.2. (ii).

¹² ZWEIGERT & KÖTZ 1998, p. 34.

¹³ *supra* Chap. II.B.5 (c).

¹⁴ See research question 3.3, *supra* Chap. I.C.2 (iii).

¹⁵ For example, GEEROMS 2004, p. 278-279 ('[the] cassation system's function ... closely ... [approaches] the error review function exercised by the English Court of Appeal, the US courts of appeal ...').

cassation recourse is comparable with the common law intermediate appeal. JOLOWICZ, for example, assumes that ‘US appeal is treated as a form of cassation’.¹⁶ However, they have not explained yet in detail how these similar functions between common law intermediate appeal courts and cassation chambers impact the design of their specific attributes.¹⁷ Therefore, the main contribution of this chapter will be to develop such a missing detailed analysis.

This chapter is divided into three sections. After this introduction (*supra* A), the first section starts with a general explanation about what an intermediate appellate court is in the common law jurisdictions under study, and why it should be considered as being a court of ‘last resort’ too (*infra* B). Following the general framework, the same section gives an overview of the structure and procedures of the intermediate appellate system in the US, particularly in the Federal Courts of Appeal (*infra* B.1), and in England and Wales, highlighting the role of the Court of Appeal and the High Court (*infra* B.2). The second section (*infra* C) is devoted to the comparison of the eight functional attributes under study¹⁸ between the intermediate appellate courts in the US and England, on the one hand, and the chambers of the cassation courts of France and Italy, on the other. Chapter V concludes with a summary table (*infra* D) in which the main points of symmetry between these two sets of courts, as regards their specific attributes for the error-monitoring function, are set out.

B. Intermediate appeal as last resort

The object of research in this study are the courts of last resort.¹⁹ In the introduction, a court was defined as being ‘last resort’ if it has the power of the final word at a domestic level.²⁰ Therefore, one may wonder why a study on courts of last resort should include the intermediate appellate courts in the US and England. At first sight, these intermediate appellate courts do not seem to have the power of the final word, because a supreme court is located above them. The reason to include them in this study is that, from the perspective of the US and English legal actors, their intermediate appellate courts count, properly speaking, as courts of last resort *in practice*, as we shall see.

¹⁶ JOLOWICZ 2000 p. 299.

¹⁷ The closest approach is MAK 2013, p. 59 (‘French and Dutch final courts in civil and criminal matters very much resemble the Court of Appeal of England and Wales, *concerning competences of review, composition and caseload*’ [emphasis added]). However, ‘the use of foreign law [is] the focus of [her] current study’ (p. 59) and, thus, she does not go into detailed research on the attributes analysed in this study.

¹⁸ *i.e.*, scope of review (*infra* C.1), publication (*infra* C.2), effects and style of the judgment (*infra* C.3 and C.4), size of the total court (*infra* C.6), composition of the panels (*infra* C.5), the number of cases (*infra* C.7) and the preliminary screening (*infra* C.8).

¹⁹ *supra* Chap. I.E.

²⁰ *supra* Chap. I.E.2 (ii,iv).

This might be intriguing for an observer who comes from France or Italy. From the perspective of these cassation jurisdictions – where a broad right to appeal is granted not only to the second level but also to the third level, at the courts of cassation²¹ – it is clear that their intermediate appellate courts do not have the final-word power in resolving conflicts. After the intermediate appeal at the second level, French and Italian litigants stand a relatively good chance of getting their case reviewed, at least on the points of law in a broad sense, a third time before the cassation chambers. Therefore, based on the actual practices of the French and Italian court systems the proper court of ‘last resort’, with the final-word power, is not at the intermediate appellate courts but at their cassation courts.

In the common law jurisdictions under study, however, the situation is different. Unlike in France and Italy, in the US and England the right to appeal at the same third court level is restricted by the writ of certiorari or the permission to appeal, respectively.²² In these common law jurisdictions, quite the contrary with regard to France and Italy, the chances of access and reversal by the third level supreme courts are constrained to such an extreme that US and English litigants cannot count on their supreme courts as a realistic alternative at hand. Due to the restrictions of access, in practice they assume that litigation ends at the second court level, not at the third one.²³ Therefore, US and English litigants do not consider their intermediate appellate courts as a real ‘intermediate’ step. From the perspective of these common law jurisdictions, the power of the final word (which defines a court as ‘last resort’) is on a daily basis pronounced at the second level of the court system.²⁴ In the situation of the US, for example:

[The Federal Courts of Appeals] decide over fifty thousand cases per year, out of which the [US] Supreme Court usually chooses to review fewer than one hundred. From the litigant’s point of view, the decision of *the Courts of Appeals are, for all practical purposes, final – the last stop in the judicial system.*²⁵

As regards England, ATKINS arrives at the same conclusion:

²¹ TROCKER & VARANO 2005, p. 264; SILVESTRI 1986, p. 305-310.

²² TARUFFO 2011A, p. 30; JOLOWICZ 1998, 56-59; SILVESTRI 1986, p. 305, 312-320.

²³ BLAKE & DREWRY 2004, p. 234 (‘The vast majority of cases that come before the Court of Appeal end in that court. It may be designated and perceived as an intermediate court but the reality is otherwise.’).

²⁴ For the US, WHEELER 2004, p. 244 (‘characterizing the US Supreme Court as the country’s ‘final court of appeal’ ... In almost all cases, that term better applies to the federal intermediate appellate court ...’). For England, BLAKE & DREWRY 2004, p. 235 (‘[W]hereas from a constitutional and legal perspective the [English and Walsh] Court of Appeal is an intermediate court, with the [House of Lords] acting to review and or supervise litigation, *in reality the Court of Appeal is the final court for the vast majority of cases.*’ [emphasis added]).

²⁵ RICHMAN & REYNOLD 2013, p. x [emphasis added].

[T]he low rate at which the court of last resort [*i.e.*, former House of Lords] reviews decisions of the English Court of Appeal indicates that *the intermediate level represents the de facto court of last resort*.²⁶

This is correct also from a historical perspective. In England, the *Judiciary Act* that created the High Court and the Court of Appeal in 1873-75 did not call them ‘intermediate’ appeals but actual ‘Supreme Courts’ (without any reference to the former House of Lords).²⁷ According to DREWRY, BLOM-COOPER & BLAKE, the original purpose of the *Judiciary Act* was:

[I]n 1867 the Supreme Court [*i.e.*, High Court and Court of Appeal] was intended to be the (*almost*) *final recourse* for litigants in England and Wales, with only a very limited further appeals to the House of Lords.²⁸

From a diagonal perspective the symmetry becomes apparent. The reason why the chambers in a cassation court are considered the court of ‘last resort’ within French and Italian jurisdictions is the same reason according to which we should consider the US and English intermediate appellate courts as courts of ‘last resort’ too. Both are the courts with the final-word power for the vast majority of cases within their respective judicial systems. There is, however, another tribunal above the US and English intermediate appellate courts that may, in extremely exceptional cases, review some of their judgments, namely, the supreme court. But the same argument applies to the cassation chambers as well. The chambers in the French and Italian cassation courts are – paraphrasing the English perspective on intermediate appeals – the tribunal of the ‘(almost) final recourse’.²⁹ The cassation chambers have the power of the final word on a daily basis. But above the cassation chambers exists the plenary sessions that, in extremely exceptional cases too, may review what the chambers decide.

The inclusion of the US and English intermediate appellate courts allows a better definition of the essential element of a court of last resort: the final-word power.³⁰ As anticipated in Chapter I, a distinction should be made between exceptional and normal final-word. The ‘exceptional’ final word refers to that very last opportunity of review that is contemplated by the rules, even if it is a chance limited to the extent that it is seldom used. While the ‘normal’ final word means the opportunity where the vast majority of cases will get their last review in practice, even if it is not the very ultimate chance hypothetically contemplated by the procedural

²⁶ ATKINS 1990, p. 100 [emphasis added]; MAK 2013, p. 59 (‘the [English] *Court of Appeal in fact is the final court* in most civil and criminal cases arising in England and Wales’ [emphasis added]); KARLEN 2004, p. 81 (‘For most civil cases, the *Court of Appeals is both the first and final appellate court* for England and Wales. Above it is the [former] House of Lords, but very few cases go that far.’ [emphasis added]).

²⁷ DREWRY, BLOM-COOPER & BLAKE 2007, p. 31.

²⁸ DREWRY, BLOM-COOPER & BLAKE 2007, p. 31-32 [emphasis added].

²⁹ See again, DREWRY, BLOM-COOPER & BLAKE 2007, p. 31-32.

³⁰ *supra* Chap. I.E.1 (ii).

rules.³¹ By applying this distinction it becomes clear why court of last resort studies should be made from a diagonal perspective.³² The *exceptional* final word in the US and England (UK) is at the third court level, while in France and Italy it is at the hidden ‘fourth’ level (supreme court *vis-à-vis* cassation plenum). While the *normal* final word, correspondingly, is at the second and third levels (intermediate appellate court *vis-à-vis* cassation chamber).

Based on that distinction, the previous chapter analysed the diagonal symmetries between the courts with the *exceptional* final word (3rd vs. 4th). This chapter will continue the comparison but between the courts with the *normal* final word (2nd vs. 3rd).³³ The next two sections introduce the intermediate appellate courts of the US and England in their general features (*infra* B.1 and B.2). The discussion of the eight functional attributes, pertinent for the diagonal comparison with the cassation chambers, will be analysed later on in the third part of this chapter (*infra* C).

1. United States of America

Let us start by recalling that the US is a political federation.³⁴ Therefore, there are two systems of courts in parallel. One at the state level and the other at a federal one.³⁵ As explained in Chapter I, this study focuses on the federal level of the US.³⁶ Accordingly, this subsection describes the origins, structure and procedure of the US intermediate appellate courts, but only in the federal system. The state court systems are outside of the analysis.³⁷

i. Structure

In the beginning, the US only had first instance judges (circuit judges) and the Supreme Court. There were no intermediate appellate courts at a federal level.³⁸ The creation of the intermediate appellate courts at a federal level, namely the *United States Courts of Appeals*, was related to the original characteristics of the US Supreme Court. Initially, the US Supreme Court was not a tribunal permanently settled in a certain location.³⁹ It was a court that travelled around the country in order to impart justice in different places for a short period of time (riding circuit).⁴⁰ Due to the difficulties in transportation during the eighteenth and nineteenth centuries, it was impractical to increase the number of Supreme Court

³¹ *supra* Chap. I.E.1 (iii).

³² See further lines of research, *infra* Chap. VI.F.

³³ See Table I.2, *supra* Chap. I.E.1 (iii).

³⁴ BONFIELD 2006, p. 30-50.

³⁵ CALVI & COLEMAN 2016, p. 44-45.

³⁶ *supra* Chap. I.F.1.

³⁷ On the US state courts, NEUBAUER & MEINHOLD 2017, p. 80-88.

³⁸ POSNER 1999, p. 3-4.

³⁹ *supra* Chap. II.D.2.

⁴⁰ HOFFER, HOFFER & HULL 2007, p. 33; GREENHOUSE 2012, p. 4.

judges to solve the problem of appeals overload, for it would have been too costly to transport a numerous panel of judges.⁴¹ In exchange, the solution in 1891 was to create a new intermediate level, the federal appellate courts, that would have jurisdiction over three or more states at the same time (*Evarts Act*).⁴²

The purpose of creating these intermediate appellate courts was to alleviate the burden on the US Supreme Court.⁴³ As a solution, the mandatory jurisdictions to hear the appeals brought before the Supreme Court were replaced by discretionary jurisdiction. This replacement was gradual and lasted until 1988, when the Congress eliminated almost all the mandatory jurisdiction of the Supreme Court.⁴⁴ Now the Supreme Court has control over its docket through the discretionary writ of certiorari.⁴⁵ In exchange, as we shall see in the following subsection, the intermediate appellate courts kept appeals as of right.⁴⁶

Currently, the basic regulation on the structure of these federal intermediate appellate courts is found in the *United States Code*, particularly in Title 28, Part I, Chapter 3.⁴⁷ At the moment of their creation (1891), there were only nine federal appellate courts.⁴⁸ Currently, that number is thirteen (twelve regional courts plus one with national jurisdiction over specialised issues).⁴⁹ Each federal appellate court has jurisdiction over a certain circuit, that is to say, a group of districts of different states.⁵⁰ For example, the Second Circuit will hear the appeals that come from New York, Connecticut and Vermont.⁵¹

The number of judges on each federal appellate court varies. It ranges from six in the First Circuit to twenty-eight in the Ninth Circuit. The majority, though, have between eleven and seventeen.⁵² If we add the number of judges of each circuit, the federal appellate court system has 179 judges in total.⁵³ The appellate judges are appointed by the President of the US, with the advice and consent of the Senate.⁵⁴ In addition to the judges, each federal appellate court is assisted by an important

⁴¹ POSNER 1999, p. 4; HALL 2008, 123-124.

⁴² SURRENCY 2002, p. 85-87; on the origins of the appeal in the US, BILDER 1997, p. 942 ff.

⁴³ SURRENCY 2002, p. 344-345; POSNER 1999, p. 4.

⁴⁴ SURRENCY 2002, p. 359; POSNER 1999, p. 5.

⁴⁵ *supra* Chap. III.B.5. (i); GOLDSTEIN 1998, p. 308.

⁴⁶ POSNER 1999, p. 4-5.

⁴⁷ See online at:

uscode.house.gov/browse/prelim@title28/part1/chapter3&edition=prelim.

⁴⁸ POSNER 1999, p. 5.

⁴⁹ POSNER 1999, p. 5.

⁵⁰ In detail, CASTANIAS & KLONOFF 2008, p. 6-9.

⁵¹ *U.S. Code*, Part III, Title 28, Part I, Chap. 3, § 41.

⁵² *U.S. Code*, Part III, Title 28, Part I, Chap. 3, § 44.

⁵³ See table at *U.S. Code*, Part III, Title 28, Part I, Chap. 3 § 44. (a).

⁵⁴ *U.S. Code*, Part III, Title 28, Part I, Chap. 3 § 44 (a); CASTANIAS & KLONOFF 2008, p. 9.

team of staff. An active judge is entitled to two secretaries, three law clerks and can also rely on conferencing attorneys who help the parties to reach a settlement.⁵⁵

ii. *Procedure*

The general principles of the procedure before the federal appellate courts can be found in a different part of the *United States Code*, namely Title 28, Part V, Chapter 133.⁵⁶ But the particular rules on appeals are in the *Federal Rules of Appellate Procedure*.⁵⁷ At a more detailed level, these rules should be combined with the *Case Management Procedure in the Federal Courts of Appeals*.⁵⁸ However, each circuit has an important degree of autonomy to define how these procedural rules will be administered in daily practice.⁵⁹ In order to understand the current procedural practices, therefore, first we need to analyse how the federal appellate courts used this autonomy to confront caseload trends.

The middle of the twentieth century saw the beginning of a so-called caseload explosion in the US.⁶⁰ Its causes vary from demographic and economic development to the enforcement of new civil rights and the increase in specialised legislation by the Congress and from regulatory agencies.⁶¹ The numbers show that in the 1960s only about 3,900 cases were filed in the circuit courts; fifty years later (2010s) that number had multiplied by a factor of fourteen, to the current approximately 56,800 filings.⁶² As a result, this caseload increase put pressure on the functioning of the courts, and it became clear that they had to adapt in some way. From that perspective, the procedural reforms introduced in the federal appellate courts should be seen as measures to manage this caseload explosion.⁶³

The first measure was to increase the number of appellate judges. In the 1960s there were sixty-eight judges; fifty years later that number had more than doubled, to 167.⁶⁴ However, the number of appellate judges increased by a smaller proportion compared to the number of appeals.⁶⁵ Therefore, at the end of this period the workload per judge was actually bigger, despite the increase in the total

⁵⁵ WHEELER 2004, p. 250. The details of the personnel regulation can be found in *U.S. Code*, Part III, Title 28, Chap. V.7.

⁵⁶ Online at:
uscode.house.gov/browse/prelim@title28/part5/chapter133&edition=prelim.

⁵⁷ On its origins, SURRENCY 2002, p. 195-202.

⁵⁸ See online at:
[www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/\\$file/caseman2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/$file/caseman2.pdf).

⁵⁹ CASTANIAS & KLONOFF 2008, p. 17-19.

⁶⁰ OVERTON 1984, p. 205.

⁶¹ RICHMAN & REYNOLDS 2013, p. 3-4.

⁶² RICHMAN & REYNOLDS 2013, p. 3.

⁶³ MILLS 1982, p. 1-26.

⁶⁴ RICHMAN & REYNOLDS 2013, p. 5-6.

⁶⁵ WHEELER 2004, p. 249.

number of judges.⁶⁶ Consequently, to cope with the increasing caseload, additional measures were needed to optimise the federal appellate courts' time and resources.

The second measure was to limit the kind of first instance decision that can be subject to appeal. In the US the general rule is that only final judgments can be appealed.⁶⁷ Appeal against interlocutory orders, for example against preliminary injunctions, class action certification, court orders against government officials (*mandamus*), among others, are exceptionally admitted in the US.⁶⁸

A third set of measures to cope with the caseload explosion was to introduce changes that save time and resources when issuing the appeal judgment itself. These changes were controversial.⁶⁹ For example, more and more the judges' individual opinions were omitted from the final decision, replaced by a single reasoning signed by the whole bench (*per curiam*).⁷⁰ The judgments became shorter and of a restricted publication in order to avoid their being widely known or used as precedents by future litigants.⁷¹ These changes will be analysed in more detail in the next sections on diagonal comparison.⁷²

Other measures were to promote settlements and to abbreviate the proceedings. For that purpose, different procedural tracks were created on appeals.⁷³ A central legal staff would undertake a preliminary screening over the filings in order to define whether an oral hearing was needed or not.⁷⁴ The criteria were: (a) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; or (c) the facts and legal arguments are adequately presented in the briefs and records, and the decisional process would not be significantly aided by oral argument.⁷⁵ In those situations, if the appeal panel agreed unanimously, oral hearings could be omitted and the decision would be based solely on the written briefs.⁷⁶ In order to cope with the increasing caseload, the judges began exercising this power of omitting the oral hearing more frequently over time. The result in practice was that in the mid-1980s 56 per cent of cases were reviewed with oral hearing. Fifteen years later (1995) that percentage had fallen to 35 per cent.⁷⁷

Among the measures that could have been used to resolve the caseload explosion, one is notably absent in the US intermediate appellate court: a restriction of the

⁶⁶ On total size, *infra* Chap. V.C.6. (i).

⁶⁷ MARCUS 2014A, p. 115; MORRISON 1996, p. 79.

⁶⁸ MARCUS 2014A, p. 115-116.

⁶⁹ For example, RICHMAN & REYNOLDS 1996, p. 273-342.

⁷⁰ RICHMAN & REYNOLDS 2013, p. 42 ff.

⁷¹ MARCUS 2014A, p. 120; RICHMAN & REYNOLDS 2013, p. 10 ff.; WHEELER 2004, p. 264-265.

⁷² For the modifications on judgment style, *infra* Chap. V.C.4 (i). For changes in the patterns of publication, *infra* Chap. V.C.2 (i).

⁷³ WHEELER 2004, p. 249.

⁷⁴ HOOPER, MILETICH & LEVY 2011, p. 16-17.

⁷⁵ *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2)(a).

⁷⁶ *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2).

⁷⁷ WHEELER 2004, p. 263.

right to appeal by a requirement of permission or leave, as in England.⁷⁸ In the US, the right to appeal to the Supreme Court is explicitly denied.⁷⁹ But the right to appeal to the lower level of the intermediate appellate courts in the US is almost everywhere recognised by statute.⁸⁰ Even if it is not considered as part of the constitutional right to due process, still it is a strong US tradition that litigants deserve at least one (but no more than one) appeal against the first instance decision.⁸¹ Therefore, the introduction in the US of a kind of English permission to appeal would have been intolerable at the level of the intermediate appellate courts because it would have violated the deeply held US cultural entitlement of a right to appeal. From that perspective, these procedural changes introduced in the US federal appellate courts should be seen as substitutes or alternatives to the introduction of a restrictive permission to appeal.

2. England and Wales

As discussed in Chapter I, the object of research in this study is not the court structures and procedures of all four countries that belong to the United Kingdom but the jurisdiction of England in particular (which includes Wales).⁸² The first relevant aspect of the English intermediate appellate level is the fact that the single ‘Court of Appeal’ in London is not the only tribunal that hears appeals against the first instance judgments. The so-called ‘High Court’, which as a general rule is a first instance trial court for large and complex claims, also hears appeals from local and small claims courts (County Courts). Therefore we need to include in our analysis both – the Court of Appeal and the High Court – so as to understand better the current English intermediate appeals system.

i. Structure

In England, the court immediately below the UK Supreme Court is called ‘Court of Appeal’ and it was founded as a result of the *Judicature Acts* at the end of the nineteenth century (1873-1875).⁸³ The previous judicial system was considered chaotic due to the intricate relations and overlaps between several dozen types of courts.⁸⁴ The creation of the Court of Appeal, together with the High Court, was undertaken to simplify and unify that chaotic system. Both courts were proposed by the Judicature Commission in 1867, under the direction of Lord CRAIN.⁸⁵

⁷⁸ On the English permission to appeal, *infra* Chap. V.B.2. (ii); Chap. V.C.8. (ii).

⁷⁹ *Rules for the Supreme Court of the United States*, Rule 10 (‘Review on a writ of certiorari is not a matter of right ...’).

⁸⁰ MARCUS 2014A, p. 112.

⁸¹ DALTON 1985, p. 66-68.

⁸² *supra* Chap. I.F.2.

⁸³ DREWRY, BLOM-COOPER & BLAKE 2007, p. 31.

⁸⁴ DREWRY, BLOM-COOPER & BLAKE 2007, p. 31-33.

⁸⁵ More about the origins of English ‘appeal’, see BILDER 1997, p. 923 ff.

Nowadays, the Court of Appeal's basic regulation can be found in *The Senior Courts Act* of 1981 (formerly called *The Supreme Court Act*), particularly in sections 2 and 3. The English Court of Appeal now has thirty-eight ordinary judges plus the, so-called, 'ex officio' judges (each president of the High Court's divisions, the Lord Chief Justice, Master of the Rolls and Supreme Court judges).⁸⁶ Since the mid-twentieth century its judges have been appointed from among the candidates of the High Court. It is allowed to appoint barristers from the bar, without a previous judicial career, but that is a practice abandoned now for more than half a century.⁸⁷ The Court of Appeal's judges are appointed by the Queen, following the recommendation of the Judicial Appointments Commission.⁸⁸

The English Court of Appeal is specialised in two divisions, one for civil matters and the other for criminal ones. The president of the criminal division is called Lord Chief Justice; the president of the civil division is named Master of the Rolls. Because this study is focused on civil matters,⁸⁹ from now on this chapter will concentrate its attention mainly on the civil division. However, we need to bear in mind that, according to English law, civil matters are defined in a purely negative way, as non-criminal.⁹⁰ Therefore, there is a distinction between the disputes that fall under the jurisdiction of one or another division of the Court of Appeal based on the criminal or non-criminal (civil) nature of the case.⁹¹

The High Court – the other court that now hears appeals – was founded in 1873-75, in the same reform movement, the *Judicature Acts* of those years.⁹² Together with the Court of Appeal it was also part of the solution to the previous judicial system perceived as disordered. As a result, the former Court of Common Pleas and the Court of Exchequer merged into the King's Bench (now Queen's Bench) and, together with the Court of Chancery, were relocated within the new High Court.⁹³

Today, the basic regulation of the High Court can be found in *The Senior Courts Act* of 1981 as well, between sections 4 and 7, right after the Court of Appeal's regulation. Besides the 'ex officio' judges, the High Court now has a maximum of 108 judges.⁹⁴ The candidates who are eligible for selection to sit on the High Court are solicitors or barristers with more than seven years of experience, and circuit judges who have held the office for more than two years. Upon the recommendation of the Lord Chancellor, High Court judges are appointed by the

⁸⁶ *The Senior Courts Act* [1981], Section 2(1) amended by *The Maximum Number of Judges Order* [2008].

⁸⁷ DREWRY, BLOM-COOPER & BLAKE 2007, p. 111.

⁸⁸ <https://jac.judiciary.gov.uk/court-appeal>.

⁸⁹ *supra* Chap. I.E.2.

⁹⁰ JOLOWICZ 2000, p. 13.

⁹¹ More on the English Court of Appeal, DARBYSHIRE 2011, p. 323-357.

⁹² PLUCKNETT 2010, p. 211-212.

⁹³ More on the English High Court, DARBYSHIRE 2011, 291-322.

⁹⁴ *The Senior Courts Act* [1981], Section 4(1)(e) amended by the *The Maximum Number of Judges Order* [2003].

Queen, based on the results of a competition before the Judicial Appointment Commission.⁹⁵

The High Court has three major divisions: Queen’s Bench, Chancery and Family Division.⁹⁶ Among them, the Queen’s Bench is the most important for civil matters. Besides criminal issues, the Queen’s Bench has jurisdiction over tort law (*e.g.*, personal injury, negligence), contract law (*e.g.*, breach of contract, non-payment of debt) and property law (*e.g.*, use and possession of land). The Queen’s Bench is also the largest division, with seventy-three judges, and is subdivided into smaller courts (Commerce, Admiralty, Mercantile, Technology and Construction). However, the Queen’s Bench is not the only division that deals with civil matters. The Chancery Division, with eighteen judges, also has jurisdiction over issues that may count as civil affairs in a broad sense: disputes relating to business, trade, insolvency, trust, patents, among others. Unlike the Court of Appeal, where civil disputes are distributed to a certain division, in the High Court the jurisdiction over civil matters overlaps, to some extent, between the Queen’s Bench and the Chancery Division, especially when the issues raises a point of equity.

ii. Procedure

Intermediate appeals procedure in England is regulated in the *Civil Procedure Rules*, precisely in Part 52.⁹⁷ This regulation is complemented by the respective *Practice Directions 52C* on appeals to the Court of Appeal.⁹⁸ Also, the organic regulation of the Court, as previously mentioned, is included in *The Senior Courts Act* of 1981.⁹⁹ Finally, certain specific rules can be found in Part IV of the *Access to Justices Act* of 1999.¹⁰⁰

The current state of affairs in the appeal procedure is mainly the result of the reform of 1999. This reform was based on the ideas of Lord WOOLF as regards civil procedure in general, and the report on appeals by Lord BOWMAN, particularly.¹⁰¹ Before the reform, the situation was that all appeals were heard by the Court of Appeal itself. The appeal against the final judgment, unlike the interlocutory decisions,¹⁰² was granted as a matter of right.¹⁰³ This resulted in the Court of Appeal becoming overburdened.¹⁰⁴ England did not have a precise study

⁹⁵ <https://jac.judiciary.gov.uk/high-court>.

⁹⁶ *The Senior Courts Act* [1981], Section 5(1)(a)(b)(c).

⁹⁷ www.justice.gov.uk/courts/procedure-rules/civil/rules/part52#text1.

⁹⁸ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52/practice-direction-52c-appeals-to-the-court-of-appeal>.

⁹⁹ www.legislation.gov.uk/ukpga/1981/54/contents.

¹⁰⁰ www.legislation.gov.uk/ukpga/1999/22/part/IV.

¹⁰¹ ZUCKERMAN 2013, p. 1112; a detailed analysis on BOWMAN’s proposal can be found in JACOB 1998.

¹⁰² DREWRY, BLOM-COOPER & BLAKE 2007, p. 35.

¹⁰³ JOLOWICZ 1999, p. 84.

¹⁰⁴ DREWRY, BLOM-COOPER & BLAKE 2007, p. 124 (‘The traditional aspects of the English appellate system have clearly undergone revision under the twin pressures to overcome

measuring the workload of the Court of Appeal before the WOOLF reforms.¹⁰⁵ Nevertheless, BOWMAN was aware of the case overload and how it was having an impact on delays of appeals.¹⁰⁶ In 1996, for example, 70 per cent of the appeals took more than fourteen months.¹⁰⁷

In order to release the Court of Appeal from part of its case overload, Lord BOWMAN proposed several procedural changes.¹⁰⁸ Among them were limiting (but not eliminating) the oral hearings in appeal;¹⁰⁹ simplifying the judgments;¹¹⁰ the use of information technologies and, most importantly, extending the requirement of permission to appeal not only to the interlocutory decisions but to the final judgments as well.¹¹¹

Another reform that deserves special attention was the redistribution of part of the appeals caseload from the Court of Appeal to the High Court. Since the reform, the High Court – formerly a first instance court for large claims only – has appellate jurisdiction, as the Court of Appeal.¹¹² Therefore, the workflow of appeals is distributed, in a particular way, between the two courts. In order to understand such distribution, however, first we need to understand the English first instance.

In simple terms, the proceedings of the English first instance are divided into three different ‘tracks’. Depending on the amount of money at stake, the urgency, complexity of the dispute or another type of importance, the case will be allocated to the small, fast or multi-track, respectively.¹¹³ In principle, the preparatory judges decide the allocation to a certain track and the pertinent court. Urgent and small value claims will be distributed to the County Courts (small, fast or multi-track under £25,000).¹¹⁴ But the more complicated cases or those of a larger value – more than £25,000 in general, or more than £50,000 in personal injuries – will be heard by the High Court instead (multi-track).¹¹⁵ This initial distribution of disputes in the first instance between County Courts and High Court is important because later on it will affect whether the appeal is heard by the High Court or the Court of Appeal, respectively, as we shall see.

delays in the appeal system and to reduce the cost incurred by unnecessary time spent in the courtroom.’).

¹⁰⁵ DREWRY, BLOM-COOPER & BLAKE 2007, p. 39.

¹⁰⁶ DREWRY, BLOM-COOPER & BLAKE 2007, p. 56.

¹⁰⁷ DREWRY, BLOM-COOPER & BLAKE 2007, p. 56.

¹⁰⁸ DREWRY, BLOM-COOPER & BLAKE 2007, p. 57.

¹⁰⁹ JACOB 1998, p. 395-396.

¹¹⁰ JACOB 1998, p. 393-395.

¹¹¹ JACOB 1998, p. 398-399.

¹¹² ZUCKERMAN 2013, p. 1112.

¹¹³ ANDREWS 2013, p. 94-96; In detail, ZUCKERMAN 2013, p. 633 ff.

¹¹⁴ ZUCKERMAN 2013, p. 634.

¹¹⁵ ZUCKERMAN 2013, p. 634.

The basic principle of jurisdiction over appeals is that the appellate court will be the tribunal in the hierarchy immediately over the first instance court.¹¹⁶ Therefore, if the first instance was the County Court, the appeal tribunal will be the High Court. If the first instance was at the High Court itself, the appeal will be brought before the Court of Appeal.¹¹⁷ We have to bear in mind this: if the distribution of cases among the first instance is dependent on the amount of money, urgency and complexity of the case, in the same manner the distribution of appeals between the intermediate appellate courts (High Court or Court of Appeal) will be dependant on the same three variables as well. Therefore, the Court of Appeal will hear the appeals from cases of the highest value or complexity since they were allocated at the High Court in first instance. On the other hand, the High Court will hear appeals of a lower value instead, but still of an important level of urgency or complexity which justifies allocating the case to the County Court judges (instead of the local district judges) in the first instance. In sum, the distribution of appeals between these two intermediate appellate courts in England and Wales (High Court and Court of Appeal) is based on the dispute value, urgency or complexity, determined at an early stage of the first instance proceedings.

Despite this difference as to which court will have jurisdiction, the appeal procedure now starts with a permission to appeal (formerly called ‘leave’).¹¹⁸ Before the 1999 reform, permission was required mainly to appeal the first instance interlocutory decisions.¹¹⁹ But appeal against the final judgment was granted as of right.¹²⁰ With the WOOLF reforms, virtually all appeals against final judgments require the permission of the lower court as well.¹²¹ If that permission is not granted, the litigant may go directly to the appellate court to ask for a reconsideration of the permission to appeal.¹²² The criteria for granting this permission is defined in section 52.3 (6)(a)(b) of the *Civil Procedure Rules*, as follows:

(6) Permission to appeal may be given only where – (a) the court considers that the appeal would have a *real prospect of success*; or (b) there is some *other compelling reason* why the appeal should be heard.¹²³

An exceptional means of recourse to the English Court of Appeal is the ‘second’ appeal (which should not be confused with the final appeal to the UK Supreme

¹¹⁶ ZUCKERMAN 2013, p. 1119; ANDREWS 2014A, p. 75.

¹¹⁷ The reader should bear in mind that this is a simplified description. Here I am omitting, to avoid overwhelming details, that a further sub-distinction could be made between district and circuit judges within the County Court. Appeals from the circuit judge are heard by the district judge. For details, see Table 1 at *Practice Directions 52A*, Rule 3.5.

¹¹⁸ ZUCKERMAN 2013, p. 1136; ANDREWS 2014A, p. 74.

¹¹⁹ JOLOWICZ 1999, p. 84; DREWRY, BLOM-COOPER & BLAKE 2007, p. 35.

¹²⁰ JOLOWICZ 1999, p. 84.

¹²¹ ZUCKERMAN 2013, p. 1112-1113; ANDREWS 2014A, p. 76-77; JOLOWICZ 1999, p. 85.

¹²² *Civil Procedure Rules*, Rule 52.3 (3). ZUCKERMAN 2013, p. 1151; ANDREWS 2014A, p. 77.

¹²³ *Civil Procedure Rules*, section 52.3 (6)(a)(b) [emphasis added].

Court).¹²⁴ This *second* appeal to the English Court of Appeal is contemplated for the situation in which the *first* appeal was heard by a court lower than the Court of Appeal itself – *i.e.*, High Court.¹²⁵ Before the Woolf reforms, the permission criterion of the second appeal was partially similar to that of the first appeal: a real prospect of success or properly arguable appeal.¹²⁶ However, the 1999 reform aimed at limiting the second appeal in order to save public resources and promote the finality at the lower courts.¹²⁷ As a result, the second appeal now has a more restrictive permission test than the first appeal.¹²⁸ The permission to the second appeal is not granted anymore just because a case may have a prospect of success.¹²⁹ Permission to the second appeal is more limited because its permission criterion is that the appeal should raise ‘an important point of principle or practice’.¹³⁰

As a result, the second appeals are nowadays an exception in English appeals practice. An average of forty second appeals reach the Court of Appeal in a year.¹³¹ That is less than 4 per cent of the overall docket of the Court of Appeal. The remaining 96 per cent of its workload are first appeals.¹³² For that reason, this study will focus on the *first* appeal, instead of the second, as a more representative picture of the daily functioning of the English appellate courts.

C. Diagonal comparison

This section will be devoted to demonstrating the diagonal symmetry of the error-monitoring function between, on the one hand, the second court level of the US and England and, on the other hand, the French and Italian third level (intermediate appellate courts *vis-à-vis* cassation chambers). In order to prove this diagonal symmetry at a lower level, the forthcoming subsections are focused on analysing whether these courts share (or not) the eight functional attributes which characterise the model of a court of error. The attributes under analysis will be the same as those that we have been discussing throughout this study: scope of review,¹³³ exposure,¹³⁴ effects,¹³⁵ and style of the judgment,¹³⁶ (B.2; B.3; B.4), the

¹²⁴ *Civil Procedure Rules*, Rule 52.13.

¹²⁵ *Civil Procedure Rules*, Rule 52.13 (1); ZUCKERMAN 20113, p. 1123.

¹²⁶ *Tanfer Ltd v. Cameron Mac-Donald* [2000] EWCA, para. 42.

¹²⁷ *Tanfer Ltd v. Cameron Mac-Donald* [2000] EWCA, para. 41.

¹²⁸ ZUCKERMAN 2013, p. 1167.

¹²⁹ ZUCKERMAN 2013, p. 1167.

¹³⁰ *Civil Procedure Rules*, Rule 52.13 (2) (a); DREWRY, BLOM-COOPER & BLAKE 2007, p. 71-72. In detail, ZUCKERMAN 2013, p. 1168-1171.

¹³¹ PLOTNIKOFF & WOOLFSON 2003, p. 28-29.

¹³² On the number of cases, *infra* Chap. V.C.7 (ii).

¹³³ *infra* Chap. V.C.1.

¹³⁴ *infra* Chap. V.C.2.

¹³⁵ *infra* Chap. V.C.3.

¹³⁶ *infra* Chap. V.C.4.

total size of the court,¹³⁷ the composition of its panels;¹³⁸ the total number of cases handled by the court¹³⁹ and the preliminary screening stage.¹⁴⁰ As regards the internal order of each section, the chapter will follow the same structure as usual – *i.e.*, models, jurisdictions, comparison – except in the first section devoted to the scope of review. A different ordering was preferred due to the special complexity of that topic.

1. Scope of review

From a diagonal perspective, Chapter IV demonstrated that the supreme courts and the cassation plenary sessions both have a narrow scope of review.¹⁴¹ According to the court of precedents model, they will focus not on any particular misapplications of the law but exclusively on those that involve a general conflict of interpretation pertinent for future disputes.¹⁴² A court of error, quite the contrary, requires a broader scope of review in order to minimise the mistakes committed by the lower court judges.¹⁴³ In a court of cassation it will be the chambers, and not the plenary session, that will review not only the most important disputes that involve general case law contradictions, but any possible misapplications of the law in particular circumstances.¹⁴⁴

The diagonal comparison of the scope of review between courts of error of different legal traditions, however, needs to be made carefully. Our goal is to understand the extensions or limitations in the problems which could be subject to reversal by these courts at different levels. For example, do intermediate appellate courts of the US and England review the questions of fact of the dispute? A comparative approach can easily get lost in translation for two reasons. First, because courts may understand different things when they talk about ‘questions of fact’. In other words, jurisdictions first differ in the *conceptual classification* of the several kinds of problems that can be reviewed by appellate courts. Secondly, and more importantly, if a certain issue counts as a question of ‘fact’, the ‘law’ or ‘procedure’ is not the only factor that defines the scope of review. Jurisdictions also differ in the *criteria of delimitation* according to which their scope of review will be expanded or restricted. In other words, jurisdictions not only disagree about whether a certain problem counts as a question of fact or not, but the disagreement on the criteria of delimitation implies that they also disagree about the reasons why that kind of problem should be under the review of the court, or not.

¹³⁷ *infra* Chap. V.C.6.

¹³⁸ *infra* Chap. V.C.5.

¹³⁹ *infra* Chap. V.C.7.

¹⁴⁰ *infra* Chap. V.C.8.

¹⁴¹ *supra* Chap. IV.C.1 (iii).

¹⁴² *supra* Chap. III.B.1. (b).

¹⁴³ *supra* Chap. III.B.1. (c).

¹⁴⁴ *supra* Chap. III.B.1. (ii).

As we shall see in the following nine subsections, the courts of error in the US and England, on the one hand, and in France and Italy, on the other, define their scope of review based on different criteria of delimitation. In the cassation courts' chambers of France and Italy, the criteria to delimitate their scope is, precisely, a certain conceptual classification: the distinction between a question of 'fact' and one of 'law'.¹⁴⁵ Cassation chambers are allowed to review, and they take action in reviewing, only questions of law and procedure, which are considered part of the 'formal law'. But the facts of the dispute (in the particular way that they understand 'questions of fact') are excluded from cassation review.¹⁴⁶ Therefore, the criterion of delimitation that defines the problems that are included within or excluded from the cassation chambers' scope of review will be drawn by that conceptual classification, a debate about what counts as a proper question of fact or law.

In the intermediate appellate courts of the US and England, however, the criteria of delimitation of the scope of review is not based on such a conceptual classification, proper of the cassation mind-set. In these common law jurisdictions, the extension of the scope is not defined by the distinction on questions of fact or law. Instead, they will be defined by something different, a criterion of delimitation that can be called 'principle of deference' to the lower decision maker (judge or jury).¹⁴⁷ The US and English appellate courts are allowed, according to their procedural regulations, to review questions of law, procedure and also questions of fact (something that, only at first sight, may look broader than what cassation courts are allowed to do). In the US, the content of the appeal includes any possible judicial error, without further limitations on the factual or legal nature of the problem that can be reviewed.¹⁴⁸ In England, legal sources authorise the intermediate appellate courts to amend any possible 'wrong', without further limitations either.¹⁴⁹

Still, even if the intermediate appellate courts of the US and England are allowed to review every possible aspect, including the facts, they will not necessarily take

¹⁴⁵ FERRAND 2017, p. 188 ('The main criterion to delimit the scope of control is the distinction between facts and law (*distinction du fait et du droit*).'). Also BORÉ & BORÉ 2015, p. 239-240.

¹⁴⁶ In France, FÉRRAND 2010, p. 598; BORE & BORÉ 2015, p. 285. In Italy, the reform of 2012 apparently betrays this traditional cassation dogma. However, the Italian reform allows their review only when a decisive fact was totally 'omitted' by the lower court, *Codice di Procedura Civile*, Art. 360 (5).

¹⁴⁷ In the US, for example, MARCUS 2014A, p. 119 ('[w]hile determining whether there has been a judicial error, the appellate court employs a deferential standard of review on many topics').

¹⁴⁸ Any judicial error, as long as it was alleged by the party in the lower instance, MARCUS 2014A, p. 118.

¹⁴⁹ *Civil Procedure Rules*, Rule 52.11 (3) (a).

action in reviewing all of them.¹⁵⁰ These intermediate appellate courts will refrain from reviewing those issues in which the lower court judge or jury may have had a better perspective than the appellate court. In other words, this principle of deference means that, even if the appellate court has the power to review a certain aspect of the dispute, the court will not exercise that review power if the lower decision maker has a certain advantage over the appellate court in evaluating that aspect. Thus, in these common law jurisdictions the criterion of delimitation that defines their scope of review will not be the conceptual debate about what should be classified as a question of fact or law, as in the cassation jurisdictions, but by a practical approach about which court has the best perspective to assess the problem at stake.

The comparative misunderstandings start when the scope of review of one legal tradition is analysed based on the conceptual classification and criterion of delimitation of another one. A comparative mistake would be that French or Italian observers apply to these common law jurisdictions their own conceptual classification of questions of law, facts and procedure. Because the US and English appellate courts are allowed to review the facts, observers from these cassation jurisdictions will get the wrong picture, in which the scope of review of these common law appellate courts appears larger than it actually is. French and Italian observers will omit from the picture that, even if these common law appellate courts are allowed to review the facts, they will frequently not do so due to the principle of deference to the lower court judge, as we shall see.¹⁵¹

US and English observers could also get the wrong picture if they apply their own conceptual framework to France and Italy. They could think that the scope of review of the cassation courts' chambers is smaller than it actually is. From the common law perspective, questions of 'fact' (the types of issues that are excluded from cassation review) are a much broader concept than in the actual cassation doctrine.¹⁵² In other words, US and English observers need to bear in mind that certain problems that within the common law conceptual framework are considered questions of fact, under the cassation framework, instead, are considered questions of law and procedure. As we shall see in the following subsections, some issues that under the US and English perspective are considered questions of 'fact' (but from the cassation perspective are seen as questions of law or procedure) are not excluded from the cassation review because, in the local cassation perspective, they fall under one of the non-prohibited concepts.

To avoid this kind of misunderstandings, comparative research needs a *tertium comparationis*, that is to say, its own set of independent categories, according to

¹⁵⁰ JOLOWICZ 1999, p. 8 ('[T]hat an appellate court is not restricted to question of law [including the facts ...] says little about the process of appeal as such or the nature and scope of an appellate court's reconsideration of the case.')

¹⁵¹ *infra* Chap. V.C.1. (ii,iii).

¹⁵² KODEK 2014, p. 45; JOLOWICZ 1998, p. 53-54.

which different local perspectives can be formulated on common grounds. As a result of this study, I concluded that the comparative misunderstanding on the scope of review can be avoided if we take as *tertium comparationis* a distinction between the following nine types of problems that could be potentially subject to review: the reproduction before the appellate court of evidence already presented at the lower court (*i*); credibility of evidence in general (*ii*); the oral (*iii*) and written evidence (*iv*) in particular; inferences constructed on the basis of such evidence (*v*); questions of general interpretation of the law (*vi*); questions about the particular application of the law to certain facts (*vii*); the infraction of important procedural guarantees (*viii*); and pure case management choices (*ix*).

A more precise definition of each one of these nine review categories will be developed in the next subsections. From now on, the point that the reader should keep in mind for the comparative analysis is to separate two things. On the one hand, the question about what is the conceptual qualification that each court gives to these nine problems (question of law, fact or procedure). On the other hand, regardless of their local conceptual qualification, which of these types of problems are included within or excluded from the scope of review of the court in practice. Table V.1 summarises the findings, which later on will be explained in detail. In order to clarify the analysis, the general conclusion from a diagonal perspective will be revealed in advance: even if the intermediate appellate courts in the US and England, on the one hand, and the chambers of the cassation courts of France and Italy, on the other, classify under different concepts these types of problems, they reach similar range in their scope of review in practice, through different criteria of delimitation.

Table V.1 : *Courts of error* – Scope of review

	US + England INTERMEDIATE APPEAL		France + Italy CASSATION CHAMBER	
	Classification	Deference	Review	Classification
General Interpretation	LAW	YES	YES	LAW
Particular Application		YES?	YES?	
Credibility of Evidence	FACT	NO	NO	FACT
Inference on Evidence		YES	YES	
Reproduction of Evidence	PROC	NO	NO	PROC
Procedural Guarantees		YES	YES	
Case management		NO	NO	

i. Reproduction of evidence

The possibility to review the questions of fact to a large extent depends on a previous procedural arrangement: whether the evidence can be presented or not in front of the decision maker. If the appellate court can observe the evidence itself, because the pieces of evidence are reproduced during the appeal, its intervention in reviewing and questioning the facts as they were stated by the lower trial court can be deeper. *Vice versa*, if an appellate court does not have access to the evidence, it will have fewer elements with which to criticise the lower trial court's evaluation of the facts.¹⁵³

It can be found that the two pairs of jurisdictions under study share the general rule from a diagonal perspective: no evidence shall be reproduced before their respective diagonal courts of error. In the US and England this restriction can be found at the second level, at their intermediate appellate courts,¹⁵⁴ whereas in France and Italy the equivalent restriction is at the third level, at their cassation

¹⁵³ KODEK 2014, p. 44.

¹⁵⁴ In the US, MARCUS 2014A, p. 118 ('the [federal] appellate court is restricted only to the evidence proffered to the trial court ...'). In England, *Civil Procedure Rules*, Rule 52.11 (2): 'Unless it order otherwise, the appeal court will not receive (a) oral evidence; or (b) evidence which was not before the lower court.' See also ANDREWS 2014A, p. 81 ('In general, only the first instance court will hear live testimony. This seems to be a sensible procedural economy. It is also the product of the historical nature of civil jury trial: for it would have been improper during the era of a jury trial for the non-jurors on the appeal to second-guess jury determinations of debatable issues of fact.').

chambers.¹⁵⁵ This restriction excludes the reproduction of evidence that was already produced at the lower court – except the written documents that, as we shall see, are in a different situation¹⁵⁶ – and also the evidence that could have been possible to present at that previous opportunity. For example, the US and English intermediate appellate courts and the French and Italian cassation chambers will not accept convening a hearing for witnesses who were already heard at the lower trial courts.

The situation of the documents is special. They are also evidence but in a written form. Following the general rule, therefore, we could have expected that documents would be excluded from reproduction before these diagonal courts of error, as well. However, they are not totally excluded. The explanation for this is that these diagonal courts of error will not review based only on the lower court's judgment. Instead, the entire case file, documents included, will be brought to the upper level.¹⁵⁷ Therefore, the US and English intermediate appellate courts and the French and Italian cassation chambers, in practice, do have access to the written evidence not because they open a special hearing for their reproduction, but just because they included among the other material in the case file.¹⁵⁸ As we shall see in the next subsection (*infra* iv), the inclusion of the documents in the recourse case file will have consequences to the extent in which these diagonal courts of error are willing to re-evaluate the credibility of the written evidence, in contrast to the other types of proof.

ii. *Credibility of evidence*

The previous restrictions on the reproduction of evidence before the court of error have, as a practical consequence, a restriction on the review of the facts. As discussed in the previous subsection, an appellate court without the possibility of re-examining the evidence will have fewer grounds on which to question the factual evaluation made by the lower court.¹⁵⁹ However, the jurisdictions under analysis differ importantly in what they understand as 'the facts' of the dispute. In order to set common grounds of comparison, let us use a distinction between the *credibility* of the evidence itself and the evidentiary *inferences* built on them.¹⁶⁰

¹⁵⁵ In France, *Code de procédure civile*, Art. 619: '*Les moyens nouveaux ne sont pas recevables devant la Cour de cassation.*' See also BORÉ & BORÉ 2015, p. 285-287; WEBER 2010A, p. 85. In Italy, COMOGLIO, FERRI & TARUFFO 2011, p. 725.

¹⁵⁶ *infra* Chap. V.C.1 (iv).

¹⁵⁷ KARLEN 2014, p. 41-42.

¹⁵⁸ In the Italian cassation, for example, the documents that *were not* produced in the previous instance are not admissible, *Codice di Procedura Civile*, Art. 372. *A contrario sensu*, litigants are allowed to attach to their cassation brief only those documents that were actually used before.

¹⁵⁹ *supra* Chap. V.C.1. (i).

¹⁶⁰ This is, to a large extent, a simplified distinction. An extensive literature on theory of evidence in the law deals with this issue in more detail – e.g., KAPTEIN, PRAKKEN & VERHEIJ 2009; WALTON 2002.

On the one hand, the *credibility* consists of the assessment of the truthfulness in one particular piece of evidence. An example of a question of credibility is: should we believe the witness when she declares that she was not present at the location of the accident? Was her testimony sincere enough?¹⁶¹ On the other hand, a question on *inference* refers to a more complex evaluation based not in a single material but several materials of evidence. The inference on evidence aims at putting all the pieces together and getting an impression of the whole picture of what happened in the dispute. The inference requires not only evidence, but also a chain of reasoning with consecutive links, in which the pieces of credibility can be arranged in different combinations.

There seems to be consensus between these two pairs of jurisdictions that the mere description of the evidence – *e.g.*, that the witness said ‘yes’ to the question about whether she was at the place of the accident – should be classified as a question of fact.¹⁶² No court of error, neither the intermediate appellate court of the US and England nor the French or Italian cassation chambers, will dare to challenge that basic storytelling of what happened during the hearings in the lower trial court, that would imply questioning the file records themselves.¹⁶³

As regards the credibility of that testimony – *i.e.*, whether or not the judge should believe that the witness actually was in that place, whether she was honest when saying ‘yes’ – it is also classified as a question of fact. When there are no other relevant pieces of evidence involved, such truthfulness assessment will be outside the scope of review of these diagonal courts of error.¹⁶⁴ This is a consequence of the lack of reproduction of evidence, previously discussed.¹⁶⁵ Because the court of error will not convene a hearing to repeat the witness declarations, which would be against the shared negative dogma of non-reproduction of evidence in the court of error, the better perspective from which to assess the credibility of certain testimony stays at the lower trial court.

When there are other relevant pieces of evidence at stake, however, the situation may be different. In case of plurality of evidence – *i.e.*, when more than one item of proof is under litigation – contradictions can arise. The evaluation of the credibility of each item of proof, individually considered, may stay at the lower trial court. But the higher court of error may review the evidence credibility not because it has a better perspective on one particular item of proof, but based on inferences drawn from the other contradictory pieces of evidence. As will be discussed in the next sections, the court of error is not at a disadvantage as regards

¹⁶¹ In the English literature, this distinction is also called primary (credibility) and secondary (inference) facts. See ZUCKERMAN 2013, p. 1183; ANDREWS 2014A, p. 83.

¹⁶² JOLOWICZ 2000, p. 301.

¹⁶³ In Italy, for example, RORDORF 2015A, p. 31-32.

¹⁶⁴ In the US, CASTANIAS & KLONOFF 2008, p. 185. In England, ANDREWS 2014A, p. 81-82. In France, BORÉ & BORÉ 2015, p. 289. In Italy, AMOROSO 2015, p. 293.

¹⁶⁵ *supra* Chap. V.B.1. (i).

the reasoning that is built beyond the proof itself, nor is it at a disadvantage in the factual inferences drawn based on several pieces of evidence.¹⁶⁶

Certainly, credibility and inference overlap. This overlap creates a complex interplay between what may or may not be reviewed by the court of error, interplay that cannot be solved *ex ante*, but only *ex post* on a case-by-case-basis. The relevant point for the diagonal symmetry is not untangling this overlap between credibility and inference, but the observation that such overlap interplay is present in both pairs of jurisdictions, but at different court levels.¹⁶⁷ In principle, the balance will be inclined to exclude the review of credibility at the second court level of the US and England and at the third level of France and Italy, as previously discussed. However, as we shall see, we can find a diagonal symmetry in which that initial balance changes depending on the type, number or complexity of the evidence. As regards questions of credibility, both pairs of jurisdictions will exclude them from their review as regards oral evidence.¹⁶⁸ But the diagonal courts of error in these four jurisdictions will keep the written documents within their scope.¹⁶⁹ Therefore, the scope of review of the diagonal courts of error will be broader (or narrower) depending on the relevance that the written (or oral) evidence had at the first instance.¹⁷⁰ The different treatment of oral and written evidence requires a separate explanation, as follows.

iii. Oral evidence

In the US and English intermediate appellate courts, oral evidence is classified as a question of fact, but these courts indeed should pay deference to the lower trial court with regard to it.¹⁷¹ The reason is that, following the aforementioned principle of deference, these courts have a worse perspective from which to evaluate the oral evidence if they have no reproduction of the oral testimony. In order to properly assess the credibility of testimonies, for example, the lower trial court had the advantage of observing the witnesses directly in the hearing,¹⁷² while the appellate court could, at best, read summaries of their statements included in the file.¹⁷³ Therefore, according to the criteria of delimitation (*i.e.*, the principle of deference to the court that has the better perspective), the credibility of the oral

¹⁶⁶ *infra* Chap. V.B.1. (v).

¹⁶⁷ In the US, CASTANIAS & KLONOFF 2008, p. 184. In England, ANDREWS 2014A, p. 83-84. In France, BORÉ & BORÉ 2015, p. 240-243. In Italy, RORDORF 2015A, p. 34-35.

¹⁶⁸ *infra* Chap. V.B.1. (iv).

¹⁶⁹ *infra* Chap. V.B.1. (iv).

¹⁷⁰ JOLOWICZ 1999, p. 8-10.

¹⁷¹ GEEROMS 2004, p. 272.

¹⁷² In England, ZUCKERMAN 2013, p. 1184 ('Questions of credibility are best left to the judge who saw and heard the witnesses is best placed to judge their veracity. An appeal court would disturb the trial judge's conclusion on credibility only were it clear that no reasonable person could have reached that decision.')

¹⁷³ In the US, MORRISON 1996, p. 80 ('Unlike the trial judge where there are live witnesses, [US Federal] appeals are decided entirely on the factual record developed in the district court.')

evidence will be outside the review of the US and English intermediate appellate courts.¹⁷⁴

On the French and Italian side, the criterion of delimitation composes the conceptual framework of questions of law, fact and procedure, in which, as observed, the questions of fact are excluded from cassation review. According to cassation literature, the assessment of credibility of the oral evidence, particularly, counts as a question of fact.¹⁷⁵ Therefore, oral evidence is excluded from the scope of review of these cassation chambers because it falls into the prohibited category of review (it is not a proper question of law).

As a diagonal comparison, therefore, both pairs of jurisdictions will *exclude* the review of *oral evidence* at the level of their respective courts of error. They also agree that the credibility of witness testimony counts as a question of fact. However, they disagree on the reason for not reviewing them. In the French and Italian cassation chambers the reason is the conceptual framework in which questions of ‘facts’ are excluded, and oral evidence counts as a question of fact for them. To the contrary, in the US and English intermediate appellate courts, even if they indeed have the power to review oral testimony, the reason for the same restriction of their scope is that the appellate court tends to be deferent to the better perspective of the lower trial court to assess witness credibility.

iv. Written evidence

Unlike oral evidence, in a model of a court of error we should not expect that the court will pay a special deference to the lower trial court’s findings based on written evidence, particularly documents. The court of error will have in its hands the case file, with the same documents that the lower trial court once observed. As regards the written evidence, consequently, the appellate court will not be in a worse position than the lower trial court.¹⁷⁶ As a result, the principle of deference to the better perspective does not apply here; and the credibility of written evidence should be within the scope of review of a court of error.

In the US and England, the credibility of a document counts as a question of fact. That is their conceptual classification. The relevant question, however, is whether such written evidence is subject to the principle of deference or not. In the US, the situation has been debated. Some case law followed the same principle of a lower deference to written documents and, thus, a review of this type of evidence more

¹⁷⁴ *Federal Rules of Civil Procedure*, Rule 52 (a)(1)(6): ‘Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.’

¹⁷⁵ In France, BORÉ & BORÉ 2015, p. 289-290. In Italy, AMOROSO 2012, p. 283 (stating that Italian cassation recourse cannot re-evaluate the facts directly but only the motivation of the lower court).

¹⁷⁶ *supra* Chap. III.B.1. (c).

broadly. In *Orvis v. Higgins*, for example, the federal appellate court said that ‘if [the lower court judge] decides a fact issue on written evidence alone, we [the appellate court] are as able as he [the lower court judge] to determine credibility’.¹⁷⁷ But the current tendency in the US seems to go in the direction of increasing the deference to the lower court even more, including the documentary evidence as well.¹⁷⁸ In England, however, the lower deference to the written evidence remains until today. ZUCKERMAN, for example, states that the appellate court should not have a strong restriction on reviewing lower court judges’ conclusions based on documents.¹⁷⁹ The reason is precisely the lower deference, because, as regards documents, the ‘trial court had no particular advantage over the appeal court’.¹⁸⁰

In the cassation jurisdictions of France and Italy the credibility of the written evidence should be counted as a question of fact and, in principle, excluded from their review. However, the French and Italian civil codes contemplate legal rules on how to assess the credibility of documents.¹⁸¹ For example, the French *Code civil* states that the signature on a private document identifies the person who consents to the obligations of the transaction.¹⁸² Moreover, if the document is signed by a public notary (*document authentique*), it is legally regulated as ‘conclusive evidence’, not only for the parties, but also for their heirs.¹⁸³ Therefore, if the credibility of documents is challenged, this will not count as a question of fact but of law due to these special rules on evaluating documents. Because the credibility of such written evidence is regulated by the law, they will fall within the scope of review of the chambers in a cassation court as well.¹⁸⁴

As a diagonal comparison, therefore, both pairs of jurisdictions agree in *including written evidence* within their scope of review of their respective courts of error. However, they disagree in their classification as fact or law, and in the reason to justify the review of written evidence. In England, and with more debate in the US, the credibility of a document classifies as a question of fact and the intermediate appellate courts will take action in reviewing it because the trial judge does not have a better perspective than the appellate court to assess it. Let us remember that both the lower trial court and the appellate court will have the case files and documents in their hands to observe and, therefore, the principle of deference does not apply. Meanwhile, for the cassation jurisdictions of France and Italy the credibility of written evidence is not a question of fact but of law because the value which documents have as evidence is regulated by their civil codes. Therefore, the

¹⁷⁷ *Orvis v. Higgins*. 180 F.2d 537 (2nd Cir. 1950), cited by CASTANIAS & KLONOFF 2008, p. 185.

¹⁷⁸ MARCUS 2014A, p. 119.

¹⁷⁹ ZUCKERMAN 2013, p. 1184.

¹⁸⁰ ZUCKERMAN 2013, p. 1184.

¹⁸¹ In France, *Code Civil*, Art. 1316-1340. In Italy, *Codice Civile*, Art. 2699-2708.

¹⁸² *Code civil*, Art. 1316-4 and Art. 1320.

¹⁸³ *Code civil*, Art. 1319.

¹⁸⁴ In France, FERRAND 2010, p. 603-606; BORÉ & BORÉ 2015, p. 295-296. In Italy, RORDROF 2015A, p. 32.

credibility of written evidence does not fall within the conceptual framework of a question of ‘fact’, the only one excluded from cassation review, but in the category of a question of law, included within the scope of these cassation courts.

v. Inference on evidence

In a model of court of error, the court will refrain from reviewing only if the lower court has a better perspective to assess the error. The court of error may have that disadvantage with respect to the oral evidence, as previously discussed. But as regards the rational inferences made on a combination of several pieces of evidence, however, the position of the court of error could be less disadvantageous. The court of error also can perform the rational inferences of balancing several pieces of evidence and checking for inconsistencies among them. Because the court of error can also perform those rational inferences to some extent, thus, the court of error may evaluate some rational inferences made by the lower trial court. Therefore, the court of error model should be willing to have a more active review not on the credibility of each piece of evidence itself, but on the inferences built on that evidence.

As observed on written evidence, the US federal appellate courts pay, in general, a higher deference to the lower trial court than their counterpart in England.¹⁸⁵ This higher deference in the US can also be observed here. However, an important distinction should be made between facts tried by the jury or tried by the judge in the first instance. The distinction is important because the jury does not ground its verdict.¹⁸⁶ Therefore, there is no explicit reasoning to be evaluated by the appellate court. Still, US federal appellate courts will do an analysis on whether there was sufficient evidence to possibly support the application of the law made by the jury.¹⁸⁷ Therefore, even in the total absence of verdict reasoning, the US federal appellate courts will also do a hypothetical evaluation on the inferences that can potentially be made on the evidence presented at the jury trial. If the facts were tried by a judge, instead, the deference will also be high but not as high as that given to the jury. Unlike the jury, the judges do give reasons for their decisions and, thus, the appellate courts indeed have an explicit inference reasoning to question. Furthermore, the standard of review for fact-findings made by judges is not the total absence of evidence to support the decision (as for the juries) but a ‘clear error.’¹⁸⁸ Therefore, a US federal appellate court will be willing to review an

¹⁸⁵ *supra* Chap. V.B.1. (iv).

¹⁸⁶ FLETCHER & SHEPPARD 2005, p. 6 ([J]uries – unlike civil law judges – do not write opinions ...).

¹⁸⁷ MORRISON 1996, p. 79-80 (‘Appeals courts will entertain such contentions [there was insufficient evidence], not to decide whether the jury was correct in its findings, but only whether, under the law, there was enough relevant evidence to permit the jury to decide the question in favour of the prevailing party.’).

¹⁸⁸ CASTANIAS & KLONOFF 2008, p. 195-196.

inference of evidence of the lower court judge, but restricted to the ‘clear error’ standard.

In England, the intermediate appellate courts do not pay such high deference to the lower trial court’s evidentiary inferences as in the US. ZUCKERMAN explains that English appellate judges are not seen as having a disadvantageous perspective as regards these inferences. Unlike the credibility of oral testimony, an English appellate court is on equal footing to analyse the correctness of the steps in the reasoning.¹⁸⁹ Therefore, in the English perspective, the principle of deference does not apply here, and the intermediate appellate court will include in its scope of review the inferences based on the evidence.¹⁹⁰

In the cassation jurisdictions under study, the same intellectual inferences built upon the evidence are included within the scope of the cassation chambers.¹⁹¹ The reason is that they are not considered questions of fact but of a procedural law issue. The cassation recourse is allowed to review questions of law in which the meaning of ‘law’ does not only refer to substantive law but also to the formal law of the procedure.¹⁹² The codes of civil procedure regulate that the final judgments need to be rationally motivated.¹⁹³ Therefore, when the lower court fails in the reasoning of its inferences, the cassation court will review the evidentiary inferences because the law of procedure, which requires rationally motivated judgments, was violated (*défaut de motif*).¹⁹⁴

As a diagonal comparison, both pairs of jurisdictions will *include* within their scope of review the *inferences on evidence* in the respective courts of error. However, they differ in the conceptual classification and criteria of delimitation invoked to include them. In the US and England the inferences on evidence will be called questions of fact and the intermediate appellate court will take action in reviewing them, because the lower court judge deserves a lower deference in this aspect (lower in England than in the US). Their intermediate appellate courts are on comparable footing to evaluate the reasoning written down in the judgment. In the cassation jurisdictions of France and Italy the inferences on evidence will be called questions of procedural law. Therefore, French and Italian cassation chambers will review them, because the requirement of reasoning in the final judgment is a matter of (formal) law and not of fact.

¹⁸⁹ In the 2006 edition of his book, he explained that the reason behind the lower deference on inferences is that ‘an appeal court is just as well placed as the trial judge to determine the proper inferences to be drawn from circumstantial ... evidence’, ZUCKERMAN 2006, p. 888.

¹⁹⁰ *Civil Procedure Rules*, Rule 52.11 (4): ‘The appeal court may draw any inference of fact which it considers justified on the evidence.’

¹⁹¹ KODEK 2014, p. 45 ([D]eficiencies in the *reasoning* as to the assessment of the evidence may be challenged by cassation or Revision in many countries.’ [emphasis added]).

¹⁹² In France, FERRAND 2010, p. 599-600. In Italy, LUCIDO & RAIMONDI 2015, p. 83-86.

¹⁹³ In France, *Code de procédure civile*, Art. 455. Italy, *Codice di Procedura Civile*, Art. 132.

¹⁹⁴ In France, WEBER 2010A, p. 79. In Italy, AMOROSO 2012, p. 279-280.

vi. *General interpretation*

In both pairs of jurisdictions, the diagonal courts of error include within their scope of review what they call the ‘points of law’. However, they do not understand that concept in the same way. The US and English conception of point of law is narrower and also of more diffuse boundaries. The French and Italian cassation doctrine, instead, tends to have a broader conception about what counts as points of law,¹⁹⁵ and (supposedly) more precise in its limits. To explain this misunderstanding, let us use the distinction between problems of *general interpretation* and problems of *particular application*.

A problem of *general interpretation* means that there is a doubt about the meaning itself of a certain legal rule or precedent in the abstract. For example, in a special field of tort law – *e.g.*, traffic accidents – we have a doubt about whether, in order to obtain compensation, culpability is required (fault responsibility) or that harm and causality are sufficient (strict responsibility).¹⁹⁶

Unlike the credibility of oral evidence, where the lower trial court has a better perspective, the legal sources (and their interpretation) are equally accessible to both, the higher and the lower courts. Therefore, a model of a court of error does not have to pay deference to pure questions of law such as general problems of legal interpretation because the court of error will also have the sources of law in its hands (*iuria novit curia*). Even more, the court of error may have a better perspective than the trial court with regard to solving problems of general interpretation. This advantage comes from the position of the court of error at a higher level, from which it can oversee part of the judicial system as a whole, identifying the different interpretations that circulate among the lower courts.¹⁹⁷

The US and English intermediate appellate courts will include these types of problems within their scope of review. In the US, the federal appellate courts review general problems of legal interpretation – a ‘point of law’ in their terminology – according to the *de novo* standard, which means without deference to the lower court.¹⁹⁸ They acknowledge that questions of fact (with ‘clear error’ deference) and questions of law (with ‘*de novo*’ no-deference) can be mixed. Still, the kind of cases in which they agree that a *de novo* standard applies are this kind of general problem of legal interpretation in which is important to maintain uniform decision criteria. An example was the discussion in *Ornelas v. United States*.¹⁹⁹ In this case the US Supreme Court decided the standard of review that the Federal Courts of Appeals should apply in warrantless searches, for example, a situation that mixes questions of fact and questions of law. Particularly, the general problem of interpretation was whether the ‘reasonable suspicion’ and ‘probable

¹⁹⁵ See again, JOLOWICZ 1998, p. 53-54.

¹⁹⁶ On this distinction in tort law, VAN DAM 2014, p. 225 ff.

¹⁹⁷ See again, O’CONNOR 1984, p. 5.

¹⁹⁸ CASTANIAS & KLONOFF 2008, p. 178.

¹⁹⁹ CASTANIAS & KLONOFF 2008, p. 178-179.

cause’ of this kind of measure should be reviewed based on a *de novo* or a clear-error standard. The US Supreme Court held that the Federal Courts of Appeals should review this kind of measure based on the lower deference of the *de novo* standard (instead of the higher deference of the ‘clear error’) in order to ‘prevent unacceptably varied results based on the interpretation of similar facts by different trial judges’.²⁰⁰ In England, the level of deference on points of law depends on the acceptance that more than one answer can be correct – one answer of the lower court and another of the appellate court. But when it comes to the general interpretation of statutes, for example, English authors affirm that ‘there will be one right answer (or at any rate only one can stand)’.²⁰¹ If there is no space for more than one answer to general problems of legal interpretation, then in England there is no space for deference to the lower trial court as regards them.

France and Italy also include the general problems of interpretation in the scope of review of their respective courts of error – *i.e.*, the cassation chambers – at the third level. A problem of general interpretation classifies as a question of ‘law’ and, thus, it is not excluded according to the cassation dogma.²⁰² In the French and Italian cassation courts the review of them is included because these general problems of interpretation are the scope of their plenary sessions as well.²⁰³ Before reaching the plenary session, the case with a problem of general interpretation should go through the scope of review of the cassation chamber first, in order to be identified as such and referred to the plenum.²⁰⁴

Another interesting observation is that these two pairs of jurisdictions, when diagonally compared, are also aware that the general points of law can go beyond their courts of error. As we observed in Chapter III, a general problem of interpretation is a question that, in the US and England (UK), should be allowed to reach not only the second court level – *i.e.*, the intermediate appellate courts – but also the third level – *i.e.*, the supreme courts.²⁰⁵ As just mentioned, in France and Italy, the same problems of general interpretation, such as contradictory case law, can be reviewed not only by their third court level (cassation chamber),²⁰⁶ but the review can go further to the hidden fourth level (cassation plenum).²⁰⁷ Therefore, from a diagonal perspective the four jurisdictions agree that questions of general interpretation are in a potentially ‘transitory’ stage at their courts of error, waiting to be reviewed by the higher authority of the respective courts of precedents of their jurisdictions.

²⁰⁰ *Ornelas v. United States*, 517 U.S. 690 (1996).

²⁰¹ ZUCKERMAN 2013, p. 1180-1181.

²⁰² In France, BORÉ & BORÉ 2015, p. 251-252. In Italy, AMOROSO 2012, p. 228.

²⁰³ *supra* Chap. IV.C.1. (i,ii).

²⁰⁴ *supra* Chap. V.C.8. (i,ii).

²⁰⁵ *supra* Chap. III.B.1. (i,a) and Chap. III.B.5. (i).

²⁰⁶ *supra* Chap. III.B.1. (ii,a).

²⁰⁷ *supra* Chap. IV.C.1. (i,ii); Chap. IV.C.8. (i,ii).

vii. *Particular application*

A problem of particular application means, instead, that once the general interpretation of the rule is settled, the problem then is whether that well-settled rule applies to the facts of the current dispute. In the same example of tort law, we can have clarity that in that field, traffic accidents, the tort regime is fault responsibility. Even if that rule is settled in its general interpretation – that negligence is needed, besides harm and causality – we can have a different doubt about whether or not the current facts of the case fit in that legal rule. An example of a problem of particular application could be: if I am talking on the phone while I am driving, does that count, or not, as ‘negligence’? That negligence is required in traffic accidents is not under discussion here, that problem of general interpretation is already solved. The current problem is in its particular application, whether the legal rule (only the negligent will have to compensate) applies, for example, to a person talking on the phone while driving.²⁰⁸

From the perspective of the French and Italian cassation courts, at least at a purely doctrinal level, the problems of particular application as such are undoubtedly classified as a question of ‘law’.²⁰⁹ For example, the French cassation judge WEBER states:

[T]he sovereign power [of the lower court judge on the facts] is not unlimited, because the Court of Cassation controls the legal qualification of those facts – for example, the direct, certain and licit character of the damage or whether at the date of the evaluation the compensation was complete – because those are notions of law which fall within the [Court of Cassation’s] mission.²¹⁰

As a consequence, the cassation chambers will take action in reviewing whether the legal rules of tort compensation, continuing with the same example, apply or not to the particular set of facts of the current dispute.²¹¹ They do not refrain from reviewing it because – unlike the US and English perspective, as we shall see –

²⁰⁸ The former implies the latter, but not *vice versa*. If we have a problem of general interpretation, as a consequence we will have a problem of particular interpretation as well. If there is no clarity about whether culpability is required or not by tort law, we will not have clarity about whether talking on the phone while driving will imply a duty of compensation either. But a problem of particular application does not imply a problem of general interpretation. We can discuss whether talking on the phone while driving counts as ‘culpability’, but there is a consensus that culpability is required in order to compensate.

²⁰⁹ In France, TROPER & GRZEGORCZYK 1997, p. 104; FERRAND 2010, p. 598; BORÉ & BORÉ 2015, p. 301 ff. In Italy, AMOROSO 2012, p. 248-250.

²¹⁰ WEBER 2010A, p. 87 (*‘Mais ce pouvoir souverain [of the lower judge] n’est pas pour autant illimité, car la Cour contrôle la qualification légale des faits tels que, par exemple, les caractères direct, certain, licite du préjudice, sa date d’évaluation, si la réparation a été intégrale, car il s’agit alors de notions de droit qui ressortissent de sa mission.’* [Author’s translation]).

²¹¹ JOLOWICZ 2000, p. 302 (*‘In France, as in other countries that distinguish between appeal and cassation, the qualification of the facts is treated as a question of law so as to bring it within the competence of the Court of Cassation: the appreciation or the evaluation of the facts as they have been found by the judge of fact, is said to be give them their legal quality.’*).

the particular application of the legal sources to the particular circumstances of the current dispute does not count as the forbidden category of ‘facts’ in France, nor in Italy. The chambers of a court of cassation seem to make efforts to expand their notion of ‘questions of law’ in order to include the legal qualifications of the facts (*qualification juridique des faits*) within their scope of review.²¹²

However, this distinction is subject to great discussion in the practice of the cassation jurisdictions under study. The amount of case law that debates the separation between facts and law in cases of particular application is overwhelming. The most complex chapter of a book on cassation case law will be devoted to problems raised by this distinction, apparently clear.²¹³ Therefore, the assertion that the particular application counts as a question of law, formulated with confidence at a doctrinal level, is a highly relativised practice.

In the US and England, however, this is sincerely acknowledged as a grey area.²¹⁴ In their perspective, the particular application of law relies heavily on the use of open standards.²¹⁵ And these open standards can be seen as a middle point between facts and law. In the words of the English judge HOFFMANN:

The judge is deciding a *question of mixed fact and law* in that he is applying the standard laid down by the court ... On the one hand, the standards applied by the law in different context vary a great deal in precision and generally speaking, the vaguer the standard and *the greater the number of factors* which the court has to weigh up in deciding whether or not the standards have been met, *the more reluctant an appellate court will be to interfere* with the trial judge’s decision.²¹⁶

Therefore, it is a grey area as to whether the application of standards is a question of fact or law. Most importantly, it is also a soft gradient of grey tones as to whether the English intermediate appellate court should intervene in the review of the application of such open standards by the lower trial court. If the standard is complex and relies on a delicate balance of a variety of factual issues, the English Court of Appeal will tend to exclude it from its scope of review. But, if it is a simple standard, based on a quasi-mechanical assertion of one or two crystal-clear facts, the English Court of Appeal will be more willing to review it.²¹⁷

The situation of the US is the other extreme from the point of view of the conceptual classification. The particular application is not considered a question of

²¹² KODEK 2014, p. 45 (‘[O]ne prevailing tendency [in the civil law] is to expand the notion of what a question of law is, thus enabling appellate courts to exercise their review powers and, if necessary, step in. This phenomenon has been described for the Courts of Cassation.’); JOLOWICZ 1998, p. 53.

²¹³ For example, BORÉ & BORÉ dedicate more than one hundred pages to explain this distinction, BORÉ & BORÉ 2015, p. 239-253, 281-300, 301-318, 319-324..

²¹⁴ In the US, CASTANIAS & KLONOFF 2008, p. 184 . In England, ZUCKERMAN 2013, p. 1181.

²¹⁵ On the use of standards in the common law legal reasoning, FLETCHER 1995, p. 949-982.

²¹⁶ *Re Grayan Buildings Services Ltd* [1995] EWCA [emphasis added].

²¹⁷ ZUCKERMAN 2013, p. 1181.

law (as in the cassation jurisdiction), not a mixed question of facts and law (as in England). In the US perspective, the particular application of the law to certain facts is considered a point of fact. This conceptual classification in the US comes from the jury system. The US jury is enshrined as the trier of ‘facts’.²¹⁸ However, the jury’s verdict not only defines the pure credibility of the pieces of evidence at trial. The jury also concludes whether the defendant is liable or not, and the amount of compensation for the current case.²¹⁹ In the comparative terminology of this study, such determination of liability and compensation made by the jury in the current dispute count as problems of particular application.

However, to what extent the particular application will be within the review of the US federal appellate courts will vary depending on whether the first instance judgment was rendered by a jury or a judge. In principle, it will be outside the scope of review if it was given by the jury. The US level of deference to the jury’s verdict is extremely high, but not absolute. As we saw before, in extreme and rare cases, when the application of the law cannot be grounded at all on the evidence presented to the jury, the appellate court will reserve some possibility of review by questioning the inferences on evidence.²²⁰

The conceptual classification of the particular application problem as a question of fact in the US does not change when the judgment is rendered by a judge and not by a jury. Therefore, the judge’s particular application will also count as a question of fact in the US perspective. However, the level of deference to the judge is lower than that given to the jury. While the standard of review on the jury’s verdict is the lack of ‘legally sufficient evidentiary bases for a reasonable jury’,²²¹ the standard of review on the judge’s judgment is the general standard of (merely) a ‘clear error’.²²² Therefore, the federal appellate court will review the judge’s particular application to a greater extent than a jury’s verdict.²²³ However, this difference should not be overestimated. The trial by jury takes place only when the procedure reaches the ‘trial’ phase. But fewer than the 5 per cent of the cases reach such trial phase,²²⁴ and only a portion of this 5 per cent of trials will be decided by juries. Instead, the normal scenario in the first instance is that the cases are settled, or decided by the judge.²²⁵ Therefore, the (higher) level of review of the appellate

²¹⁸ KANE 2018, p. 187.

²¹⁹ FLETCHER & SHEPPARD 2005, p. 243 (‘In civil cases, [US] juries decide not only the question of liability but also the amount of damages the defendant must pay.’).

²²⁰ *supra* Chap. V.C.1. (v).

²²¹ CASTANIAS & KLONOFF 2008, p. 193.

²²² CASTANIAS & KLONOFF 2008, p. 196.

²²³ MORRISON 1996, p. 79-80 (‘Although appellate rulings are generally limited to questions of law, there are two exceptions ... Secondly, where the facts are found by a judge instead of a jury, an appeals court will overturn a finding [of fact] if it concludes (as it rarely does) that the trial judges was “clearly erroneous”.’).

²²⁴ HAZARD & TARUFFO 1993, p. 212.

²²⁵ See again, GALANTER 2004, p. 459-570.

court on the trial judge’s particular application is a more representative picture of the US federal appellate practices.

From a diagonal perspective it can be concluded that the review of *particular application* problems is a *scale of grey* colours in the two pairs of jurisdictions under study. However, they differ in how explicitly they acknowledge this gradient. The US and England seem to have an open and transparent approach in admitting that the problems of particular application are questions of facts combined with issues of law. Also, whether the particular application should or should not be within the scope of their intermediate appellate courts will also be a gradient scale, which depends on the complexity of the standard that needs to be applied. On the side of France and Italy, in practice there is also a gradient scale, but not one explicitly admitted. At a purely doctrinal level, the particular application of the law in each dispute counts as a question of law, not of fact. But despite this apparent clarity in the abstract dogma, the distinction between facts and law is problematised on a daily basis in the (abundant and contradictory) cassation’s case law. The final practical result seems to be comparable to the US and English intermediate appeal, but in a constant denial. In actual French practice, for example, it is also a grey zone as to whether the particular application of the law in real-life disputes will be included within or excluded from the cassation chambers’ review. But this grey zone in France and Italy will not be openly assumed as such, as it is in the US and England, but will be the result of an endless debate that is reopened case after case, about how the (apparently) clear division between facts and law should be properly applied to the current dispute.

viii. Procedural guarantees

A judicial decision can be the result of an error not only if the facts were not verified or the law was misapplied. A judgment also needs to be the result of a fair procedure. Therefore, for a court of error it is relevant to check whether or not the lower court followed the regulated stages of the judicial process. However, not all the specific procedural rules are relevant for a court of error, but only some of them. The model of a court of error will pay special attention to the procedural rules that imply important guarantees of due process for a fair result – *i.e.*, the impartiality of the judge, the opportunity to be heard, publicity of the proceedings, among others.

In the US and England, the intermediate appellate courts will include these procedural guarantees within their scope.²²⁶ In the US, the procedural violations are, in general, within the scope of review of the federal appellate courts because they are entitled to review ‘errors’ of any type,²²⁷ which may include procedural errors as well. Due to the deference to the lower trial court, however, the US

²²⁶ In the US, CASTANIAS & KLONOFF 2008, p. 189-190. In England, DREWRY, BLOM-COOPER & BLAKE 2007, p. 23.

²²⁷ See again, MARCUS 2014A, p. 118.

appellate court in practice exercises such review power on procedural violations only in case of an ‘abuse of discretion’.²²⁸ In other words, procedural issues are considered as part of the lower court judge’s discretion and normally not under federal appeal review. However, the clear violation of the most important procedural guarantees may count as an ‘abuse’ of discretion and, therefore, exceptionally within the review of the US federal appellate courts.²²⁹

The situation of England as regards procedural violations is similar to the US ‘abuse-of-discretion’ standard. The English intermediate appellate courts are allowed to review a ‘serious procedural or other irregularity in the proceedings’ committed at the lower court.²³⁰ The kind of procedural irregularities which are considered ‘serious’ enough are, precisely, these types of crucial guarantees. According to ZUCKERMAN, ‘[t]he provision is wide enough to cover any aspect of the adjudicative process, such as lack of impartiality on the part of the judge or absence of public access to the hearing’.²³¹

On the side of France and Italy, the cassation chambers will also review the most relevant procedural violations. Let us remember that according to doctrine, cassation reviews all questions of law (substantive or procedural). These guarantees are contemplated in the law of the codes of procedure. Therefore, procedural guarantees will be included within the cassation scope of review as well, under the classification of formal law.²³² In the situation of Italy, for example, the code includes an explicit list of the procedural violations reviewable in cassation. The kinds of irregularities included on that list are, precisely, the ones that involve important procedural guarantees as such:

Art. 360. The judgment pronounced in appeal or in a single instance may be challenged through the cassation recourse:

- 1) Due to motives related to the jurisdiction;
- 2) Due to a violation of the norms on competence [*i.e.*, impartiality and natural judge], if the resolution on competence was not outdated; ...
- 4) Due to nullity of the judgment or the procedure; ...²³³

From a diagonal perspective it can be concluded that both pairs of jurisdictions *include* the *procedural guarantees* within their scope of review, but at different levels. In the US and England the monitoring of the procedural rights will be at their

²²⁸ CASTANIAS & KLONOFF 2008, p.190 ([T]he sort of issues that are properly subject to abuse-of-discretion review ... many of these fall under the rubric of procedural or case-management rulings.)

²²⁹ *e.g.*, CASTANIAS & KLONOFF 2008, p. 192-193.

²³⁰ *Civil Procedure Rules*, Rule 52.11 (3)(b).

²³¹ ZUCKERMAN 2013, p. 1187.

²³² FERRAND 2010, p. 599-600; BORÉ & BORÉ 2015, p. 372 ff.

²³³ *Codice di Procedura Civile*, Art. 360 [Author’s translation]; COMOGLIO, FERRI & TARUFFO 2011, p. 712-715.

intermediate appellate courts (2nd level), while in France and Italy in their cassation chambers (3rd level). These four jurisdictions authorise the review of the most important procedural violations at their diagonal courts of error. However, they differ in how precise they grant that authorisation. In the situation of the US and England, the permission is formulated in broad terms ('abuse of discretion' or 'serious procedural irregularity'). Therefore, it will be up to the US and English appellate judges to decide, on a case-by-case basis, which procedural irregularities are serious or abusive enough to deserve a review. In the cassation recourse, that authorisation, especially in Italian law, is more precise. It will not be up to the cassation court to define which irregularities are serious enough, but that definition will be enshrined in advance by the legislator in a list.

ix. Case management

Not all of the procedural regulation has to do with important guarantees of due process. Some other rules of procedure deal with purely managerial aspects of the administration of justice – *e.g.*, scheduling hearings, defining deadlines, timetabling witnesses, choosing a procedural track. A court of error, which deals with the constant risk of becoming overburdened, cannot give close attention to all the procedural aspects. It has to concentrate only on those aspects that involve a relevant procedural guarantee. The remaining steps of a mere managing of the proceedings will be outside of its attention. From a diagonal perspective, as we shall see, both US and English intermediate appellate courts and the chambers of cassation courts in France and Italy tend to exclude the pure case management decisions from their scope of review, as follows.

In the US, as a general rule, the federal appellate courts will not get involved in such case management issues that are up to the discretion of the lower court judge.²³⁴ As previously discussed, procedural matters are the concern of the federal appellate courts in the US as long as they involve an 'abuse of discretion'.²³⁵ *A contrario sensu*, if there is no such abuse at risk, the US federal appellate courts will be deferential to the routine procedural decisions made by the lower trial courts. In England, these kinds of procedural issues are properly called 'case management'.²³⁶ The English appellate courts will also be reluctant to review them.²³⁷ In their perspective, case management decisions are part of the deference

²³⁴ MORRISON 1996, p. 80 ('There is a third category of issues arising on appeals in which the trial court is almost never overruled. They involve exercises of the court's discretion on matters such whether additional discovery should be stopped because it has become unduly burdensome, whether further cross-examination should be allowed ... the appeal courts, largely in recognition of the need to allow the trial judge flexibility and her ability to access first hand all the relevant factors, almost never finds that the trial judge abused her discretion ...').

²³⁵ *supra* Chap. V.B.1. (ix).

²³⁶ In more detail, ANDREWS 2014B, p. 335-347.

²³⁷ DREWRY, BLOM-COOPER & BLAKE 2007, p. 73.

that is due to the lower court.²³⁸ Because the lower trial court is responsible for the efficient progress of the litigation, and is closer to the parties and the evidence, the trial court, instead of the appellate court, is the one that has the better perspective to take case management decisions on a daily basis.²³⁹

In France and Italy, mere case management issues are also usually excluded from the review of the cassation chambers. In principle, case management is about procedure, and should be within their scope because it is a question of (formal) law. In practice, however, the court of cassation will refrain from intervening in such procedural aspects in which the lower court judge has discretionary power. This is one of the few aspects in which these cassation and common law jurisdictions agree, in similar words, on the criteria of delimitation of their scope of review. In French case law, for example, the pure procedure managing issues are part of the sovereignty of the first instance court, to which the cassation court should pay respect.²⁴⁰ This French ‘sovereignty’ of the lower court in procedural aspects resembles a similar idea in England – that the English lower court judge deserves ‘deference’ from the appellate court in administering the dispute through case management tools.²⁴¹ In Italy, the same restriction on pure case management decision can be seen in the new ‘filter’. Since the reform of 2009, the cassation court can declare inadmissible a petition which manifestly fails to ground the violation of due process.²⁴² The ‘due process’ clause only refers to the most sensitive aspect of the procedure. *A contrario sensu*, the pure case management decisions, which do not affect the due process core, will also be excluded from the Italian cassation review because they will be preliminarily screened out by the new filter.

2. Exposure

In the previous chapter, the diagonal perspective showed that the common law supreme courts and the plenary session of the cassation courts under study maintain a conscious effort to publish most of their decisions, whether in official bulletins or in annual reports, and now on institutional web pages.²⁴³ At the lower level of the chambers in a cassation court, instead, there is a more selective approach as regards publication.²⁴⁴ The number of chamber decisions that are published through those formal channels is only a small percentage of the

²³⁸ ANDREWS 2014A, p. 87.

²³⁹ ZUCKERMAN 2013, p. 1195.

²⁴⁰ WEBER 2010A, p. 87.

²⁴¹ For an overview of these conclusions on the diagonal comparison of the scope of review between the common law intermediate appellate courts and the cassation chambers, see the summary table presented at the beginning of this section, *supra* Chap. V.C.1.

²⁴² *supra* Chap. III.B.5. (ii).

²⁴³ *supra* Chap. IV.C.3 (iii).

²⁴⁴ *supra* Chap. III.B.3 (ii).

chambers' total caseload.²⁴⁵ However, the less exposure given to the judgments of the cassation chambers is not decided at random. Cassation chamber judgments are published or not based on their importance in guiding the case law. The French Court of Cassation, for example, has a plan on the different hierarchies of publication that their *arrêts* could have.²⁴⁶ In the case of the Italian Court of Cassation, this selective publication is done by a separate office, called *ufficio massimario*, which is in charge of selecting the most important judgments, summarising and publishing them in an annual report.²⁴⁷

The explanation for this selective system of publication is related to the fact that the court of error hears a large number of cases.²⁴⁸ On its enormous docket, the vast majority of cases are routine problems, which are of relevance just for the current parties in dispute.²⁴⁹ Only a few of the court of error decisions clarify important points of law in significant disputes, which need to be known by a broader audience.²⁵⁰ The result is that the kinds of chamber judgments that are fully published are only a small fraction that have a case law relevance. The rest of the chambers' judgments will remain archived in the court's facilities, used only for consultation by the parties and other judges.²⁵¹ Do the US and English intermediate appellate courts – the courts of error equivalent, from a diagonal perspective, to the chambers in the cassation courts – have a comparable regime of publication?

i. United States of America

In the US, the publication of the judgments of the courts of appeals reached a critical situation in recent decades. The special concern for the publication of judgments is related to the *stare decisis* doctrine.²⁵² Within a system of judge-made law, most of the judicial decisions should potentially be known by the population because they will be governed by those binding precedents.²⁵³ Therefore, the strict publication of the higher courts' previous decisions was understood as an accountability safeguard for the people subject to the power of those judges.²⁵⁴

However, in the second half of the twentieth century the US judicial system faced a litigation explosion that led to a concern about keeping the traditional publishing practices.²⁵⁵ US commentators realised that the database of precedents was

²⁴⁵ See again, WEBER 2010A, p. 105-106.

²⁴⁶ DEUMER 2015, p. 98-100; *supra* Chap. IV.C.3 (i).

²⁴⁷ COCCIA 2015, p. 25; *supra* Chap. IV.C.3 (i).

²⁴⁸ *supra* Chap. III.B.4 (c).

²⁴⁹ *supra* Chap. III.B.3 (c).

²⁵⁰ RICHMAN & REYNOLDS 2013, p. 27-28.

²⁵¹ UZELAC 2014B, p. 3-4.

²⁵² REYNOLDS & RICHMAN 1981, p. 575.

²⁵³ REYNOLDS & RICHMAN 1981, p. 575.

²⁵⁴ RICHMAN & REYNOLDS 2013, p. 44.

²⁵⁵ RICHMAN & REYNOLDS 2013, p. 10-11; *supra* Chap. V.C.2. (i).

becoming excessively numerous and complicated.²⁵⁶ In order to cope with the workload, the federal appellate courts started to take measures to speed up the procedures.²⁵⁷ However, the consequence of these measures was that the appellate courts were finally devoting a short (too short) period of time to resolving each case, compromising the quality of decisions.²⁵⁸

In the Sixties and Seventies of the twentieth century the alternative that the US federal appellate courts found was, to some extent, intricate. Instead of an explicit restriction of the force of certain precedents, which would be a violent transgression of their common law tradition of *stare decisis*, they opted for ‘hiding’ certain precedents by restricting their publication.²⁵⁹ The courts were aware that a precedent, in order to be applied in the future, first needs to be known. To avoid the problem of the unintended consequences of a precedent settled in a case which they had not had enough time to thoroughly analyse, the alternative was to restrict the access of the general public to the content of the judgment.²⁶⁰ The justification was that not every opinion of every single judgment needs a detailed reasoning. Due to the simplicity of these appeals, it was seen as inappropriate to always publish such abbreviated opinions.²⁶¹ The underlying assumption of this reform was that, if a judgment is not published, then it cannot become an influential precedent either.

From then on, the appellate courts themselves decided which judgments’ opinions would be published in the official reports.²⁶² To coordinate which ones would be known or not, the federal appellate courts developed ‘Publication Plans’.²⁶³ These plans defined the criteria for publication based on the general interest of the issue, or its relevance for case law unification and development. For example, the *Publication Plan of the Fifth Circuit* states:

(47.5.1) Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it: (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked ...²⁶⁴

²⁵⁶ RICHMAN & REYNOLDS 2013, p. 11.

²⁵⁷ WHEELER 2004, p. 262-263.

²⁵⁸ REYNOLDS & RICHMAN 1981, p. 573.

²⁵⁹ In detail, REYNOLDS & RICHMAN 1978, p. 1167-1208.

²⁶⁰ MARCUS 2014A, p. 121; WHEELER 2004, p. 264-267.

²⁶¹ RICHMAN & REYNOLDS 2013, p. 11.

²⁶² REYNOLDS & RICHMAN 1981, p. 577.

²⁶³ RICHMAN & REYNOLDS 2013, p. 10 ff.

²⁶⁴ (47.5.1 continues) ‘... (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule; (c) Explains, criticizes, or

As a result, the average percentage of judgments of the federal appellate courts that were finally published decreased over time. In the 1980s it was 38 per cent.²⁶⁵ In the last decade, it was less than 19 per cent.²⁶⁶

Besides the criticism against the restriction of publication itself,²⁶⁷ this measure was of limited success. The official court reports are not the only way a judgment can be known by the general public – the alternatives of private publication and academic law journals exist in the US. Therefore, the judgments, even if they were not officially published by the court, end up being known, especially by practicing lawyers, through these other means and used in future cases anyway.²⁶⁸ The reaction of the federal appellate courts was to go even further. In addition to limiting publication, federal appellate courts started to prohibit the citation of unpublished opinions or, directly, denying their precedential force, as we shall see in the analysis of the judgment effects attribute.²⁶⁹

ii. *England and Wales*

In England, the evolution was different than in the US. The peculiarity of England is that there are no judge-made reports of judgments. The courts are not the ones in charge of publishing their own decisions. Those who traditionally have taken on this task are the lawyers, particularly the barristers.²⁷⁰ The barristers are not, properly speaking, court officials, but private professionals.²⁷¹ Therefore, the case law reports made by the barristers are not really public or official in nature. But neither are they a purely private publication for the eyes of English authors. They prefer to say that barristers' reports are some kind of middle point; they have become semi-official.²⁷² This publication system was not the object of the Woolf reforms on appeals.²⁷³ Therefore, this semi-official (but private) initiative of the

reviews the history of existing decisional or enacted law; (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another; (e) Concerns or discusses a factual or legal issue of significant public interest; or (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.- An opinion may also be published if it: Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.' On other circuits – e.g., the Fourth and Sixth – see REYNOLDS RICHMAN 1979, p. 807-841.

²⁶⁵ REYNOLDS & RICHMAN 1981, p. 587.

²⁶⁶ BAYER 2009, p. 14.

²⁶⁷ RICHMAN & REYNOLDS 2013, p. 42-55.

²⁶⁸ RICHMAN & REYNOLDS 2013, p. 49.

²⁶⁹ *supra* Chap. V.C.3. (i).

²⁷⁰ KARLEN 2014, p. 75.

²⁷¹ More on English barristers, KRAMER 2011.

²⁷² BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 320-321.

²⁷³ See WOOLF 1996, p. 153-167.

barristers in reporting judgments was not seriously modified with the new *Civil Procedure Rules* and remains a consolidated English tradition since 1865.²⁷⁴

There are hierarchies among these barristers' publications. The most important ones are the *Weekly Law Reports* and *The Law Reports*. Between the two, *The Law Reports* has a higher hierarchy. First, because it includes not only the judgment itself but also a summary of the counsel's argument.²⁷⁵ Second, because when a case is included in *The Law Reports* the citation on it has preference over any other kind of report where the same judgment could be added too.²⁷⁶

Barristers-editors decide which cases to include in the reports based on their usefulness for case law discussions. In a similar manner as the US federal appellate courts' publication criteria,²⁷⁷ according to KARLEN in England:

The basis upon which they [the barrister-editors] exercise their discretion is precedent value. If a decision announces a principle of law, they deem it worthy of publication, but if it merely applies a well-settled principle to a particular state of facts, they do not.²⁷⁸

As a result, included in the *Weekly Law Reports* are cases that cover procedural matters and points of law of general interest, pertinent in both the short term and the long term; unlike *The Law Reports*, which publishes, among the previous cases, only the cases of long-term concern. According to these editorial criteria, the vast majority of the UK Supreme Court's judgments end up being published.²⁷⁹ The publication of the English Court of Appeal's decisions, instead, is more selective: less than the 25 per cent.²⁸⁰ High Court decisions, finally, are only exceptionally included in *The Law Reports*.²⁸¹

iii. *Diagonal comparison*

From a diagonal perspective, we can find a common place in a selective pattern of exposure through publication between the second court level of the US and England *vis-à-vis* the third level of France and Italy. In a quantitative dimension, these diagonal courts of error in each pair of jurisdictions opt for publishing only a small fraction of their decisions. In France and Italy, one-tenth or fewer of the cassation chamber decisions will be officially published.²⁸² In the intermediate appellate courts of the common law jurisdictions under study the number will not

²⁷⁴ More on the history of law reporting in England, WARD & AKHTAR 2011, p. 99-104.

²⁷⁵ SLAPPER & KELLY 2016, p. 138.

²⁷⁶ SLAPPER & KELLY 2016, p. 139; KARLEN 2014, p. 74.

²⁷⁷ See again, Publication Plan of the Fifth Circuit (47.5.1); *supra* Chap. V.C.2. (i).

²⁷⁸ KARLEN 2014, p. 74.

²⁷⁹ During the former House of Lords, for example, it was 70 per cent. KARLEN 2014, p. 74.

²⁸⁰ KARLEN 2014, p. 74.

²⁸¹ COWNIE, BRADNEY & BURTON 2013, p. 46 ('Though, unlike the previous three courts [Privy Council, Court of Appeal and Supreme Court], only a selection of its [High Court's] decision are reported. Even Lexis and Westlaw do not contain a complete set of reports.').

²⁸² *supra* Chap. III.B.3. (ii). WEBER 2010A, p. 105-106; FERRAND 2017, p. 196-197.

be much higher: as we saw, one-fifth in the US²⁸³ and one-fourth in England.²⁸⁴ From a diagonal perspective, therefore, the vast majority of the decisions of these intermediate appellate courts and cassation chambers will remain unpublished for a general audience, and available only for the parties in dispute.²⁸⁵

The decision of whether to publish can be up to the court itself, as in the US and France, or it can be delegated. In Italy, the delegation is made to a staff office (*ufficio massimario*),²⁸⁶ while in England publication is under the charge of a special bar of lawyers (barristers).²⁸⁷ The editorial criteria can be more or less defined, as in the US and France that have detailed publication plans.²⁸⁸ Despite these differences in the organ or the level of definition, however, both the US and English intermediate appellate courts (2nd level) and the French and Italian cassation chambers (3rd level) share similar editorial criteria for publishing. The decisions will be published or not based on their case law relevance. The few disputes that raise important points of law, with arguable interpretations, will have priority in the case law reports. While routine appeals – in which clear and well-settled law is applied to a more or less typical factual context – will normally be excluded from publication.

3. Judgment effects

In the model of a court of precedents it is necessary that the judgments issued by the tribunal have a strong effect in determining the future decision criteria of the lower courts.²⁸⁹ That force can be derived from a *de iure* recognition as legally binding or a *de facto* hierarchical influence.²⁹⁰ From a diagonal perspective, we observed in the previous chapter that such strong force can be found at the supreme court of the US and England,²⁹¹ and at the plenary session of the court of cassation in France and Italy.²⁹²

The chambers in the cassation court, though, do not have the same force as the plenary sessions. French and Italian scholars do not hesitate to emphasise that in

²⁸³ BAYER 2009, p. 14.

²⁸⁴ KARLEN 2014, p. 74.

²⁸⁵ This symmetry in the limited publication patterns between civil and common law was broadly suggested by MARCUS 2014A, p. 121 ('To Continental eyes, unfamiliar with the notion of common law precedent, that development [of not publishing appeal judgments in the US] may not seem remarkable.').

²⁸⁶ TARUFFO & LA TORRE 1997, p. 148-149.

²⁸⁷ KARLEN 2014, p. 75.

²⁸⁸ For the US, see again, *Publication Plan of the Fifth Circuit* (47.5.1). For France, *supra* Chap. IV.C.3. (i).

²⁸⁹ TARUFFO 2001B, p. 96; *supra* Chap. III.B.2 (b).

²⁹⁰ See again, PECZENIK 1997, p. 465-467; against this *de iure* vs. *de facto* distinction, HOPMAN 2017, p. 54-66.

²⁹¹ *supra* Chap. III.B.2 (i).

²⁹² *supra* Chap. IV.C.2 (i,ii).

their jurisdictions judgments are not binding; they are not a formal source of law or binding precedents, properly speaking,²⁹³ but have only a (high) moral authority or *de facto* persuasive force.²⁹⁴ This means that the judges are not obligated to follow them *de iure*; but in practice they adhere to them unless there are strong exceptional reasons for a departure.²⁹⁵ However, we have to remember that the force that precedents have is not a matter of all-or-nothing, but of a *continuum*.²⁹⁶ According to MACCORMICK & SUMMERS, there are different degrees of force that precedents can exhibit in a comparative perspective.²⁹⁷ Therefore, even if the cassation chambers do not have the maximum force as the plenum has, that does not mean that their judgments are completely devoid of impact. Their degree of force is lower, but could remain influential. The case law trends identified by French and Italian scholars are not based on plenary session judgments alone, but are also based on patterns of the most relevant chamber decisions as well.²⁹⁸

Here, it is important to remember the distinction between a system of *precedents* and a system of *jurisprudence constante*, in order to grasp this difference. In a system of precedents, only one judgment can change future decision-making. Differently, in the *jurisprudence-constante* system, a single judgment will not be enough. Instead, it is necessary to unite several judgments in the same new direction in order to be capable of altering the judicial criteria.²⁹⁹ Based on this distinction, comparative scholars usually have stated that the common law jurisdictions have a system of precedents, where just one judgment is sufficient to shift the case law trend.³⁰⁰ While civil law jurisdictions have a system of *jurisprudence constante* instead, where more than one judgment is necessary.³⁰¹

According to the findings of this study, that description of the difference in the effects of the judgments between the common law and the civil law can be correct from a horizontal perspective, but not from a diagonal one. It is true that the third court level of the common law jurisdictions of the US and England (UK), at their supreme courts, has a system of precedents; while at the same third level of the cassation jurisdictions of France and Italy, at their cassation chambers, the judgments will have force only as *jurisprudence constante*.³⁰² However, based on the diagonal symmetry concluded in the previous chapter, it is possible to notice that a proper system of precedents, supposedly proper of the common law, can also be found in civil law jurisdictions such as France and Italy, but at a higher hierarchical

²⁹³ For France, WIJFFELS 2013C, p. 80. For Italy, ALVAZZI DEL FRATE 2013, p. 60.

²⁹⁴ For France, WEBER 2009, p. 116. For Italy, TARUFFO & LA TORRE 1997, p. 154; SILVESTRI 2017, p. 235.

²⁹⁵ GLENDON, CAROZZA & PICKER 2008, p. 132-136; HEAD 2011, p. 136. *supra* Chap. III.B.2 (ii).

²⁹⁶ MACCORMICK & SUMMERS 1997B, p. 532.

²⁹⁷ MACCORMICK & SUMMERS 1997B, p. 532.

²⁹⁸ *supra* Chap. III.B.2. (ii).

²⁹⁹ See also, GLENDON, CAROZZA & PICKER 2008, p. 132-136.

³⁰⁰ MACCORMICK & SUMMERS 1997B, p. 538.

³⁰¹ MACCORMICK & SUMMERS 1997B, p. 538.

³⁰² *supra* Chap. III.B.2 (iii).

level. In France and Italy the system of precedents is not absent, but located at a hidden fourth level: the system of precedents is not at the level of the chambers but at the plenary session of the same court of cassation.³⁰³ Continuing with the diagonal comparison, the task of this section will be to find out whether the *jurisprudence constante* system, supposedly proper of the civil law, is also present in the common law jurisdictions of the US and England, but at the lower level of the intermediate appellate courts.

Nevertheless, in respect of the precedential strength of the chambers' judgments it is important to understand not simply that they have a lower force than the plenary session, and not only that they can change future criteria only if several judgments are united (*jurisprudence constante*). Additionally, we have to bear in mind that not all of the cassation chamber judgments will have such force, but only a few of them.³⁰⁴ Due to the large number of cases that the cassation chambers resolve, it is not possible for the litigants, nor for the court itself, to keep exhaustive track of all their previous judgments.³⁰⁵ In practice, only some chamber decisions, among many, will be used as case law guidelines or court of cassation doctrine.³⁰⁶ Consequently, the remainder of the cassation chamber decisions will deal just with routine matters or particular circumstances, with no precedential repercussions nor general interest. Besides those exemplary judgments that stand out, the rest of the cassation chamber judgments will have no further influence beyond the current dispute.³⁰⁷ The question that we need to answer now is whether such lower and selective force of precedents can be found, from a diagonal perspective, in the US and English intermediate appellate courts.

i. United States of America

The US has had an interesting evolution as regards the effects of their judgments. As we observed in the previous section, the federal appellate courts reacted to the case overload by restricting the publication of precedent-setting opinions.³⁰⁸ But together with these publicity limitations courts also started to declare that the citation of certain judgments in future cases would not be allowed – *i.e.*, citation prohibition.³⁰⁹

With such unpublished judgments for the less complicated or less relevant cases, the federal appellate courts can save time by abbreviating the proceedings and writing down shorter judgments.³¹⁰ What is more, if the citation will not be allowed, then the federal appellate court does not need to deal with all the possible

³⁰³ *supra* Chap. IV.C.2. (iii).

³⁰⁴ TROPER, GRZEGORCZYK & GARDIES 1991, p. 106.

³⁰⁵ TARUFFO 1991, p. 172; BRAVO-HURTADO 2014, p. 328.

³⁰⁶ WEBER 2010A, p. 105-106; FERRAND 2017, p. 196-197.

³⁰⁷ *supra* Chap. III.B.2. (ii).

³⁰⁸ *supra* Chap. V.C.2 (i).

³⁰⁹ In detail, REYNOLDS & RICHMAN 1978, p. 1179-1181.

³¹⁰ RICHMAN & REYNOLDS 2013, p. 26.

repercussions (consequentialist reasoning) which a non-carefully written precedent may cause in the future.³¹¹ This prohibition of citation was, in practice, a subtle effort to deny the precedential force of many appeal judgments.

Restrictions on publication and citations, nonetheless, aroused harsh criticism.³¹² US scholars argued that restrictions on publication and citations eroded the *stare decisis* tradition.³¹³ The government finally agreed with this criticism. Accordingly, in 2006 this restriction on citations was abolished with the reform to the *Federal Rules of Appellate Procedure*.³¹⁴ The new Rule 32.1 permitted once more the citation of federal judgment opinions even if they were declared unpublishable or non-precedential by the court.³¹⁵

From a diagonal perspective, we can observe a temporary diagonal symmetry between France and the US as regards the effects of the judgments during a period of fifty years. In France, the citation of previous decisions in cassation judgment is forbidden even today.³¹⁶ In a similar manner, as previously described, the US federal appellate courts from the mid-twentieth century until 2006 did not allow the citation of certain judgments either. In France, this prohibition of citation is the result of a long tradition. The general lack of confidence in the judiciary produced a strong denial of judge-made case law as a proper source of law, a conviction inherited from the French Revolution.³¹⁷ In the US, the equivalent restriction on citations did not come from a long historical tradition as such. Instead, it came from the need for a practical solution to the explosive growth in the case overload the federal appellate courts were facing in the final decades of the last century.³¹⁸ Therefore, it is interesting to note that France and the US converged during the course of half a century in the prohibition of citations, but due to different motivations. While in France it was a historical tradition, in the US it seems to have been a pragmatic solution.

³¹¹ RICHMAN & REYNOLDS 2013, p. 27 ff.

³¹² Specially by REYNOLDS & RICHMAN 1979, 1987.

³¹³ RICHMAN & REYNOLDS 2013, p. 47 ff.

³¹⁴ RICHMAN & REYNOLDS 2013, p. 67.

³¹⁵ The Rule 32.1 states: '(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and - (ii) issued on or after January 1, 2007.- (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.'

³¹⁶ TROPER & GRZEGORCZYK 1997, p. 115; BORÉ & BORÉ 2015, 408.

³¹⁷ DAWSON 1986, p. 375-386; CAPPELLETTI 1971, p. 13; MERRYMAN & PÉREZ-PERDOMO 2007, p. 16-17.

³¹⁸ *supra* Chap. V.C.2. (i).

But even if citation is permitted again in the US,³¹⁹ the possibility to use judgments with unpublished or non-precedential opinions remains limited. The reason is again practical. Let us remember that federal appellate courts used these mechanisms to confront their increasing workload, streamline procedures and save time by writing shorter judgments in less complicated cases.³²⁰ Unpublished opinions are brief to the point that, usually, no substantial information about the case comes with them.³²¹ Therefore, that lack of factual description makes unpublished opinions irrelevant as precedents for future litigants, who will find no use in invoking them in practice.

However, the unpublished opinions of the federal appellate courts do not lack influence completely. Some of them may stand out above the rest. Even if they were declared non-precedential by the court itself, these judgments keep, according to US scholars, some element of their ‘persuasive value’.³²² This means that the next judges are not properly obliged to follow the unpublished precedent, but they can cite its arguments if, in their opinions, it is worth doing so.³²³

ii. *England and Wales*

In England, the force of the appeal judgments depends on the specific court that heard the appeal. Let us remember that in English civil procedure not only the Court of Appeal will hear appeals, but also the High Court. As explained before, cases of higher value or complexity will be heard by the former (Court of Appeal) because at the first instance they were distributed to the Higher Court in multi-track. The latter (High Court), though, will hear cases of smaller value or complexity because the first instance was assigned to a County Court.³²⁴

This distinction is important because English authors recognise different levels of force of the judgments from one or the other. According to BANKOWSKI, MACCORMICK & MARSHALL, for example, a Court of Appeal’s judgment has the force of ‘defeasible precedents’.³²⁵ This is a lower force than the one that the House of Lords had because it means that, in principle, the Court of Appeal’s precedents have to be followed unless more or less explicit exceptions justify departing from it.³²⁶ However, these exceptions to the Court of Appeal’s obligation to follow its own precedents – such as the *per in curiam* exception (a decision omitting a

³¹⁹ After the reform of 2006, RICHMAN & REYNOLDS 2013, p. 67.

³²⁰ WHEELER 2004, p. 262-263.

³²¹ RICHMAN & REYNOLDS 2013, p. 69 (‘[T]here is so little meat in most unpublished opinions, so little in the way of facts or analysis, that it is difficult to see how those decisions are of any use to anyone’).

³²² RICHMAN & REYNOLDS 2013, p. 69.

³²³ RICHMAN & REYNOLDS 2013, p. 70.

³²⁴ *supra* Chap. V.B.1. (i).

³²⁵ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 326.

³²⁶ CROSS & HARRIS 1991, p. 107 ff.; Also SLAPPER & KELLY 2016, p. 160-161.

pertinent source of law) – have become broader than expected.³²⁷ As a consequence, Lord DENNING suggested that the Court of Appeal should no longer be considered as being bound by its own previous decisions.³²⁸ In fact, Lord DENNING argues that the Court of Appeal’s behaviour of following precedents should be considered not as a rule of law but as a *rule of practice*.³²⁹

As regards the English High Court, its judgments have an even lower force. English authors say that they are not properly binding, but ‘persuasive’.³³⁰ The mere persuasive force means that the parallel or lower court is not formally obliged to follow the High Court’s decision criteria.³³¹ They are not obliged, but just allowed, to follow its rulings only to the extent that they share the reasoning behind the judgment.³³² Therefore, the High Court practice of following its own precedents does not come from a proper legal binding force, but as a tendency in practice motivated by a mere ‘judicial comity’.³³³

In sum, this appeal distribution between the Court of Appeal and the High Court has as a consequence that the value and complexity of the dispute will be directly proportional to the force of the appeal judgment. In other words, if we consider the way in which the types of cases that can potentially be appealed to the Court of Appeal and the High Court are determined – at the first instance by their value and complexity – the consequence is that the level of force that an appeal judgment will have in England will be correlated with the value or complexity of the dispute in the first instance, as well. The appeal judgment in a high value dispute will tend to have the higher force of a defeasible precedent because it was issued by the Court of Appeal, whereas the appeal judgment in lower value disputes will also have a lower force, only as persuasive precedent, because it was issued by the High Court instead.

Also, the number of appeal judgments that have one or the other degree of force is different. The Court of Appeal reviews a minor percentage of the total number of appeals, only the few that have a value sufficient enough to be distributed in the first instance to the High Court in multi-track.³³⁴ The vast majority of appeals, however, will be heard by the High Court, because this tribunal is the one that hears the largest number of appeals against disputes of a lower complexity and value, which are assigned to the County Court.³³⁵ In conclusion – and this is

³²⁷ COWNIE, BRADNEY & BURTON 2013, p. 95.

³²⁸ *Davis v. Johnson* [1979] AC 264 (HL), p. 293. Cited by COWNIE, BRADNEY & BURTON 2013, p. 95.

³²⁹ COWNIE, BRADNEY & BURTON 2013, p. 95-96.

³³⁰ SLAPPER & KELLY 2016, p. 154 (‘[S]trong persuasive authority’).

³³¹ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 325-327.

³³² CROSS & HARRIS 1991, p. 121-122; SLAPPER & KELLY 2016, p. 155.

³³³ COWNIE, BRADNEY & BURTON 2013, p. 96.

³³⁴ In 2010, the percentage of cases allocated to multi-track was 13% (ca. 23,000 from a total of 170,000 cases). UK JUDICIAL STATISTICS 2011, p. 16.

³³⁵ In detail, *supra* Chap. V.C.7. (ii).

important to remember in order to demonstrate the diagonal symmetry with the cassation chambers – in England, a minor percentage of appeal judgments will have the relatively higher force of defeasible precedents (Court of Appeal judgments), while the vast majority will have, not proper binding force, but persuasive value (High Court appeal decisions).

iii. Diagonal comparison

The US and England have in common that their intermediate appeal judgments have different levels of force depending on the complexity and relevance of the case. Both the important and the complicated disputes will be decided with a judgment having a level of force close to a proper precedent, while the less complicated or unimportant cases will be decided by a judgment with a lower force, just as persuasive reasoning.

However, the US and England got into this situation through different paths. In the former, the different levels of force are defined by a different regime of publication within the same court. In the latter, though, this is determined by different courts that issued the judgment. In England, therefore, complicated and high value disputes will be decided by an appeal judgment with the force of a defeasible precedent because they were heard by the Court of Appeal. Simpler or low value cases will be decided in England with a mere persuasive precedent because the tribunal that issued the appeal judgment was the High Court. The High Court currently hears the vast majority of the appeal caseload in England. Therefore, a more representative picture of the effects of the judgments in the English intermediate appeals is not the higher force of the Court of Appeal defeasible precedents, but the lower force of the High Court's mere persuasive decisions.

In the US, there is no distinction between High Court and Court of Appeal for the appeal procedure (as in England and Wales). All federal appeals are lodged before the same Federal Courts of Appeals, in the corresponding circuits. Therefore, in the US the same tribunal hears appeals in cases of both high and low value or complexity. But within the US federal appellate courts, both types of disputes will be treated differently in procedural terms, and finally only the judgment in relevant cases will be published (counting as proper precedent), while the less relevant ones will not be published, reducing their force to a mere persuasive decision. Nowadays, the vast majority of the federal appellate courts' decisions are not published. In a similar manner as in the English High Court, therefore, the more representative picture of the judgments' effects in the US federal appellate courts is the reduced force of persuasive decisions of the unpublished opinions.

The similarities are evident from a diagonal perspective. French and Italian scholars also say that cassation chamber judgments are not proper, binding

precedents.³³⁶ Most of the judgments have no more than an illustrative or persuasive value and only some of them will gain an exceptional influence. However, that influence in these cassation jurisdictions is not due to their recognition as formal sources of law but as a ‘higher or lower moral authority’.³³⁷ The diagonal symmetry here lies in the fact that what is called ‘higher or lower moral authority’ in the cassation culture is a close equivalent to the ‘defeasible precedent’ or ‘persuasive value’ in the US and English legal terminology. In both types, the routine decisions from the French and Italian cassation chambers, on the one hand, or the unpublished opinions of the US courts of appeals or the English High Court judgments, on the other, will not have a binding force *per se*, but they will influence future cases only to the extent that the other courts agree with the strength of the internal reasoning of the previous judgment (‘lower’ moral authority or ‘persuasive value’). But the outstanding judgments of a cassation chamber, on the one hand, and the US federal appeals that are actually published and the English Court of Appeal decisions, on the other, will both have the stronger force of the ‘higher’ moral authority or ‘defeasible precedent’. This stronger force implies that the court will follow the precedent even if does not agree entirely with its internal reasoning. Yet the ‘defeasible’ nature of this force means that the other courts still have the possibility to deviate from the precedent, but only in extraordinary circumstances.³³⁸

The way in which authors from England and Italy, for example, describe this exceptional higher force that their courts of error have is also revealing when diagonally compared. This defeasible force – in which the precedent of the English Court of Appeal should be followed unless important exceptions arise – is remarkably similar, from a diagonal perspective, with the attitude that, in theory, Italian cassation judges should have. TARUFFO & LA TORRE also refer to the idea that cassation chamber judgments are binding but defeasible – in a way that resembles the English Court of Appeal – but with different words:

The general attitude is that a precedent should be applied, at least when no good reasons can be found not to follow it [*n.b.*, ‘defeasibility’, in English terms]. When such reasons exist, every court is expected to state them using proper arguments and justifying its own decision. Moreover, lower courts should follow the precedents of the higher courts, and each court could follow its own precedents, unless good reasons exist not to do this.³³⁹

This diagonal symmetry in the effect of the judgment can be explained based on the shared model of court and judicial function. The second level intermediate appellate court in the US and England *vis-à-vis* the third level cassation chambers

³³⁶ WIJFFELS 2013C, p. 80; ALVAZZI DEL FRATE 2013, p. 60.

³³⁷ *supra* Chap. III.B.2. (ii).

³³⁸ On the definition of ‘defeasibility’, see in general, FERRER & BATTISTA 2012, and in particular SCHAUER 1998, p. 223-240.

³³⁹ TARUFFO & LA TORRE 1997, p. 156.

in France and Italy both have an error-monitoring function. Sooner or later, a court of error needs to differentiate between higher or lower levels of force within their judgments depending on the relevance of the case. Due to the large number of cases that need to be resolved in a court of error model,³⁴⁰ these diagonal courts cannot recognise a strong binding force to all their judgments, but only to some of them. The vast majority of these diagonal courts of error judgments that are left out will have only a persuasive value for future disputes, only to the extent of the inner strength of their arguments. The same differentiation of the force of precedents happens in the US, England, France and Italy, but at different levels. In other words, the internal distinction between defeasible and mere persuasive precedent can be found in the US and English intermediate appellate courts and in the French and Italian cassation chambers because of their shared function as error-monitoring courts.

The comparative distinction between precedential and *jurisprudence-constante* systems is also useful in explaining the diagonal symmetry at this level. A single judgment of the cassation chambers normally will not have power enough to produce a change in future judicial criteria by itself, it is not a proper precedent, with such individual potential. Cassation chamber judgments can modify future trends only if they become part of repeated case law.³⁴¹ A single US federal appellate court unpublished opinion will not count as a proper precedent either, due to the explicit un-precedential character imprinted by the court that issued it, but it can be invoked as *jurisprudence constante*, as we shall see.

An example of the *jurisprudence-constante* system of the unpublished opinions in the US intermediate appellate court is *Bragg v. Linden Research, Inc.*³⁴² In that case, the appellate court cited a non-published precedent (*Wellness Publishing v. Barefoot*), not individually but together with the trial court judgment that was challenged. The idea was that an unpublished appellate opinion (*Wellness*) does not have enough power by itself, but if combined with another one in the same direction (*i.e.*, the trial court judgment), it will gain enough influence to decide the case. The popular saying in the US courts is that an unpublished opinion that is cited today can become a precedent tomorrow.³⁴³ Therefore, the practical use of unpublished opinions in the US federal appellate courts resembles, from a diagonal perspective, the *jurisprudence-constante* system of the French and Italian cassation chambers: a single (unpublished) judgment may be weak, but when cited with others in the same direction it can become strong enough to change decision criteria.

In the English Court of Appeal, we can also observe the diagonal symmetry to a *jurisprudence-constante* system but in a different manner. Let us remember that the exceptions to the binding force of the Court of Appeal judgments have become

³⁴⁰ *supra* Chap. III.B.4 (c).

³⁴¹ MACCORMICK & SUMMERS 1997B, p. 538.

³⁴² *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D.Pa. 2007).

³⁴³ RICHMAN & REYNOLDS 2013, p. 71 ('[T]oday citation, tomorrow precedent.').

more numerous over time and – according to Lord DENNING – the Court of Appeal should be considered as following its own precedents only as a rule of practice (but not as a rule of law).³⁴⁴ This statement seems to be equivalent to the Italian scholars' statement that previous decisions are *de facto* sources of law (but not a *de iure* 'formal' sources).³⁴⁵ In both phrases, English and Italian authors seem to agree that the practice of following precedents in their diagonal courts of error does not come from a proper legal obligation but from regularity in the court's daily behaviour, which in comparative terms has been known as *jurisprudence constante*.

The diagonal perspective also shows the relation between the precedential force and the level of reasoning in the judgment.³⁴⁶ At the second level in the US, unpublished opinions have become (too) brief and, thus, they do not provide enough information to be invoked in future disputes.³⁴⁷ The same criticism is formulated about the third level in France. Due to the 'extreme conciseness' style of the cassation chamber, it becomes especially difficult to interpret its judgment and make use of it in future disputes.³⁴⁸ As a result of the insufficient information provided by their decisions, most of the US unpublished opinions are forgotten in the stacks of closed cases; in the same way that, from a diagonal perspective, most of the cassation chamber judgments are forgotten as well. Therefore, the diagonal comparison demonstrates that the reduced precedential force of these courts of error at the second and third level, respectively, is also a practical consequence. Their judgments do not have major effects in guiding future disputes because they simply do not provide enough guiding information in the first place.

4. Opinion style

In a court of precedents, the style of the judgments needs to be more detailed as to the multiple grounds for the judgments and, as a consequence, judgments tend to be of a longer extension.³⁴⁹ Due to the binding effects of its decisions, future litigants (and the future members of the court as well) need detailed opinions and descriptions of the facts, so as to understand precisely to which types of cases the new precedent applies.³⁵⁰ Because a court of precedents deals with general problems of interpretation, in its style it is also important to include dissenting opinions that can be used to identify the dialectic tension of the interpretation positions in dispute.³⁵¹ According to the diagonal symmetry thesis, the previous

³⁴⁴ COWNIE, BRADNEY & BURTON 2013, p. 95-96.

³⁴⁵ TARUFFO & LA TORRE 1997, p. 154.

³⁴⁶ On the diagonal comparison of the opinion styles, *infra* Chap. V.C.4 (iii).

³⁴⁷ RICHMAN & REYNOLDS 2013, p. 69.

³⁴⁸ TROPER, GRZEGORCZYK & GARDIES 1991, p. 172.

³⁴⁹ *supra* Chap. III.B.8 (b).

³⁵⁰ MACCORMICK & SUMMER 1997B, p. 536; GOLDSTEIN 1998, p. 329.

³⁵¹ BANKOWSKI, MACCORMICK & MARSHALL 1997, p. 319-320.

chapter demonstrated that more detailed judgments that include dissenting opinions can be found, on the one hand, at the third level in the US and England (UK), at the supreme courts.³⁵² On the side of France and Italy, on the other hand, more detailed judgments as those of a court of precedents can be found at the hidden fourth level of the plenary session of the cassation court, with external forms of rudimentary dissenting opinions.³⁵³

The chambers of the same courts of cassation, however, have detailed opinions less frequently.³⁵⁴ The large number of cases that a court of error needs to review, together with the lack of strong binding effect of its decision, make it too time-consuming to have long and detailed judgments for each dispute.³⁵⁵ To cope with the overwhelming caseload, the judgments of a cassation chamber tend to be concise, short and grounded in just one or two main arguments.³⁵⁶ Also, with a large caseload to deal with, to have separate opinions written by each judge will be too time-consuming in a court of error. Instead, cassation chambers normally issue short judgments with neither dissents nor concurring opinions,³⁵⁷ but just as one voice that speaks for the whole panel of judges.³⁵⁸ Following the diagonal symmetry, we need to look at the intermediate appellate courts of the US and England in order to find both aspects, brief and collectively written judgments.

i. Unites States of America

In the US federal court system the traditional style has been judicial individualism. This means that in collegiate courts, each judge may write down separately his or her own opinion on the whole dispute in every judgment.³⁵⁹ However, the US federal appellate courts have moved to a more collectivistic style, that is to say, that judgments tend to be written as a single voice for the whole panel, having fewer individual opinions. This shift from individualistic to collectivist judgments was a side effect of the changing policies as regards publications. As we have seen, the rise of unpublished opinions was a reaction to confronting the problem of case overload.³⁶⁰ Besides the lack of publication, those judgments are not signed by any particular judge either. This means that instead of being rendered as a sum of individual opinions, unpublished judgments are issued *per curiam*, that is to say, in the name of the court as a whole, omitting the mention of the judge or judges who authored the writing of the judgment.³⁶¹ This is different from a judgment that is signed at least by one judge and, therefore, someone particularly takes

³⁵² *supra* Chap. III.B.8 (i).

³⁵³ *supra* Chap. IV.C.6 (iii).

³⁵⁴ *supra* Chap. III.B.8 (ii).

³⁵⁵ *supra* Chap. III.B.8 (c).

³⁵⁶ GILLET 2012, p. 173-174; *supra* Chap. III.B.8 (ii).

³⁵⁷ TROPER & GRZEGORCZYK 1997, p. 110; TARUFFO & LA TORRE 1997, p. 145.

³⁵⁸ GINSBURG 2010, p. 2; MUNDAY 2002, p. 321.

³⁵⁹ In detail, BOWIE, SONGER & SZMER 2014, p. 132 ff.; REYNOLDS 2002, 12 ff.

³⁶⁰ *supra* Chap. V.C.2. (i).

³⁶¹ RICHMAN & REYNOLDS 2013, p. 42 ff.; KARLEN 2014, p. 45.

responsibility for its content. In *per curiam* judgments, quite the contrary, there is no personal signature at all and that, according to US commentators, raises important concerns of accountability.³⁶²

Also, *per curiam* and unpublished single opinions lead in the US to less detailed and, therefore, shorter judgments. According to KARLEN, a typical *per curiam* judgment could be of one or two pages, or even a single paragraph.³⁶³ The lack of precedential force of unpublished opinions has the result that the federal appellate courts perform a less deep analysis of the legal questions and, therefore, the judgments will be more succinct as regards points of law.³⁶⁴ As a consequence, in the easier cases, when the intervention of the US federal appellate court is limited to correcting a specific and clear error, no publication is needed nor a detailed reasoning. When no general interpretation problem is at stake, but just a particular issue for the parties, the federal appellate courts do not need to repeat a complete re-examination of every fact of the dispute, because the parties are already aware of them from the first instance.³⁶⁵

ii. *England and Wales*

In the intermediate appellate courts of England and Wales we can observe a similar evolution, albeit through different paths. In the English judiciary the traditional style has also been judicial individualism.³⁶⁶ However, this tradition has shifted towards the opposite,³⁶⁷ a more collectivistic approach as a result not of a special change in the publication plans (as in the US), but due to the BOWMAN recommendations implemented in the Woolf reforms.³⁶⁸ The main mechanisms for this collectivisation of the style are two: the single joined-judgment and the composite-judgment. This tendency to judgments as ‘team products’ can be observed in the English Court of Appeal, as we shall see.³⁶⁹

In easier cases – where no relevant discussion on the legal principles is at stake, but just the application of a well-settled law as to a clear set of facts – one judge of the Court of Appeal will write down the judgment and the rest of the bench will simply adhere to it. In such easy disputes, it would be useless to have individual opinions merely stating, ‘I agree and I have nothing else to add’ (single-joint

³⁶² RICHMAN & REYNOLDS 2013, p. 43.

³⁶³ KARLEN 2014, p. 45.

³⁶⁴ RICHMAN & REYNOLDS 2013, p. 43 (‘[I]t is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis ...’).

³⁶⁵ RICHMAN & REYNOLDS 2013, p. 29-30.

³⁶⁶ DREWRY, BLOM-COOPER & BLAKE 2007, p. 123.

³⁶⁷ DARBYSHIRE 2011, p. 324 (‘Judges [in the English Court of Appeal] normally gave separate judgments, though there has been a trend to a single or collective judgment.’).

³⁶⁸ JACOB 1998, p. 393-395.

³⁶⁹ ANDREWS 2017, p. 43.

judgment).³⁷⁰ However, when the facts of the case are complicated, a situation that becomes more and more frequent with the rising complexity of litigation, the judges usually divide the tasks. Each judge will be in charge of drafting the judgment of a certain portion of the facts in dispute and the other judges will review and amend each others' drafts. The result will be a judgment written down by several judges at the same time, signed by all of them as a team. But the general public will not know which judge in particular is the author of each specific part (composite judgment) because all judges participated, in different degrees, in drafting, reviewing and amending every part.³⁷¹

The style of the English intermediate appellate court judgments has changed not only as regards the number of dissenting or concurring opinions, but also as regards the extension of each judgment as a whole. DREWRY, BLOM-COOPER & BLAKE state, not without a dose of sarcasm, that 'it is not in the English tradition for appellate courts to write a treatise or exegesis on any legal topic'.³⁷² In their opinion, to elaborate large and detailed judgments on points of law should be the task of the UK Supreme Court, but not of the English Court of Appeal.³⁷³ The reason is that the appellate court does not need to deal in detail with the primary finding of facts, because that was the function of the first instance court, and the intermediate appellate court can just refer to them.³⁷⁴ Therefore, appellate court judgments will be short when they are simply a confirmation of the lower court's decision or, when reversing, the reasoning will deal only with the specific point that is challenged.

iii. *Diagonal comparison*

We can find another interesting symmetry from a diagonal perspective, now as regards the style of the judgments. First, the diagonal symmetry can be observed in the length of judgments. In the US federal appellate courts, *per curiam* opinions typically have one page, two pages or just a brief paragraph.³⁷⁵ This extreme conciseness at the second level in the US (federal appellate courts) resembles the third level in France. The French cassation chamber's *arrêts* usually have no more than one or two pages either.³⁷⁶ Therefore, these courts of error share, from a diagonal perspective, a style of judgments characterised by (extreme) concise decisions. In the previous section the consequences of this short style on the effects of the judgments were analysed. An extreme conciseness in writing opinions,

³⁷⁰ DREWRY, BLOM-COOPER & BLAKE 2007, p. 123.

³⁷¹ MUNDAY 2002, p. 337-339; on composite judgments, see also DREWRY, BLOM-COOPER & BLAKE 2007, p. 123-124, 126-127.

³⁷² DREWRY, BLOM-COOPER & BLAKE 2007, p. 127.

³⁷³ DREWRY, BLOM-COOPER & BLAKE 2007, p. 127.

³⁷⁴ DREWRY, BLOM-COOPER & BLAKE 2007, p. 129-131.

³⁷⁵ See again, KARLEN 2014, p. 45.

³⁷⁶ *supra* Chap. III.B.8. (ii).

which characterises these diagonal courts of error, limits the practical use of their decisions in future disputes.³⁷⁷

An even more interesting symmetry is that now the judgments of these diagonal courts tend to a collective style. Cassation chambers decisions are not only brief but also written as a single and shared opinion of the whole court.³⁷⁸ In the intermediate appellate courts of the common law jurisdictions under study a similar tendency can be observed. In the US, this is the result of case overload, *per curiam* decisions and unpublished single opinions.³⁷⁹ In England, the same style without dissenting opinions can be observed when the judgment is written by a single judge and the rest of the panel just adheres to it; or also in the composite judgments, in which the different parts of the writing process are flexibly distributed and mutually revised among the judges, but in the end nobody knows who wrote what.³⁸⁰

In sum, in Chapter III of this study the style of judgment marked a point of asymmetry from a horizontal perspective.³⁸¹ The US and English (UK) supreme courts are characterised by long judgments with dissenting opinions.³⁸² While, from a horizontal perspective, the French and Italian cassation chambers have the opposite style of short writings without dissenting opinions.³⁸³ From a diagonal perspective instead, similar short and collective judgments can be found both in the common law and in the cassation jurisdictions under study, but at different court levels. These short and collective decisions are present at the second level in the US and England (intermediate appellate courts) and at the third level in France and Italy (cassation chambers). The explanation for this diagonal symmetry in the style of judgments can be based on the shared error-monitoring function of these diagonal courts. The big caseload of a court of error makes these short and collective judgments necessary to cope with the increasing caseload of lower court decisions under monitoring.³⁸⁴ Because the four jurisdictions under study have courts of error, but at different levels, the same short and collective judgments will be found at different levels, as well.

This is important from a comparative law perspective. Comparative law studies have usually thought that a difference in the style of the judgments between civil law and common law jurisdictions is the inclusion of dissenting opinions in the courts' judgments.³⁸⁵ Common law jurisdictions are supposedly characterised by

³⁷⁷ *supra* Chap. V.C.3. (iii).

³⁷⁸ HEAD 2010, p. 218. For Italy, for example, TARUFFO & LATORRE 1997, p. 145.

³⁷⁹ RICHMAN & REYNOLDS 2013, p. 42-43.

³⁸⁰ DREWRY, BLOM-COOPER & BLAKE 2007, p. 123-127.

³⁸¹ *supra* Chap. III.B.8. (iii).

³⁸² *supra* Chap. III.B.8. (i).

³⁸³ *supra* Chap. III.B.8. (ii).

³⁸⁴ *supra* Chap. III.B.8. (c).

³⁸⁵ See again, MUNDAY 2002, p. 321; MERRYMAN & PÉREZ-PERDOMO 2007, p. 37.

judges who mention their separate reasoning (*i.e.*, individualistic approach);³⁸⁶ while civil law courts omit the individual opinions within a common writing of the judgment (*i.e.*, collectivistic approach).³⁸⁷ This way of distinguishing civil law and common law jurisdictions can be correct from a horizontal perspective, when comparing the US and UK supreme court *vis-à-vis* the French and Italian cassation chambers (3rd vs. 3rd). However, this section has demonstrated that such a comparative approach of differentiating legal traditions based on the individual or collective style of the judgments does not hold from a diagonal perspective.³⁸⁸ This Chapter V hence demonstrated that collectivistic judgments (supposedly proper of civil law jurisdictions) could be found in common law jurisdictions such as the US and England, but at their intermediate appellate courts (2nd vs. 3rd). Chapter IV demonstrated that rudimentary forms of dissenting opinions (supposedly proper of common law jurisdictions) could be found in civil law jurisdictions such as France and Italy when considering the additional documents – such as previous case-law, note of comments of (dissident) scholars, reporting judge’s brief, or general attorney’s reports, among others – consciously added to the publication of the cassation plenum judgment (3rd vs. 4th).³⁸⁹ Therefore, relevant jurisdictions of the two legal traditions have both individualist (court of precedent) or collectivistic (court of error) style of judgments but at different levels because the courts that perform the equivalent judicial functions, and require a distinctive style of judgments, are at different levels too.

5. Panel composition

In a court of precedents the panel of judges that will analyse the case tends to be more numerous.³⁹⁰ Due to the binding effect that comes from its judicial lawmaking function, this model tends to have sittings of more than five (prestigious) judges from different legal specializations. In this model is convenient to have an interdisciplinary team of seven, nine or more judges working together in order to analyse consequences of the current decision in future disputes or in other legal fields.³⁹¹ Consistent with the diagonal symmetry thesis that is proposed in this study, the previous Chapter IV demonstrated that such a large and interdisciplinary panel can be found in the US and UK supreme courts (3rd level),³⁹² and in the plenary session of the French and Italian cassation courts (4th level), respectively.³⁹³

³⁸⁶ MUNDAY 2002, p. 321; GINSBURG 2010, p. 2.

³⁸⁷ SHAPIRO 1980, p. 653; GINSBURG 2010, p. 2; HEAD 2010, p. 218.

³⁸⁸ On the redefinition of the identity of legal traditions, *infra* Chap. VI.G.

³⁸⁹ *supra* Chap. IV.C.6. (i).

³⁹⁰ *supra* Chap. III.B.6. (b).

³⁹¹ NORKUS 2015, p. 6.

³⁹² *supra* Chap. III.B.6. (i).

³⁹³ *supra* Chap. IV.C.6. (i,ii).

The chambers of a court of cassation, instead, have several panels but each one of them is of a smaller size – usually just five or even three members, as in France – for the vast majority of easy cases.³⁹⁴ Moreover, these smaller panels tend to be less interdisciplinary because they are comprised of judges that come from a similar legal specialization of a particular chamber. As discussed, cassation chambers are not courts of precedents but mainly courts of errors. Due to the lack of binding effect of their judgments, the cassation chambers do not need a large and interdisciplinary team of judges forecasting consequences in future cases and other legal fields (as the court of precedents does need). Quite the contrary, in the error-monitoring function it becomes a priority to maintain high capability and efficiency for monitoring lower courts.³⁹⁵ According to a court of error model, instead of just one large and interdisciplinary team of judges, in the chambers of the cassation courts it will be preferable to have several smaller groups of judges working in parallel, each group specialised in the same legal field, and divide the caseload among them.³⁹⁶

From a diagonal perspective, such smaller and less interdisciplinary panels of judges may be found not at the third level of the common law jurisdictions under study, but at their second one. The error-monitoring function is performed at the intermediate appellate courts in the US and England; and we should be able to find there panels of judges of a more similar size and composition as the cassation chambers in France and Italy. Cassation chambers are normally specialised panels of five judges (Italy) or between three and five (France). What is the size and composition of the panel in the intermediate appellate courts of the US and England?

i. United States of America

Nowadays, in the US the federal courts of appeals can sit *en banc* (i.e., full court or plenary session) or in panels of a maximum of three judges.³⁹⁷ This implies that, at least in theory, a panel of two is possible in the US. However, the normal practice has been three.³⁹⁸ Supposedly, the panel should comprise the permanent judges appointed for that federal appellate court. However, as a reaction to case overload, more and more appellate panels consist of external judges. For example, the panel of a federal appellate court could have just one proper appellate judge of that court together with a district judge and another senior judge from a different court.³⁹⁹

In certain cases the courts of appeals have to sit *en banc*. Particularly, a full bench judgment will be required when: '[it] is necessary to secure or maintain the

³⁹⁴ *supra* Chap. III.B.6. (ii).

³⁹⁵ *supra* Chap. III.B.6. (c).

³⁹⁶ *supra* Chap. III.B.6. (iii).

³⁹⁷ *U.S. Code*, Part III, Title 28, Part I, Chap. 3, § 46 (c).

³⁹⁸ WHEELER 2004, p. 251; KARLEN 2014, p. 38.

³⁹⁹ RICHMAN & REYNOLDS 2013, p. 95 ff.

uniformity of the court's decisions; or the proceedings involve a question of exceptional importance'.⁴⁰⁰ The size of the full bench sitting will depend on the total size of the particular federal appellate court, because different circuits do not have the same size.⁴⁰¹ However, we need to bear in mind that, despite these extraordinary meetings *en banc*, the ordinary practice of the federal appellate courts in the US is to sit in panels of three judges only.⁴⁰²

As regards the composition of the panels, the US federal appellate court system only has certain specialised courts: tax, international trade, armed forces and veterans claims.⁴⁰³ Bankruptcy appeals are also reviewed by a panel of judges specialised in bankruptcy law in the circuit appellate courts.⁴⁰⁴ In these legal fields, therefore, we can find an important level of specialisation in the panel composition at the second court level of the US.

As regards the remaining federal appellate courts of each circuit, quite the contrary, the general practice is randomness.⁴⁰⁵ This random assignment process is different depending on the circuit. The assignment could be up to the chief judge, court clerks or court executives.⁴⁰⁶ The rationale behind this random assignment is neutrality. Random assignment is meant to avoid an *ad hoc* panel composition that 'tilts' the result in advance.⁴⁰⁷ Recent empirical studies, however, question the actual randomness of these assignment procedures at the federal appellate courts.⁴⁰⁸

Still, the problem with this more or less random composition is that it does not allow a proper specialisation of the panel of judges.⁴⁰⁹ Because the panels are randomly composed, and the types of cases are randomly distributed too, judges will tend to review a variety of topics. However, the specialisation in the US federal appellate courts seems to be present not at the early stage of the panel composition but at the final moment of assigning the task of writing the court's opinion to a certain judge.⁴¹⁰ Unlike the panel composition, this opinion writing assignment is not random. Empirical studies demonstrate that the assignment of writing the opinion to a certain judge tends to be based on the judge's

⁴⁰⁰ *Federal Rules of Appellate Procedure*. Rule 35. *En Banc Determination*. (a)(1)(2); CASTANIAS & KLONOFF 2008, p. 309-310.

⁴⁰¹ *infra* Chap. V.B.6 (ii).

⁴⁰² See again, WHEELER 2004, p. 251.

⁴⁰³ CASTANIAS & KLONOFF 2008, p. 12-19.

⁴⁰⁴ CASTANIAS & KLONOFF 2008, p. 217.

⁴⁰⁵ CASTANIAS & KLONOFF 2008, p. 25.

⁴⁰⁶ CASTANIAS & KLONOFF 2008, p. 26.

⁴⁰⁷ BROWN & LEE 1999, p. 1103-1106.

⁴⁰⁸ CHILTON & LEVY 2015, p. 1-51.

⁴⁰⁹ POSNER 1983, p. 775-776.

⁴¹⁰ CASTANIAS & KLONOFF 2008, p. 294.

specialisation.⁴¹¹ Moreover, this specialised opinion assignment seems to be, the same as in the previous attributes, an adaptation to caseload pressures.⁴¹²

ii. *England and Wales*

Before the Second World War, in England the judges of the Court of Appeal usually sat in panels of five judges.⁴¹³ However, this practice has gradually changed since then. Now the Court of Appeal usually sits in panels of two or three.⁴¹⁴ The original composition of five judges is now reserved for exceptional disputes.⁴¹⁵ Also, each Court of Appeal panel divides its tasks. In each case, one of the three judges will be designated as the presiding judge, a sort of reporting judge, in charge of summarising the dispute for colleagues on the panel, and responsible for writing down a draft of the judgment.⁴¹⁶

Also in England, appeals are heard not only by the Court of Appeal. As we observed, appeals from a County Court will be brought before the High Court.⁴¹⁷ These types of lower level appeals are not heard by a panel of judges of the Court of Appeal. Instead, the appeal of such small claims will be heard by the High Court.⁴¹⁸ The composition of the panel at the High Court is different from that of the Court of Appeal – it is even smaller. Appeals before the High Court will be heard by single judges, plus some judicial staff that support them.⁴¹⁹

The composition of the panels in the English intermediate appellate courts shows a higher level of specialisation than in the US federal system. The English Court of Appeal has two divisions, one for criminal matters and the other for civil (non-criminal) affairs.⁴²⁰ In principle, the judges of the Court of Appeal can sit in both divisions since they are conceived as ‘generalists’,⁴²¹ instead of specialists. In practice, however, close to 40 per cent of the English Court of Appeal’s judges (15 out of 38) work in civil matters only.⁴²² Finally, in the composition of these civil panels of three judges at least two come from that specialisation.⁴²³

⁴¹¹ ATKINS 1974, p. 409.

⁴¹² ATKINS 1974, p. 410.

⁴¹³ DREWRY, BLOM-COOPER & BLAKE 2007, p. 125.

⁴¹⁴ UK JUDICIAL STATISTICS 2012, p. 63 (‘In the Civil Division, courts of two or three judges are normally constituted from the Master of the Rolls and the Lords Justices.’); also, ZUCKERMAN 2013, p. 1119; DARBYSHIRE 2011, p. 324.

⁴¹⁵ *The Senior Courts Act* [1981], Section 54 (2); DARBYSHIRE 2011, p. 324. (‘[G]uideline precedents are set by a bench of five.’).

⁴¹⁶ DREWRY, BLOM-COOPER & BLAKE 2007, p. 125.

⁴¹⁷ *supra* Chap. V.B.1. (i).

⁴¹⁸ ZUCKERMAN 2013, p. 1119.

⁴¹⁹ PLOTNIKOFF & WOOLFSON 2003, p. 131; ZUCKERMAN 2013, p. 1119.

⁴²⁰ DARBYSHIRE 2011, p. 324-325.

⁴²¹ DARBYSHIRE 2011, p. 327.

⁴²² DARBYSHIRE 2011, p. 327.

⁴²³ DARBYSHIRE 2011, p. 327 (‘Supervision LJs [Lords of Ladies Justices] tried to fix the civil benches of three to contain two specialists.’).

The English High Court appears as even more specialised than the Court of Appeal. The High Court has not only two but three internal division, namely Queen’s Bench, Chancery and Family Division.⁴²⁴ The Family Division is devoted to personal human relations – *e.g.*, such as divorce, children, inheritance – and the Chancery to property, trust, patents, among others.⁴²⁵ The latter two divisions, therefore, show a high level of specialisation. The Queen’s Bench, however, has a more generalist approach instead. In fact, the Queen’s Bench reviews criminal matters together with issues that classify as civil affairs (*e.g.*, personal injury due to negligence, breach of a contract, possession of land, among others).⁴²⁶ Even if the Queen’s Bench has subspecialised panels – such as the Administrative, Commercial, Admiralty and Technology and Construction Courts⁴²⁷ – the judges, who were recruited from specialised bars of lawyers, can be assigned to cases outside their expertise.⁴²⁸

iii. *Diagonal comparison*

From a diagonal perspective we can observe that both legal traditions have in common that the panel in their court of error will normally be smaller than the panel at their court of precedents. In the common law jurisdictions under study, the court of precedents will have panels of five, seven or nine judges (supreme court);⁴²⁹ while in these US and English courts of error currently there are three or even just one (intermediate appellate court). In France and Italy, each panel of their courts of error (cassation chambers) is also smaller than the panel of their higher court of precedents (cassation plenum). The plenary session can be composed of between nine (Italian *sezioni unite*),⁴³⁰ and nineteen (French *assemblée plénière*) judges;⁴³¹ while the ordinary functioning of the cassation chambers is usually five (Italian *collegio giudicante*) or between three and five for the easier cases (French *formations restreintes*).⁴³²

When diagonally compared, we can observe that the common law jurisdictions – even if they share this trend towards a smaller panel in their courts of error than in their courts of precedents – went a bit further than the cassation jurisdictions in this attribute. The size of the US and English intermediate appellate courts can be three judges, two or even just one (as in the English High Court), while in the French and Italian courts of error (cassation chambers) there are three or five.

⁴²⁴ See again, *The Senior Courts Act* [1981], Section 5(1)(a)(b)(c).

⁴²⁵ DARBYSHIRE 2011, p. 291.

⁴²⁶ DARBYSHIRE 2011, p. 291.

⁴²⁷ DARBYSHIRE 2011, p. 303 ff.

⁴²⁸ DARBYSHIRE 2011, p. 293-294.

⁴²⁹ *supra* Chap. III.B.6. (i).

⁴³⁰ *supra* Chap. IV.B.4. (ii).

⁴³¹ *supra* Chap. IV.B.4. (iii).

⁴³² *supra* Chap. III.B.6. (ii).

There is a great amount of symmetry, nevertheless. In France nowadays, around 50 per cent of the cases are decided by the *formations restreintes* (three judges) of the cassation chambers.⁴³³ Therefore, in half of the caseload, French cassation chambers and these common law intermediate appellate courts hear the disputes in panels of the same size, namely three. Only the complicated disputes will pass to the ordinary civil chamber in France, with the larger panel of five judges or more. In the same way, these common law intermediate appellate courts also can have extraordinary meetings for the important cases of a panel larger than the usual three – *i.e.*, the US *en banc* decisions of five or more judges or the English Court of Appeal that sits in a panel of five judges of ‘guideline precedents’.⁴³⁴ As an overview, French and Italian cassation chambers are nowadays larger (five judges) than the US and English intermediate appellate courts (three judges). However, an incipient symmetry can be observed where, on the one hand, cassation chambers tend to decide cases with fewer than five judges (French *formation restreinte*) and, on the other hand, these common law intermediate appellate courts decide by more than three judges in the important disputes.

Therefore, these diagonal courts seem to share a trend towards reducing the panel of judges. This tendency to a reduced panel is consistent with a court of error model which needs to reduce the size of its panels over time in order to increase the monitoring capacity over a growing caseload.⁴³⁵ However, this trend started much earlier in the courts of error in the US and England (2nd level). For example, the five-judge panel that the Italian cassation chamber has nowadays⁴³⁶ resembles the old practice in the English Court of Appeal before the Second World War, which was five judges back then.⁴³⁷ But, as we observed, in the mid-twentieth century the English Court of Appeal started a transition from a panel of five judges to three. The same transition from five judges to three can be observed in the French cassation chambers, but later on, beginning in 1981.⁴³⁸ Therefore, the trend of reducing the panel of their diagonal courts of error started more than three decades earlier in England than in France. Accordingly, a historical explanation about why nowadays the panel size of the US and English courts of error (2nd level) is smaller than the respective French and Italian courts of error (3rd level) may lie in the fact that the same trend started much earlier in the former of the two pairs of jurisdictions.

Finally, a partial symmetry can be observed in the specialisation of these diagonal courts of error. At the third level in France and Italy, the panels of judges are specialised according to the chamber’s subject matter.⁴³⁹ Unlike their plenary

⁴³³ *supra* Chap. III.B.6. (ii); WEBER 2010A, p. 69; FERRAND 2017, p. 191.

⁴³⁴ See again, DARBYSHIRE 2011, p. 324.

⁴³⁵ *supra* Chap. III.B.6. (c).

⁴³⁶ COCCIA 2015, p. 23.

⁴³⁷ DREWRY, BLOM-COOPER & BLAKE 2007, p. 125.

⁴³⁸ WIJFFELS 2013C, p. 81.

⁴³⁹ *supra* Chap. III.B. 6 (ii).

sessions, which combine a more interdisciplinary panel of judges from the different chambers.⁴⁴⁰ Due to the diagonal symmetry, the supreme courts at the third level in the US and England (UK) share the interdisciplinary panel composition,⁴⁴¹ as in the French and Italian cassation plenums in the hidden fourth level.⁴⁴² On the other hand, the judges of the US and English intermediate appellate courts are, in principle, generalists. In that sense, they are not as specialised as their diagonal counterparts of the French and Italian cassation chambers. Still, these common law intermediate appellate courts show a higher level of specialisation than their respective supreme courts. In the US federal appellate system exist specialised courts for taxes, international trade and bankruptcy, among others; and in England, 40 per cent of the Court of Appeal judges are devoted only to civil matters, while in the High Court there are separate specialisations at least in the Family and Chancery Divisions.

Among the two models under analysis here, the court of error needs a more specialised composition than a court of precedents which, quite the contrary, requires an interdisciplinary panel.⁴⁴³ In Chapter III, the French and Italian cassation chambers appear specialised according to the court of error model.⁴⁴⁴ The US and English intermediate appellate courts, as we observed, are not as specialised as these French and Italian diagonal counterparts. Still, the second court level in the US and England has a higher specialisation than their own third level (*i.e.*, supreme courts). In that sense, the US and English intermediate appellate courts appear more compatible to the court of error model than their respective supreme courts.

6. Total size

In Chapter III of this study we observed that the chambers of the French and Italian courts of cassation, despite their smaller composition in the particular panels that hear each case, end up being much larger in their total size than the supreme courts in the common law jurisdictions under study.⁴⁴⁵ The US and UK supreme courts have had nine and twelve members, respectively, in a relatively stable manner.⁴⁴⁶ But when we talk about the Italian or French court of cassation, we have to count the total number of judges in the hundreds, and they have been increasing in the last decades.⁴⁴⁷

⁴⁴⁰ *supra* Chap. IV.C.4 (i,ii).

⁴⁴¹ *supra* Chap. III.B.6 (i).

⁴⁴² *supra* Chap. IV.C.4 (iii).

⁴⁴³ *supra* Chap. III.B.6 (b,c).

⁴⁴⁴ *supra* Chap. III.B.6 (c)(ii).

⁴⁴⁵ *supra* Chap. III.B.7. (iii).

⁴⁴⁶ *supra* Chap. III.B.7. (i).

⁴⁴⁷ *supra* Chap. III.B.7. (ii).

This difference in total size was explained by the asymmetrical models of court from a horizontal perspective. At the third level of the US and England (UK) there are courts of precedents, which do not have an error-monitoring function over the lower court judges,⁴⁴⁸ but a judicial lawmaking function concentrated on resolving outstanding conflicts of general interpretation.⁴⁴⁹ When the caseload of the judicial system grows as a whole, therefore, these supreme courts do not add more judges,⁴⁵⁰ but introduce more restrictive preliminary screenings,⁴⁵¹ in order to keep the attention of the court focused on the most important cases only. According to the diagonal symmetry, the same happens in France and Italy, but at the fourth court level.⁴⁵² The total size of the cassation plenum is smaller and remains constant, resembling the model of a court of precedents, as well.⁴⁵³ While, from a horizontal perspective, the third level in France and Italy (cassation chambers) do have a strong responsibility in monitoring the lower court judges,⁴⁵⁴ and, thus, they have to maintain a high capacity of reviewing cases. Therefore, these chambers tend to add more cassation judges in an increasing proportion to the growing caseload of the judicial system that needs to be monitored, following the court of error trends instead.⁴⁵⁵

According to the diagonal symmetry thesis proposed in this study, we should be able to find courts whose total size evolves in similar trends as the cassation chambers not at the third level of the common law jurisdictions under study but at their second level. If the intermediate appellate courts in the US and England are the equivalent courts of error, their total size should reflect a growing tendency in the long run, making them much bigger than their supreme courts which, quite the contrary, are small and remain at a relatively stable size over time.

i. United States of America

In the US, the current total number of judges of the federal courts of appeals is 179.⁴⁵⁶ This is close to the 200 members that, from a diagonal perspective, the chambers of the French Court of Cassation currently has. An initial objection could be made against this calculation: here the comparison has been made between the total number of judges within the same courthouse in one jurisdiction (France) versus the total number when adding courthouses located in different places in the other jurisdiction (US). However, from a functionalist approach the relevant aspect to compare is the common function of certain courts and not their geographical

⁴⁴⁸ *supra* Chap. II.D.3. (ii); Chap. II.D.4. (ii).

⁴⁴⁹ *supra* Chap. II.D.3. (i); Chap. II.D.4. (i).

⁴⁵⁰ *supra* Chap. III.B.7 (i).

⁴⁵¹ *supra* Chap. III.B.5. (i).

⁴⁵² *supra* Chap. IV.C.5 (i,ii).

⁴⁵³ *supra* Chap. IV.C.5 (i,iii).

⁴⁵⁴ *supra* Chap. II.D.1. (i); Chap. II.D.2. (i).

⁴⁵⁵ *supra* Chap. III.B.7. (c).

⁴⁵⁶ This total is the result of adding the number of appellate judges of all the circuits. See again the table at *U.S. Code*, Part III, Title 28, Part I, Chap. 3 § 44. (a); *supra* Chap. V.B.2. (ii).

dispersion. Also, the different chambers of a cassation court, even if they are located under the same roof, can develop a certain level of autonomy or independence from each other, not so far from the relative autonomy of federal appellate courts of different circuits. If the basis of comparison is not the geographical distribution but the shared function (error-monitoring), then the calculation of the US federal appellate courts, taken all together, is pertinent for their comparison with the chambers of the cassation courts.

Despite the similar total number of judges between the two diagonal courts (179 in the US federal appellate courts and 200 in the French cassation chambers), the population of the US is much bigger than that of France (320 million against 66 million). Therefore, at first sight, we should expect that the US courts of error (the federal intermediate appellate courts), which need to grow in proportion to the judicial system as a whole, should be much bigger than the French one (the cassation chamber). However, we need to take into account that France is a unitary state – and, therefore, its court of cassation potentially hears all the cases within the jurisdiction – whereas, the US is a federal state. Therefore, the US federal courts will be in charge of hearing not all the national disputes but only that portion that implies a conflict within states or with the federal government. The rest of the workflow that comes from the disputes that are of a purely state-level concern will be absorbed by the local court of appeals of that same state, not by the federal court system.

Moreover, in order to identify a court of error by its total size, we need to focus not only on its current absolute number but also on the evolution of its total size.⁴⁵⁷ We can observe in the US that this number is constantly growing, as well. In the 1960s, there were sixty-eight authorised judgeships for the federal appellate courts.⁴⁵⁸ Currently, as we know, there are 179. This means that the federal appellate system has more than doubled its size in the last fifty years. Clearly, this accelerated growth rate is related to the crisis of volume that started in that earlier decade, and continued in the years that followed.⁴⁵⁹ However, the rate of increase in the total size of the federal appellate courts has not kept equal pace with the rate of increase in the total number of the appeals – the pace has been slower.⁴⁶⁰ In the 1960s, there were 57 filings per judge, and in the 2010s there are 327.⁴⁶¹

⁴⁵⁷ *supra* Chap. III.B.7. (c).

⁴⁵⁸ RICHMAN & REYNOLDS 2013, p. 5.

⁴⁵⁹ RICHMAN & REYNOLDS 2013, p. 5-6.

⁴⁶⁰ WHEELER 2004, p. 249 ('Appellate judgeships have increased much less than the number of cases.').

⁴⁶¹ RICHMAN & REYNOLDS 2013, p. 6.

ii. *England and Wales*

In England, the Court of Appeal is composed of thirty-eight judges in total.⁴⁶² This is bigger than a typical court of precedents that has a dozen members at most, such as its own UK Supreme Court. However, these thirty-eight judges seem too small in number, even from a diagonal perspective, compared to the total size of the cassation courts under study (France ca. 200, Italy ca. 400).⁴⁶³

However, let us remember that today in England and Wales the appeal caseload is shared between the Court of Appeal and the High Court, the latter having 114 judges in total.⁴⁶⁴ In simple addition, the Court of Appeal and the High Court have 152 members altogether, which would be closer to the total size of the French Court of Cassation (ca. 200). Still, adding them together needs clarification. An important portion of the High Court's workload is not devoted to the appeals (appellate jurisdiction),⁴⁶⁵ but to the first instance in large value claims allocated to multi-track (original jurisdiction).⁴⁶⁶ Yet, in principle, all the judges of the High Court are available to hear appeals.⁴⁶⁷ Therefore, the *potential* total size of the intermediate appellate courts that perform the error-monitoring function in England should be considered as a certain combination of both, High Court and Court of Appeal, and not as the members of the Court of Appeal only.

As discussed for the US, a supplementary indicator of a court of error is the evolution of its total size, rather than its current absolute number of members. From the perspective of its evolution, the English Court of Appeal has also had a constant growing tendency. At the moment of its creation (1873-1875),⁴⁶⁸ the Court of Appeal had just five members.⁴⁶⁹ In 1934 this increased to nine.⁴⁷⁰ By the 1970s the Court of Appeal had fourteen judges,⁴⁷¹ and now it comprises a total of thirty-eight members.⁴⁷² This means that the English Court of Appeal, like the US federal appellate courts, has doubled its total size in less than fifty years.

⁴⁶² *The Senior Courts Act* [1981], Section 2(1) amended by the *The Maximum Number of Judges Order* [2008]; COWNIE, BRADNEY & BURTON 2013, p. 44.

⁴⁶³ *supra* Chap. III.B.7. (ii).

⁴⁶⁴ Particularly, the High Court is comprised of 108 ordinary ('pusine') judges, plus six presiding judges: Lord Chief Justice, the President of the Queen's Bench, the President of the Family Division, the Chancellor of the High Court, the Senior Presiding Judge and the Vice-President of the Queen's Bench. See *The Senior Courts Act* [1981], Section 4(1)(e) amended by *The Maximum Number of Judges Order* [2003]; COWNIE, BRADNEY & BURTON 2013, p. 46.

⁴⁶⁵ *Senior Courts Act* [1981], Section 28 (3).

⁴⁶⁶ *Senior Courts Act* [1981], Section 19 (2); in detail, ZUCKERMAN 2013, p. 634.

⁴⁶⁷ PLOTNIKOFF & WOOLFSON 2003, p. 131.

⁴⁶⁸ DREWRY, BLOM-COOPER & BLAKE 2007, p. 31.

⁴⁶⁹ DREWRY, BLOM-COOPER & BLAKE 2007, p. 34.

⁴⁷⁰ DREWRY, BLOM-COOPER & BLAKE 2007, p. 39.

⁴⁷¹ DREWRY, BLOM-COOPER & BLAKE 2007, p. 34.

⁴⁷² DREWRY, BLOM-COOPER & BLAKE 2007, p. 34.

However, the great increase in the number of judges performing error-monitoring functions in England was not made through adding more judges to the Court of Appeal itself, but with the inclusion of the High Court judges to the appellate review in the 2000s.⁴⁷³ The High Court is also a tribunal with a trend for constant growth but at a slower pace than the Court of Appeal. In 1981, at the time of the *Senior Courts Act* enactment, the number of High Court judges was 86.⁴⁷⁴ Nowadays, instead, the High Court has a total number of 114 judges, as we just discussed.⁴⁷⁵ Therefore, in the course of fewer than four decades, the High Court has grown by 32 per cent.

iii. *Diagonal comparison*

From a diagonal perspective, a trend in the same direction as regards the total size can be observed. The intermediate appellate courts in the US and England and the cassation chambers in France and Italy are not tribunals whose size remains fairly constant over time. Unlike the diagonal courts of precedents analysed in Chapter IV, which have kept a relatively stable total number of judges in the last decades,⁴⁷⁶ in these two pairs of courts of error the number of judges is to some extent responsive to the increase in the caseload.⁴⁷⁷ Both the US and England have doubled the total size of their intermediate appellate courts in a fashion that resembles the growth of the French and Italian courts of cassation.⁴⁷⁸

This common trend could be explained through the thesis of a diagonal symmetry as proposed in this study. Even if they are at different levels of their respective judiciaries, both – the intermediate appellate courts in the US and England *vis-à-vis* the cassation chambers in France and Italy – are courts that exist to perform a similar error-monitoring function. Therefore, these two diagonal pairs of courts will prefer to confront the growth in caseload over time by adding more judges to their workforce,⁴⁷⁹ instead of by restricting the preliminary screening stages (as a court of precedents does),⁴⁸⁰ which may limit their monitoring capacity.

That is why the difference in the total size of the courts is smaller when diagonally compared. The courts of error in France and Italy, the combination of several cassation chambers, are not the only big courts composed of hundreds of judges. The US federal courts of appeals, the equivalent court of error, also consist of a combination of more than one hundred members altogether. And the English appellate courts – when combining the Court of Appeal and the High Court –

⁴⁷³ ZUCKERMAN 2013, p. 1112; *supra* Chap. V.B.1. (i).

⁴⁷⁴ Six presiding judges plus 80 ordinary (pusine) judges. See, *Senior Courts Act* [1981], Rule 4 (1) (e).

⁴⁷⁵ *The Maximum Number of Judges Order* [2003]; COWNIE, BRADNEY & BURTON 2013, p. 46.

⁴⁷⁶ *supra* Chap. III.B.7 (b,i); Chap. IV.C.5. (i,ii).

⁴⁷⁷ *supra* Chap. III.B.7. (c).

⁴⁷⁸ *supra* Chap. III.B.7. (ii).

⁴⁷⁹ *supra* Chap. III.B.7. (c).

⁴⁸⁰ *supra* Chap. III.B.5. (c).

exceed one hundred judges performing an equivalent error-monitoring function as well. If we remember that the intermediate appellate courts are, in practice, the courts of last resort in these common law jurisdictions,⁴⁸¹ their total size does not mark a radical point of asymmetry from the chambers of the courts of cassation in France and Italy, which are the last resort in practice, as well.

7. Number of cases

Chapter IV demonstrated that, from a diagonal perspective, the third level supreme courts of the US and England (UK),⁴⁸² *vis-à-vis* the hidden fourth level cassation plenum of France and Italy,⁴⁸³ are symmetrical in reviewing a reduced number of cases per year (usually, less than one hundred).⁴⁸⁴ A small number of cases to review is necessary in the context of the proper functioning of a court of precedents.⁴⁸⁵ In this model, the court is responsible not for monitoring the lower courts but for solving general interpretation problems through judicial lawmaking.⁴⁸⁶ To perform that function, the courts of precedents need to concentrate their attention only on a few exemplary cases which raise a general interpretation problem, and not on every possible misapplication of the well-settled law.⁴⁸⁷

Not at the fourth but at the third court level of France and Italy, instead, do the several cassation chambers tend to review a large number of disputes in total, which can be counted in the thousands altogether.⁴⁸⁸ This large number of cases to review is functional to the error-monitoring function that the cassation chambers aim to perform.⁴⁸⁹ If the goal is to minimise the unresolved mistakes of the lower court judges, the chambers in the courts of cassation need to be open to reviewing a larger number of complaints of particular mistakes,⁴⁹⁰ a number larger than the docket of their cassation plenary session devoted to a more precise function.⁴⁹¹

From a diagonal perspective we should not expect to find the same error-monitoring function at the parallel third level in the common law jurisdictions under study.⁴⁹² That function is performed in the US and England at a level lower

⁴⁸¹ *supra* Chap. V.B.

⁴⁸² *supra* Chap. III.B.4. (i).

⁴⁸³ *supra* Chap. IV.C.7. (i,ii).

⁴⁸⁴ *supra* Chap. IV.D.7. (iii); the Italian *plenum*, however, exceeds this trend, *supra* Chap. IV.C.7 (ii).

⁴⁸⁵ *supra* Chap. III.B.4. (b).

⁴⁸⁶ *supra* Chap. II.C.2.

⁴⁸⁷ *supra* Chap. III.B.5. (b).

⁴⁸⁸ *supra* Chap. III.B.4. (ii); TARUFFO 1998, p. 109.

⁴⁸⁹ *supra* Chap. III.B.4 (c).

⁴⁹⁰ *supra* Chap. III.B.4 (iii).

⁴⁹¹ *supra* Chap. IV.C.7. (iii).

⁴⁹² *supra* Chap. II.D.3 (ii); Chap. II.D.4. (ii).

than the supreme court. As the previous sections demonstrated, the error-monitoring function is in the charge of the intermediate appellate court in these jurisdictions.⁴⁹³ Therefore, we should expect to find at the second court level of the US and England a larger (and allegedly excessive) number of cases for review, comparable to the cassation chambers' docket.

However, the reader must remember a methodology clarification made in Chapter I 'Introduction': this study focuses not on civil cases themselves, but on courts that have jurisdiction in civil cases, regardless of whether they may have jurisdiction in other legal matters too.⁴⁹⁴ Remembering this clarification here is important because, as we shall see in the US and England, the intermediate appellate courts that have jurisdiction in civil cases – according to the definition of 'civil matters' of this study⁴⁹⁵ – also hear appeals from other fields of law. For example, the English intermediate appellate courts hear appeals on issues of administrative law, which are considered 'civil' matters in the broad definition of English law, but they are seen as 'non-civil' from the narrower definition of French law.⁴⁹⁶ Still, from a functionalist perspective the relevant issue is to understand the functioning of a certain court organisation as a whole, even if that organisation has to share its workforce between civil and non-civil cases. Accordingly, the calculation of the caseload may include not only the number of appeals in civil cases, in a narrow sense, but also the appeals in other legal matters, as long as they are handled by the same court organisation that has jurisdiction in civil matters.

i. United States of America

In the US, the Supreme Court, which performs the role of a court of precedents, (combined with a constitutional court) hears close to one hundred cases a year.⁴⁹⁷ The workload of the Supreme Court looks minuscule compared to the federal appellate courts. In the last decade, altogether the federal appellate courts caseload was about 57,000 cases per year.⁴⁹⁸

This is an enormous increase from a historical perspective. In the 1960s, there were only 3,900 appeals per year.⁴⁹⁹ Therefore, in that decade the Federal Courts of Appeal had a caseload that was just 7 per cent of its current burden (3,900 compared to 57,000). As described in the Introduction of this chapter, the litigation explosion then and during subsequent decades in the US increased the workload

⁴⁹³ For the US, RICHMAN & REYNOLDS 2013, p. 2-3; for England, BLAKE & DREWRY 2004, p. 226-227.

⁴⁹⁴ *supra* Chap. I.E.2.

⁴⁹⁵ *supra* Chap. I.E.2.

⁴⁹⁶ See again, JOLOWICZ 2000, p. 11.

⁴⁹⁷ *supra* Chap. III.B.4. (i).

⁴⁹⁸ In 2010 there were 56,800; RICHMAN & REYNOLDS 2013, p. 3; in 2002 there were 57,464; WHEELER 2004, p. 240.

⁴⁹⁹ RICHMAN & REYNOLDS 2013, p. 3.

of the federal courts of appeals.⁵⁰⁰ As a result, the current total caseload in the US intermediate appellate courts is fourteen times bigger than half a century ago.

ii. England and Wales

In England, the caseload of the Court of Appeal is also much bigger than that of the UK Supreme Court.⁵⁰¹ Normally, the UK Supreme Court receives about 200 applications for permission to appeal per year.⁵⁰² But, in accordance with the model of a court of precedents,⁵⁰³ it finally judges no more than sixty cases annually.⁵⁰⁴ Meanwhile in the Court of Appeal, just in the Civil Division, more than 3,000 permissions to appeal per year are normally decided.⁵⁰⁵ However, of the total filings, around one-third pass the permission stage and, therefore, about 1,000 appeals are finally decided on their merits.⁵⁰⁶ The Criminal Division of the same Court of Appeal usually hears seven times more cases than the Civil Division.⁵⁰⁷ Therefore, the caseload of the whole Court of Appeal, the Criminal and Civil Division together, increases to about 8,000 appeals per year.

In the same manner as in the analysis of the total size of the court in the previous section, here we have to take into account the High Court as well.⁵⁰⁸ According to court statistics, the total of appeals heard by the High Court in a year tends to be about 13,000 cases.⁵⁰⁹ Almost all of them are heard by the Queen's Bench which is, as we observed,⁵¹⁰ the one with the main jurisdiction in civil matters among the three divisions of the High Court.

This appeal caseload of the Queen's Bench comprises, first, 'appeals by way of case stated' – which means that the losing litigant disagrees with the application of the law on the facts as settled by the lower court⁵¹¹ – corresponding to the French and Italian cassation grounded on a violation of the substantive law.⁵¹² Secondly, the vast majority of the Queen's Bench appeal caseload consists in judicial review.

⁵⁰⁰ *supra* Chap. V.B.2. (ii); RICHMAN & REYNOLDS 2013, p. 3-4.

⁵⁰¹ BLAKE & DREWRY 2004, p. 222.

⁵⁰² See again, UK JUDICIAL STATISTICS 2012, p. 63.

⁵⁰³ *supra* Chap. III.B.4. (b).

⁵⁰⁴ *supra* Chap. III.B.4 (i).

⁵⁰⁵ In 2010, there were 3,350. UK JUDICIAL STATISTICS 2010, p. 141. The next year there were 3,758, UK JUDICIAL STATISTICS 2011, p. 64.

⁵⁰⁶ For example, in 2010 the number of appeals that were allowed to pass for a hearing was 1,180. Of these, 529 were finally accepted on the merits (allowed) and 434 rejected (dismissed), UK JUDICIAL STATISTICS 2011, p. 153.

⁵⁰⁷ For example, in 2010 the Civil Division finally judged 1,225 cases and the Criminal Division 7,250. UK JUDICIAL STATISTICS 2011, p. 159.

⁵⁰⁸ *supra* Chap. V.C.6. (i).

⁵⁰⁹ UK JUDICIAL STATISTICS 2011, p. 159.

⁵¹⁰ *supra* Chap. V.B.2 (i).

⁵¹¹ *Practice Directions 52E – Appeals by Way of Case Stated. Rule 1.1.*

⁵¹² The number of 'appeals by way of case stated' filed at the High Court were ca. 100 in 2010, UK JUDICIAL STATISTICS 2011, p. 157.

Some may question including judicial review cases in the number of ‘civil appeals’ for comparative purposes. The argument could be that judicial review is an action of administrative law that, according to French and Italian law, is not handled by the cassation courts for civil matters but by a separate and autonomous body of administrative courts (*Conseil d’État* or *Consiglio di Stato*).⁵¹³ Including the number of judicial review cases of the English High Court appears justified in this study for the following two reasons. First, according to English law, judicial review can be invoked not only against public organs of the Executive Branch, but also against the legality and propriety of the decisions-making procedure of the lower courts too.⁵¹⁴ When applied against the lower courts, therefore, judicial review becomes a functional equivalent to an appeal on procedure, similar to French and Italian cassation when grounded on violations not of the substantive but of the formal law. Second, from a functionalist perspective, these judicial reviews against lower courts (*i.e.*, appeal on procedure) are handled within the Queen’s Bench of the High Court that also has appeal jurisdiction for civil matters. According to the methodology clarification previously mentioned,⁵¹⁵ thus, to understand the whole functioning of the Queen’s Bench on handling civil appeals we need to understand how this judicial unit needs to organise its workforce between, on the one hand, civil appeals and its functional equivalents (‘appeals by way of case stated’ and judicial review against lower courts) and, on the other hand, appeals and judicial review on different legal matters.⁵¹⁶

In sum, the number of cases that are heard by the English intermediate appellate courts altogether – in a combination of the Court of Appeal and the High Court – in total is around 21,000. If we exclude the caseload of the Criminal Division, the intermediate appeals will be about 16,000 in civil matters in the broad sense of English law.

iii. *Diagonal comparison*

From a diagonal perspective, it can be observed that the US and English second court level and the French and Italian third court level, on the one hand, hear a much larger number of cases than the US and English (UK) third level and the French and Italian hidden fourth level, on the other. In France, for example, the three types of plenary session will issue no more than two dozen judgments a year,⁵¹⁷ while the workload of the cassation chambers will be about 20,000

⁵¹³ CADIET 2012A, p. 56; GONOD 2014.

⁵¹⁴ SLAPPER & KELLY 2016, p. 508-509; in detail for judicial review on procedural violations, FORDHAM 2012, p. 618-650.

⁵¹⁵ *supra* Chap. I.E.2.

⁵¹⁶ In fact, cases of judicial review are handled by the so-called ‘administrative court’ within the Queen’s Bench. However, this administrative court should not be seen as an independent judicial organisation, separate from the Queen’s Bench, since the judges who hear judicial review cases in the administrative court also sit in other types of cases of the High Court in general.

⁵¹⁷ *supra* Chap. IV.C.7. (i).

pouvoirs.⁵¹⁸ In a typical court of cassation, like the French one, its caseload can be ‘numbered in the thousands’ – in JOLOWICZ’s words.⁵¹⁹

In similar terms, we can observe that the US and English intermediate appellate courts hear a much larger number of cases than the supreme courts over them.⁵²⁰ Depending on the calculation, they will hear a number of appeals that is hundreds of times bigger (57,000:80 or ca. 700 times bigger in the US; 16,000:60 or ca. 250 times bigger in England and Wales). JOLOWICZ thought that in a cassation court the caseload can be numbered in the thousands.⁵²¹ The diagonal perspective shows that the caseload in the US and English intermediate appellate courts can be counted in the thousands, as well.

These absolute numbers can be explained based on the courts’ function. A court of error needs to hear a much larger number of cases than a court of precedents.⁵²² The reason is that the court of error has the responsibility of policing the lower courts and, thus, to potentially review any litigant’s claim of a serious judicial mistake.⁵²³ The court of precedents, however, is free of that policing responsibility and, thus, it can focus on a few relevant cases for the judicial lawmaking function.⁵²⁴ Accordingly, if a court of precedents decides, for example, one hundred cases in a normal year, the court of error below probably will hear much more than 10,000 appeals. Therefore, one explanation for why the US and English second court level and the French and Italian third level – *i.e.*, diagonal courts of errors – review a much larger number of cases *vis-à-vis* the US and English (UK) third level and the French and Italian hidden fourth level – *i.e.*, diagonal courts of precedents – is that the former have a responsibility for policing the lower courts, a policing responsibility that the latter do not have.

However, this similarity in the rough absolute numbers still seems too weak to demonstrate the diagonal symmetry of functions in the number of cases. Another explanation could be that litigation has several costs and, obviously, fewer litigants can afford to continue litigation at the higher levels. However, the key element to prove the diagonal symmetry of functions is not only the absolute number, but also the evolution. In other words, the important aspect is not only that, nowadays, the courts of error review a larger number of cases than the courts of precedents. The distinctive feature is that the number of cases heard in a court of error aims at growing together with the total size of the judicial system,⁵²⁵ and does not remain stagnated as it does in a court of precedents.⁵²⁶ The function of a court of error is to

⁵¹⁸ *supra* Chap. III.B.4. (ii).

⁵¹⁹ JOLOWICZ 1998, p. 57.

⁵²⁰ *supra* Chap. III.B.4. (ii).

⁵²¹ See again, JOLOWICZ 1998, p. 57.

⁵²² *supra* Chap. III.B.4. (b,c).

⁵²³ *supra* Chap. II.C.3.

⁵²⁴ *supra* Chap. II.C.2.

⁵²⁵ *supra* Chap. III.B.4. (c).

⁵²⁶ *supra* Chap. III.B.4. (b).

monitor the judicial system below it.⁵²⁷ Therefore, this model needs to increase its monitoring capacity, by reviewing a larger number of cases, in proportion to the growth of the system of courts under its control.

We observed the growth pattern in the courts of cassation of France and Italy. The number of cases decided by their chambers grows over time.⁵²⁸ From a diagonal perspective, the same evolution can be found in the US and English intermediate appellate courts. The number of cases that they hear is not only bigger in absolute terms than their supreme courts, but is also continually growing. We observed that the caseload of the US federal courts of appeals had grown fourteen times in the last fifty years.⁵²⁹

In the case of England, the growth in the caseload of the Court of Appeal has also been consistent. In the 1960s, about 700 appeals petitions were lodged, and between 400 and 600 were judged on the merits (between 60% and 85%).⁵³⁰ Fifty years later, the English Court of Appeal receives four times more appeals petitions (ca. 3,000) than in the 1960s.⁵³¹ This is a clear pattern of growth, but slower than in the US, where it was fourteen times bigger in a similar period. However, if we include in the picture the new appeals before the High Court, the growth rate in England does not look small. By adding those approximately 13,000 appeals that now are heard at the High Court,⁵³² the appeals caseload numbers of England (16,000 in total) are more aligned with the growth in the caseload in the other courts of error of the US, France and Italy from a diagonal perspective.

8. Preliminary screening

In the previous chapters we have observed that the supreme courts and courts of cassation have some sort of initial stage with simplified conditions for refusing cases.⁵³³ The differences in these preliminary screenings between the models of courts were defined by the criterion according to which that initial simplified rejection is exercised. Due to their judicial lawmaking function, in the model of a court of precedents the preliminary screening will be exercised based on the public relevance of the case to solve a general problem of interpretation.⁵³⁴ According to the diagonal symmetry, it is possible to find such court of precedent's preliminary screening criterion at the third level and fourth levels of the jurisdictions under

⁵²⁷ *supra* Chap. II.C.3.

⁵²⁸ *supra* Chap. III.B.4. (ii).

⁵²⁹ *supra* Chap. V.C.7. (i).

⁵³⁰ KARLEN 2014, p. 72.

⁵³¹ *supra* Chap. V.C.7. (ii).

⁵³² See again, UK JUDICIAL STATISTICS 2011, p. 159.

⁵³³ *supra* Chap. III.B.5.

⁵³⁴ *supra* Chap. IV.C.8. (b).

study:⁵³⁵ in the US and English (UK) supreme courts⁵³⁶ and, in their own way, at the plenary sessions of the French and Italian cassation courts as well.⁵³⁷

Preliminary screenings are present in a court of error too, although the criterion to screen is different. Since the function of this model is not general judicial lawmaking but the error-monitoring of the lower courts, the screening criterion is a preliminary evaluation of error, as well.⁵³⁸ From a horizontal perspective, Chapter III demonstrated that the chambers in the cassation courts have indeed a preliminary screening with the characteristics of a court of error. In the French and the Italian cassation courts that preliminary stage for refusing cases is the non-admission procedure of the *formation restreinte* (France) and the new filter of the *sesta sezione* (Italy).⁵³⁹ The criterion according to which these cassation chambers exercise that preliminary rejection is similar. With different wording, both France and Italy screen out the manifestly unfounded petitions.⁵⁴⁰

From a diagonal perspective, the pertinent comparison for the cassation chambers preliminary screening is not the screening at the US and English (UK) supreme courts but at their intermediate appellate courts. Due to their proximity to the first instance, intermediate appellate courts also need a screening device to manage the incoming caseload. According to which criterion does the second court level in the US and England perform that preliminary screening?

i. United States of America

In principle, appeal is granted as of right in the US federal system.⁵⁴¹ Still, the federal appellate courts developed some sort of preliminary screening over time.⁵⁴² As adaptation to the caseload explosion, these courts implemented an initial stage with simplified conditions to refuse cases, among other measures.⁵⁴³ According to the *Federal Rules*, a first panel of three judges may decide, unanimously, not to grant a hearing for oral arguments.⁵⁴⁴ In practice, however, it could be claimed that this task is not performed by the appeal judges themselves but delegated to the law clerks or the central legal staff.⁵⁴⁵ Moreover, this preliminary screening is decided without an oral hearing itself, but just based on written documents: parties' briefs and court records.⁵⁴⁶ The preliminary screening also contemplates

⁵³⁵ *supra* Chap. IV.C.8 (iii).

⁵³⁶ *supra* Chap. III.B.5. (i).

⁵³⁷ *supra* Chap. IV.C.8. (i,ii).

⁵³⁸ *supra* Chap. III.B.5. (c).

⁵³⁹ *supra* Chap. III.B.5. (ii).

⁵⁴⁰ *supra* Chap. III.B.5. (iii).

⁵⁴¹ See again, MARCUS 2014A, p. 112.

⁵⁴² On the definition of 'preliminary screening', *supra* Chap. III.B.5.

⁵⁴³ In detail, BOWIE, SONGER & SZMER 2014, p. 30 ff.

⁵⁴⁴ *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2)(a).

⁵⁴⁵ RICHMAN & REYNOLDS 1996, p. 286-292. HOOPER, MILETICH & LEVY 2011, p. 16-17.

⁵⁴⁶ *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2)(a); CASTANIAS & KLONOFF 2008, p. 270.

the simplified condition of lower standards to provide reasons for rejection. This simplified rejection can be the result of the unpublished opinion, which produces (too) concise judgments with a reasoning of poor quality – *i.e.*, ‘junk’ opinions, as they are called.⁵⁴⁷ What is more, the simplified rejection could also be the result of a total absence of argumentation in the judgment, as a result of a so-called ‘order’, which is allowed to contain no explanation at all, but just one word (‘affirmed’).⁵⁴⁸ Therefore, the preliminary screening in the US federal appellate courts will be that initial stage in which whether or not to grant a further oral hearing is decided.⁵⁴⁹

The general criterion in this initial screening stage is whether oral arguments are unnecessary.⁵⁵⁰ However, oral hearings are unnecessary not just if the written briefs and records are enough to decide the case.⁵⁵¹ In the US federal appellate courts, this screening criterion is also a preliminary evaluation of error. The court is allowed to screen out at this initial stage those appeals that are ‘frivolous’; or if there is an ‘authoritative decision on the issues of the case’.⁵⁵² According to the terminology that has been used in this study, the ‘frivolous’ phrase is a clear error-checking criterion. An appeal will be frivolous if it is manifestly ill-grounded in complaining against a lower court mistake. The second phrase, ‘have been authoritatively decided’, is also an error-checking criterion in the context of a system based on precedents. An appeal that aims to challenge a point of law that has already been decided by previous case law also counts as a manifestly unfounded appeal in a system where precedents are binding.

ii. *England and Wales*

In England, the preliminary screening is the permission to appeal (formerly called ‘leave’). The permission procedure is also an initial stage with simplified conditions for refusal.⁵⁵³ First, it is normally of a written nature at the appellate court.⁵⁵⁴ The Court of Appeal generally decides on the permission without an oral hearing, but based on written materials.⁵⁵⁵ If permission is denied, however, the litigant has the opportunity to request an oral hearing for reconsideration.⁵⁵⁶ But if the application is ‘totally without merit’, the court will refuse in advance that oral reconsideration.⁵⁵⁷ Second, as regards the level of motivation for the refusal, the

⁵⁴⁷ RICHMAN & REYNOLDS 1996, p. 284.

⁵⁴⁸ *Federal Rules of Appellate Procedure*, Title VII, Rule 36. RICHMAN & REYNOLDS 1996, p. 285.

⁵⁴⁹ On other procedural thresholds at the initial screening, CROSS 2007, p. 178 ff.

⁵⁵⁰ *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2).

⁵⁵¹ *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2) (C).

⁵⁵² *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2) (A) (B); CASTANIAS & KLONOFF 2008, p. 271-272.

⁵⁵³ In detail, DREWRY, BLOM-COOPER & BLAKE 2007, p. 67 ff.

⁵⁵⁴ The permission at the lower court, however, can be made orally, ZUCKERMAN 2013, p. 1147.

⁵⁵⁵ *Practice Directions 52C – Appeals to the Court of Appeals*. Rule 15 (1); ZUCKERMAN 2013, p. 1149.

⁵⁵⁶ *Civil Procedure Rules*, Rule 52.3 (4); DREWRY, BLOM-COOPER & BLAKE 2007, p. 70.

⁵⁵⁷ *Civil Procedure Rules*, Rule 52.3 (4A) (a).

court needs to provide reasons for denying permission.⁵⁵⁸ In practice, however, the reasons that the court gives for refusing permission are extremely abbreviated, usually one paragraph of a brief questionnaire.⁵⁵⁹

The main criterion to screen cases in the permission to the intermediate appeal in England is the requirement of ‘real prospect of success’ (besides the exceptional ‘some other compelling reason’).⁵⁶⁰ *Swain v. Hillman*, particularly Lord WOOLF’s opinion, explains what the meaning of this phrase is:

The words “no real prospect of being successful or succeeding” do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success or ... they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.⁵⁶¹

The English phrase ‘real prospect of success’ is also a preliminary evaluation of error, according to the terminology used in this study. As discussed in the previous section on the scope of review, the grounds for appeal are that the lower decision was wrong (in the facts, law or procedure).⁵⁶² Therefore, an appeal which does not have prospects of success – which is fanciful, in Lord Woolf’s terms – means a case in which it is evident that such judicial wrong does not exist. In other words, an appeal manifestly ill-grounded in its efforts at complaining against an error in the lower court will be one with unrealistic chances of succeeding.

iii. *Diagonal comparison*

A symmetry can be observed from a diagonal perspective in this final attribute, as well. The chambers in a cassation court have an initial screening process based on a preliminary evaluation of error.⁵⁶³ The cassation procedure of France and Italy phrase this screening in different manners, but the common idea is the early rejection of manifestly unfounded petitions.⁵⁶⁴ The common law intermediate appellate courts under study also screen out in a similar fashion, however with different wording.

⁵⁵⁸ UK Supreme Court, *Practice Directions 52C – Appeals to the Court of Appeals*. Rule 15 (1).

⁵⁵⁹ For an example of this permission questionnaire of the lower court, see: wbus.westlaw.co.uk/forms/pdf/cpf09262.pdf.

⁵⁶⁰ *supra* Chap. V.B.1. (ii); *Civil Procedure Rules*, Rule 52.3 (6)(a); ZUCKERMAN 2013, p. 1156-1157. However, the use of the second clause (‘some other compelling reason’) remains ‘rare’, DREWRY, BLOM-COOPER & BLAKE 2007, p. 71. Accordingly, here I will focus on the first clause instead, ‘real prospect of success’, as a more representative picture of the permission practice.

⁵⁶¹ *Swain v. Hillman* [1999] EWCA, para. 7; also, DREWRY, BLOM-COOPER & BLAKE 2007, p. 70.

⁵⁶² *Civil Procedure Rules*, Rule 52.11 (3) (a) (b); *supra* Chap. V.C.1.

⁵⁶³ *supra* Chap. III.B.5. (ii).

⁵⁶⁴ In France, *Code de l’organisation judiciaire*, Art. 131-6; BORÉ & BORÉ 2015, p. 656-658. In Italy, *Codice di Procedura Civile*, Art. 360bis; FERRARIS 2015, p. 184-196.

In the US federal courts of appeals, the rejection of an oral hearing has similar practical consequences as the English refusal of permission to appeal. Both imply a confirmation of the lower court's decision, based on simplified refusal at an early stage of the appeal procedure. The main criterion for refusing an oral hearing in the US (*i.e.*, 'frivolous' appeals)⁵⁶⁵ is similar to what is found in England, even if the choice of words seems different (*i.e.*, 'fanciful' petitions, as Lord WOOLF phrased it).⁵⁶⁶ The US and English screening criteria aim at separating the appeals for which, at first sight, it is clear that no error is at stake, from the others which do raise relevant grounds for a correction of the lower court decision. Whether under 'frivolous' or 'fanciful' terms, both intermediate appellate courts will reject at an early stage based on a preliminary evaluation of the error complained against by the appellant.

When diagonally compared, therefore, both the intermediate appellate courts in the US and England (2nd level), on the one hand, and the chambers of the courts of cassation in France and Italy (3rd level), on the other, are similar in having an initial screening process based on a preliminary evaluation of error. The differences in their wording do not seem an obstacle for the diagonal symmetry. Screening out cases because they are 'manifestly unfounded' in cassation terms seems, for all practical matters, the same as screening out 'frivolous' or 'fanciful' appeals, under US and English legal concepts.

The explanation for this diagonal symmetry can be the shared error-monitoring function at different levels of these four jurisdictions. In the model of a court of error, an initial screening process is needed as long as the criterion to screen is error-checking as well.⁵⁶⁷ Because the jurisdictions under study are symmetrical not horizontally but diagonally, such error screening will be found at the second level in the US and England, and at the third level in France and Italy, as this section demonstrated.

D. Summary tables

The general purpose of Chapter V was to conclude the diagonal comparison between courts of last resort, but at a lower level than in Chapter IV. This chapter compared the second level of these common law jurisdictions (intermediate appellate courts) and the third level of the cassation jurisdictions (cassation chamber).⁵⁶⁸ Due to the access restrictions to the US and UK supreme courts, this study included the intermediate appellate courts of these jurisdictions because they

⁵⁶⁵ See again, *Federal Rules of Appellate Procedure*, Title VII, Rule 34 (2) (A) (B); CASTANIAS & KLONOFF 2008, p. 271-272.

⁵⁶⁶ See again, *Swain v. Hillman* [1999] EWCA, para. 7; also, DREWRY, BLOM-COOPER & BLAKE 2007, p. 70.

⁵⁶⁷ *supra* Chap. III.B.5. (c).

⁵⁶⁸ See again, Figure IV.1, *supra* Chap. V.A. (Introduction).

are the recourse of last resort in practice, the ones that normally have the final-word power in a similar manner as the French and Italian cassation chambers. Table IV.2 summarises the findings of the comparisons on each of the eight functional attributes in particular among these diagonal pairs of courts.⁵⁶⁹

Table V.2 : *Courts of error* – Diagonal symmetry

COURT ATTRIBUTES	US + England INTERMEDIATE APPEAL	France + Italy CASSATION CHAMBERS
<i>Scope of Review</i>	particular application	particular application
<i>Judgments Effects</i>	jurisprudence constante	jurisprudence constante
<i>Exposure</i>	few selective	few selective
<i>Number of Cases</i>	large number increasing	large number increasing
<i>Preliminary Screening</i>	error evaluation low discretion	error evaluation low discretion
<i>Panel Composition</i>	three or less specialized (-)	five or fewer specialized (+)
<i>Total Size</i>	big growing	big growing
<i>Opinion Style</i>	summary no dissents	summary no dissents
COURT LEVEL	2 ND	3 RD

The general conclusion of the analysis in this chapter was that a diagonal symmetry exists at this lower level too. Chapter V showed that the French and Italian cassation chambers are actually comparable to the intermediate appellate courts of the US and England. Both pairs of courts have similar attributes according to the function of monitoring the errors of the lower courts, although at different levels (see Figure IV.2, below). Therefore, cassation chambers at the third level in France and Italy, on the one hand, and the intermediate appellate courts at the second level of the US and England, on the other, are the equivalent courts of error of their judicial systems.

⁵⁶⁹ For the conclusions, *infra* Chap. VI.D.3.

Figure IV.2 : *Courts of error* – Diagonal models

US + ENGLAND		FRANCE + ITALY	
4°		Cassation Plenum <i>PRECEDENTS</i>	4°
3°	Supreme Court <i>PRECEDENTS</i>	Cassation Chamber <i>ERROR</i>	3°
2°	Court of Appeal <i>ERROR</i>	Court of Appeal	2°
1°	First Instance	First Instance	1°

CHAPTER VI: CONCLUSION

TABLE OF CONTENTS

CHAPTER VI: CONCLUSION	327
A. Research findings	328
B. Judicial functions	330
1. Rule of Law and judicial functions	331
2. Rule of Law and court models.....	332
3. Local manifest functions.....	333
4. Manifest functions compared	335
C. Court attributes.....	337
1. Attributes of the ideal models	338
2. Attributes of the real courts.....	340
3. Attributes and manifest functions.....	343
4. Attributes and latent deviations.....	348
D. Courts hierarchical level	355
1. Horizontal asymmetry: Courts of last resort	356
2. Diagonal symmetry (I): Courts of precedents	357
3. Diagonal symmetry (II): Courts of error	359
E. Policy recommendations.....	361
1. Clarifying the options	362
2. Taking the decision.....	362
3. Designing a reform	363
4. Responding to opposition	364
F. Further lines of research.....	368
1. Comparative law.....	369
2. Legal history	370

3. Socio-legal study.....	371
G. Closing: Legal traditions revisited	372

This final chapter *Conclusion* will not be devoted to providing an overall summary of each previous chapter. Elaborating each of them here appears unnecessary since each chapter provides a final summary table.¹ Instead, this *Conclusion* will be devoted to answering the research questions (*infra* A,B,C,D), providing policy recommendations based on these conclusions (*infra* E), guiding some further lines of research that follow from the diagonal symmetry thesis (*infra* F) and closing with how the distance between the civil law and common law legal traditions should be revisited (*infra* G).

Let us remember that there were three hierarchies of research questions: the general question,² specific questions³ and sub-questions.⁴ The answers to those questions will be grounded on the sum of individual observations and comparison directions made in the course of this study. These observations and comparisons were numerous because they cover eight specific attributes, at two court levels per each of the four jurisdictions under study.⁵ To keep a clear order, the research questions will head each section of this *Conclusion*, exactly as formulated in Chapter I: *Introduction*.⁶ Right after each research question, this chapter provides the answers that can be concluded based on such individual observations and comparisons. When pertinent, the footnotes mention internal references to the original part of this study in which a particular conclusion was discussed in more detail.

A. Research findings

The general question of this study aimed at comparing the courts of last resort of four jurisdictions from a functionalist perspective. Accordingly, the general question was: *To what extent do the courts of last resort in civil matters of the US, England, France and Italy perform different or similar functions?* The corresponding general answer is that the differences or similarities depend on choosing the

¹ The reader can find these chapter summaries at *supra* Chap. II.E; Chap. III.C; Chap. IV.D; Chap. V.D.

² *supra* Chap. I.C.1.

³ *supra* Chap. I.C.2.

⁴ *supra* Chap. I.C.2 (i,ii,iii).

⁵ For methodology, *supra* Chap. I.D.

⁶ *supra* Chap. I.C.

horizontal or diagonal perspective. The horizontal perspective shows mainly differences;⁷ whereas, the diagonal perspective reveals more similarities instead.⁸

The *horizontal* perspective means that the comparison is conducted between courts located at the same level of each jurisdiction.⁹ The horizontal perspective shows mainly differences, because the 3rd level of courts in the US and England, on the one hand, and the 3rd level of courts in France and Italy, on the other, have courts of last resort with different functional attributes. In the former, the so-called ‘supreme courts’ have mainly the attributes of a court of precedents,¹⁰ with a judicial lawmaking function.¹¹ In the latter, the so-called ‘courts of cassation,’ particularly their chambers, have the attributes of a court of error,¹² with an error-monitoring function instead.¹³ These differences from a 3rd vs. 3rd level comparison were summarised as ‘horizontal asymmetry.’¹⁴

The *diagonal* perspective means that the comparison is conducted between courts located at different levels of each jurisdiction.¹⁵ The diagonal perspective, quite the contrary, reveals more similarities. The reason is that the US and England, on the one hand, and France and Italy, on the other, have courts of similar functional attributes, but at different levels. First, the functional attributes of the 3rd level supreme courts of the US and England can be found at a hidden fourth level in France and Italy, in the so-called cassation ‘plenary sessions.’¹⁶ Both the US and English (UK) supreme courts and the French and Italian cassation plenary sessions share the attributes of a court of precedents for the judicial lawmaking function.¹⁷ Due to these similarities at a 3rd vs. 4th level comparison, this pair of courts is labelled as the ‘courts of precedents’ from a diagonal perspective.¹⁸

Second, the functional attributes of the lower 2nd level of the US and England, the so-called ‘intermediate appellate courts’, can be found in the 3rd level chambers of

⁷ In general, *supra* Chap. III.

⁸ In general, *supra* Chap. III; and Chap. V.

⁹ See again, Figure III.1, at *supra* Chap. III.A.

¹⁰ *supra* Chap. III.B.1 (i); Chap. III.B.2 (i); Chap. III.B.3 (i); Chap. III.B.4 (i); Chap. III.B.5 (i); Chap. III.B.6 (i); Chap. III.B.7 (i); Chap. III.B.8 (i).

¹¹ *supra* Chap. II.D.3 (i); Chap. II.D.4 (i). The US Supreme Court, however, also has attributes of a constitutional court because it combines the judicial lawmaking function with a political counterweight function, *supra* Chap. II.D.3 (iii).

¹² *supra* Chap. III.B.1 (ii); Chap. III.B.2 (ii); Chap. III.B.3 (ii); Chap. III.B.4 (ii); Chap. III.B.5 (ii); Chap. III.B.6 (ii); Chap. III.B.7 (ii); Chap. III.B.8 (ii).

¹³ *supra* Chap. II.D.1 (i); Chap. II.D.2 (i).

¹⁴ See again Table III.1, at *supra* Chap. III.C.

¹⁵ See again, Figure IV.1, at *supra* Chap. IV.A; and Figure V.1, at *supra* Chap. V.A.

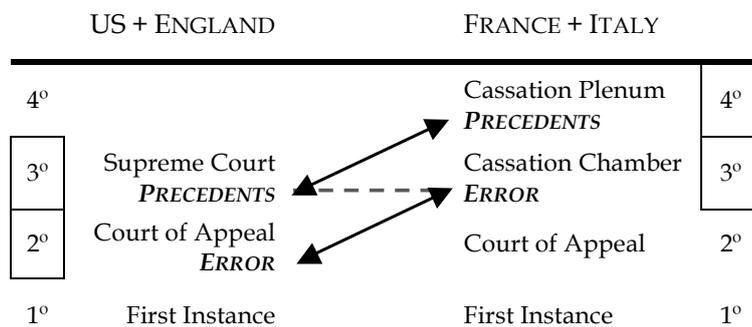
¹⁶ *supra* Chap. IV.C.1 (i,ii); Chap. IV.C.2 (i,ii); Chap. IV.C.3 (i,ii); Chap. IV.C.4 (i,ii); Chap. IV.C.5 (i,ii); Chap. IV.C.6 (i,ii); Chap. IV.C.7 (i,ii); Chap. IV.C.8 (i,ii).

¹⁷ *supra* Chap. IV.C.1 (iii); Chap. IV.C.2 (iii); Chap. IV.C.3 (iii); Chap. IV.C.4 (iii); Chap. IV.C.5 (iii); Chap. IV.C.6 (iii); Chap. IV.C.7 (iii); Chap. IV.C.8 (iii).

¹⁸ See again, Table IV.1, at *supra* Chap. IV.D.

the French and Italian courts of cassation.¹⁹ Both the US and English intermediate appellate courts, on the one hand, and the French and Italian cassation chambers, on the other, share the attributes of a court of error for the error-monitoring function.²⁰ Due to these similarities at a 2nd vs. 3rd level comparison, this other pair of courts is labelled as the ‘courts of error’ from a diagonal perspective.²¹ The combination of similarities from a 3rd vs. 4th and a 2nd vs. 3rd level comparison are called the ‘diagonal symmetry’ thesis, and they are the main contribution of this study.²² Figure VI.1 represents this diagonal symmetry of models of courts.

Figure VI.1 : *Conclusion* – Diagonal symmetry of models



B. Judicial functions

The general research question stood above three specific topics: judicial functions (*supra* B), court attributes (*infra* C) and court hierarchical level (*infra* D). The first of them asked about identifying the set of judicial functions that these courts may perform. The specific research question of this first topic was: 1.- *What are the functions of the courts of last resort?* The overall answer for the topic is that, unlike the public-private divide of the current classifications, this study identifies four judicial functions: dispute resolution,²³ error-monitoring,²⁴ judicial lawmaking²⁵

¹⁹ *supra* Chap. V.C.1 (i-ix); Chap. V.C.2 (i,ii); Chap. V.C.3 (i,ii); Chap. V.C.4 (i,ii); Chap. V.C.5 (i,ii); Chap. V.C.6 (i,ii); Chap. V.C.7 (i,ii); Chap. V.C.8 (i,ii).

²⁰ *supra* Chap. IV.C.1 (i-ix); Chap. IV.C.2 (iii); Chap. IV.C.3 (iii); Chap. IV.C.4 (iii); Chap. IV.C.5 (iii); Chap. IV.C.6 (iii); Chap. IV.C.7 (iii); Chap. IV.C.8 (iii).

²¹ See again, Table V.2, at *supra* Chap. V.D.

²² *supra* Chap. I.B.

²³ *supra* Chap. II.B.4 (i).

²⁴ *supra* Chap. II.B.4 (ii).

²⁵ *supra* Chap. II.B.4 (iii).

and political counterweight.²⁶ These functions could be entrusted to the court of last resort for civil matters or to different courts.²⁷

The current views on comparative law studies usually identify two opposite functions. The mainstream classification is the duality between the private and public purposes of the courts of last resort.²⁸ This study identified five problems with this private-public duality.²⁹ The most important one is that it seems to oversimplify the diversity that can be found when comparing not just two but three or more courts, as in this study. Based on such duality, actual courts of different jurisdictions tend to appear as middle ground between two extremes.³⁰ In reality, however, the courts of certain jurisdictions could be better described as distinctive models following different coordinates than the public-private divide.

For that reason, among others, this study elaborated its own framework to answer the question about the functions of the courts of last resort. First, the framework is based on the general requirements of the Rule of Law in society.³¹ From the principle that the law should be applied equally to every person, the framework derives four distinctive judicial functions, as detailed in the next subsection.³² These four judicial functions could be located at different court hierarchical levels in each jurisdiction.³³

1. Rule of Law and judicial functions

The first specific topic on judicial functions had a first sub-question which related these functions to the Rule of Law in general. This sub-question was formulated as follows: *1.1.- What are the functions that the courts need to satisfy according to the Rule of Law?* The answer is that from the Rule of Law requirement – that the same legal rules should apply equally to every person – four judicial functions derive:

(a) *Dispute resolution.* The first function of the courts is to provide a peaceful arena within which to resolve legal conflicts about rights and obligations enshrined in the legal rules.³⁴

(b) *Error-monitoring.* To make sure that the same legal rules are applied correctly by every court, a higher set of courts is established to correct the lower courts' mistakes.³⁵

²⁶ *supra* Chap. II.B.4 (iv).

²⁷ *supra* Chap. II.B.5 (c).

²⁸ *supra* Chap. II.B.2.

²⁹ On the five problems, *supra* Chap. II.B.3.

³⁰ *supra* Chap. II.B.3.

³¹ *supra* Chap. II.B.4.

³² *infra* Chap. VI.B.1.

³³ *supra* Chap. II.B.5.

³⁴ *supra* Chap. II.B.4 (i).

(c) *Judicial lawmaking*. The legal rules may contain problems of interpretation, thus, the equal application of the law needs a court that settles unified interpretation criteria.³⁶

(d) *Political counterweight*. Finally, the Rule of Law applies also to the public organs which create those rules; and, accordingly, one or more courts need to review whether they violate their constitutional limitations.³⁷

2. Rule of Law and court models

The second sub-question of the first specific topic aimed at designing ideal court models according to the judicial functions previously identified. Accordingly, the second sub-question was: 1.2.- *What models of courts are adequate to perform the Rule of Law functions?* The answer is that, based on the four judicial functions of the Rule of Law previously defined, the study identified four models of courts:³⁸

(a) The first model is the *trial court*, which performs the general function of dispute resolution. The main characteristic of a trial court is the openness to hear all the parties' allegations. In this model, accordingly, the court will receive evidence, determine the facts and apply the law to resolve the entire dispute.³⁹

(b) The second model is the *court of error*, entrusted with the error-monitoring function. The characteristic of a court of error is the large capacity to supervise the lower courts' decisions. Still, the court of error has a more limited task than a trial court model. The court of error does not review the entire dispute but only one or more particular mistakes committed by the lower courts, in which the higher court has a better perspective to assess.⁴⁰

(c) Third, the *court of precedents* model, which corresponds to the judicial lawmaking function. The court of precedents has an even more precise task than a court of error. The court of precedents gets involved in a dispute only when a general problem of interpretation is present. In this model, the court solves that problem by delivering judgments meant to be used as interpretation guidelines by the rest of the courts.⁴¹

(d) Finally, the model of *constitutional court* performs the political counterweight function. The constitutional court's distinctive characteristic is the strong judicial review power. In this model, the court may strike down a piece of legislation. In

³⁵ *supra* Chap. II.B.4 (ii).

³⁶ *supra* Chap. II.B.4 (iii).

³⁷ *supra* Chap. II.B.4 (iv).

³⁸ *supra* Chap. II.C.

³⁹ *supra* Chap. II.C.4.

⁴⁰ *supra* Chap. II.C.3.

⁴¹ *supra* Chap. II.C.2.

this sense, the constitutional court might become powerful to the extent of counteracting the Parliament.⁴²

3. Local manifest functions

The third sub-question of the first specific topic aimed at identifying the manifest functions of the courts of last resort under study. The sub-question was formulated as follows: 1.3.- *How do the legal actors of each jurisdiction conceive the (manifest) functions of their court of last resort?* The answer is that the manifest functions are different from one jurisdiction to the other. The US Supreme Court combines the manifest functions of judicial lawmaking and political counterweight (*infra* i). In England, the UK Supreme Court has judicial lawmaking as its single manifest function (*infra* ii). France and Italy combine error-monitoring and judicial lawmaking as manifest functions of their courts of cassation (*infra* iii, iv). The following four subsections detail the formulation of the manifest functions per each jurisdiction.

i. US

The court of last resort for civil matters in the US is the *Supreme Court of the United States*.⁴³ US legal actors argue that their supreme court has a judicial lawmaking function.⁴⁴ In their view, this judicial lawmaking function at the US Supreme Court is incompatible with the error-monitoring and dispute resolution functions.⁴⁵ In the US federal system, the error-monitoring function is allocated to the intermediate appellate courts;⁴⁶ and the trial court is the first instance court judge and jury.⁴⁷ Since *Marbury v. Madison*, the US Supreme Court has been entrusted with an important political counterweight function since it has a strong power of judicial review on the executive and legislative branches.⁴⁸

ii. England

The court of last resort for civil matters in cases coming from the jurisdiction of England is *The [UK] Supreme Court* – which is the court of last resort for Wales, Scotland and Northern Ireland too.⁴⁹ English legal actors say that the court has a judicial lawmaking function.⁵⁰ They believe that this judicial lawmaking function

⁴² *supra* Chap. II.C.1.

⁴³ *supra* Chap. II.D.3.

⁴⁴ *supra* Chap. II.D.3 (i).

⁴⁵ *supra* Chap. II.D.3 (ii).

⁴⁶ *supra* Chap. II.D.3 (ii).

⁴⁷ *supra* Chap. II.D.3 (iii).

⁴⁸ *supra* Chap. II.D.3 (iv).

⁴⁹ *supra* Chap. II.D.4.

⁵⁰ *supra* Chap. II.D.4 (i).

of the UK Supreme Court is incompatible with the error-monitoring function.⁵¹ The intermediate appellate courts in England – *i.e.*, the Court of Appeal and now the High Court, as well – are entrusted with the error-monitoring function instead.⁵² And the dispute resolution function is allocated to the first instance court judge, which is a trial court model.⁵³ Finally, the UK Supreme Court does not have a political counterweight function in respect of the Parliament. In England, there is no strong judicial review of the legislation because that would be against their political system of parliamentary sovereignty.⁵⁴

iii. *France*

The court of last resort for civil matters in France is the *Cour de cassation*.⁵⁵ French legal actors usually say that the court performs two inseparable functions: error-monitoring and judicial lawmaking, which they call *mission disciplinaire*⁵⁶ and *mission normative*,⁵⁷ respectively. Based on the doctrine that cassation reviews only points of law, scholars strongly deny that the *Cour de cassation* could become a third trial court, excluding pure dispute resolution from their court of last resort functions.⁵⁸ In France, the trial court model applies to the first instance court judge and the intermediate appellate courts.⁵⁹ Finally, the political counterweight function is not entrusted to the *Cour de cassation* in France, but to the *Conseil Constitutionnel*. Nowadays, the French Court of Cassation has the task of referring cases to the *Conseil Constitutionnel* when the applicable legislation raises questions of constitutionality.⁶⁰

iv. *Italy*

The court of last resort for civil matters in Italy is the *Corte Suprema di Cassazione*.⁶¹ Italian legal actors also identify a double function in this court: error-monitoring and judicial lawmaking, which they call *nomofilaquia*⁶² and *uniformità*,⁶³ respectively. In principle, the Italian Court of Cassation should be limited to points of law. In Italy, the model of trial court – characterised by a broad scope on both questions of fact and points of law to resolve the entire dispute – supposedly should be the first instance court judge and the intermediate appellate courts

51 *supra* Chap. II.D.4 (ii).

52 *supra* Chap. II.D.4 (ii).

53 *supra* Chap. II.D.4 (iii).

54 *supra* Chap. II.D.4 (iv).

55 *supra* Chap. II.D.1.

56 *supra* Chap. II.D.1 (i).

57 *supra* Chap. II.D.1 (ii).

58 *supra* Chap. II.D.1 (iii).

59 *supra* Chap. II.D.1 (iii).

60 *supra* Chap. II.D.1 (iv).

61 *supra* Chap. II.D.2.

62 *supra* Chap. II.D.2 (i).

63 *supra* Chap. II.D.2 (ii).

exclusively.⁶⁴ Still, Italian scholars are sceptical about the self-constraint of their court of last resort. They suspect that, at a latent level, the court of cassation to some extent repeats the dispute resolution function, becoming in practice a third trial court.⁶⁵ The political counterweight, finally, is not entrusted to the court of cassation but to a separate court. In Italy, the judicial review of legislation is decided by the *Corte Costituzionale*.⁶⁶

4. Manifest functions compared

The final sub-question of the first specific topic aimed at comparing the manifest formulation of the judicial functions between the jurisdictions under study. The fourth sub-question was: 1.4.- *How similar or different are the manifest functions between the courts of last resort in these jurisdictions?* The answer is that, based on the previous conclusions on the local manifest functions, two similarities and three differences were found in this study. As will be explained in the following subsections, the similarities could be positive (*infra* i) or negative (*infra* ii). The differences are in combinations (*infra* iii), compatibilities (*infra* iv) and constitutional functions (*infra* v).

i. Negative similarity

These four jurisdictions have a negative similarity. In none of them should the courts of last resort repeat the general dispute resolution function by way of the third trial court.⁶⁷ In Italy, however, scholars suspect that the court of cassation, at a latent level, performs as a third trial court model despite the manifest denial of that function.⁶⁸ The US,⁶⁹ England,⁷⁰ France⁷¹ and Italy⁷² also agree that this broad dispute resolution function should be performed at least by their first instance court judges. In France and Italy, however, the same function is meant to be repeated at the intermediate appellate courts by way of the second trial court model.⁷³

ii. Positive similarity

The US, England, France and Italy have a positive similarity. With different wording, the four jurisdictions have in common that in civil matters they entrust a

⁶⁴ *supra* Chap. II.D.2 (iii).

⁶⁵ *supra* Chap. II.D.2 (iii).

⁶⁶ *supra* Chap. II.D.2 (iv).

⁶⁷ *supra* Chap. II.D.1 (iii); Chap. II.D.2 (iii); Chap. II.D.3 (iii); Chap. II.D.4 (iii).

⁶⁸ *supra* Chap. II.D.2 (iii).

⁶⁹ *supra* Chap. II.D.3 (iii).

⁷⁰ *supra* Chap. II.D.4 (iii).

⁷¹ *supra* Chap. II.D.1 (iii).

⁷² *supra* Chap. II.D.2 (iii).

⁷³ *supra* Chap. II.D.1 (iii); Chap. II.D.2 (iii).

judicial lawmaking function to their courts of last resort.⁷⁴ This function is described as the role of their courts of last resort in solving problems of interpretation in order to maintain a uniform application of the law. In the US⁷⁵ and England,⁷⁶ this function is readily admitted since it is compatible with their legal tradition of judge-made law. In France⁷⁷ and Italy,⁷⁸ however, the same function may not be explicitly called ‘judicial lawmaking’ (but ‘*mission normative*’ or ‘*uniformità*’ instead), since that conflicts with the local legal tradition which denies judge-made law. Still, the French and Italian courts of cassation are expected to solve these interpretation problems, usually through a judgment of the plenary sessions of the cassation courts, notwithstanding the fact that solutions will not be labelled as ‘strictly binding’ precedents.⁷⁹

iii. Combination difference

England is the only jurisdiction which entrusts a single function to the UK Supreme Court among the four judicial functions considered here: judicial lawmaking exclusively.⁸⁰ In the other three jurisdictions, however, the courts of last resort are expected to combine this judicial lawmaking function with another function. In the US, the judicial lawmaking function of the US Supreme Court is combined with a strong political counterweight function.⁸¹ In the courts of cassation of France⁸² and Italy,⁸³ the judicial lawmaking function should be combined with an error-monitoring function.

iv. Compatibility difference

Another point of comparison is whether the judicial lawmaking and error-monitoring functions are considered compatible at a manifest level. In the US,⁸⁴ and England,⁸⁵ these two functions are seen as incompatible. Accordingly, these common law jurisdictions keep the judicial lawmaking function at the supreme courts and entrust the error-monitoring function to a lower level, the intermediate appellate courts. In France,⁸⁶ and Italy,⁸⁷ quite the contrary, the judicial lawmaking and error-monitoring functions are seen as compatible. According to the French

⁷⁴ *supra* Chap. II.D.1 (ii); Chap. II.D.2 (ii); Chap. II.D.3 (i); Chap. II.D.4 (i).

⁷⁵ *supra* Chap. II.D.3 (i).

⁷⁶ *supra* Chap. II.D.4 (i).

⁷⁷ *supra* Chap. II.D.1 (ii).

⁷⁸ *supra* Chap. II.D.2 (ii).

⁷⁹ *supra* Chap. II.D.1 (ii); Chap. II.D.2 (ii).

⁸⁰ *supra* Chap. II.D.4 (i).

⁸¹ *supra* Chap. II.D.3 (i,iii).

⁸² *supra* Chap. II.D.1 (i,ii).

⁸³ *supra* Chap. II.D.2 (i,ii).

⁸⁴ *supra* Chap. II.D.3 (ii).

⁸⁵ *supra* Chap. II.D.4 (ii).

⁸⁶ *supra* Chap. II.D.1 (ii).

⁸⁷ *supra* Chap. II.D.2 (ii).

and Italian perspective, therefore, the same court of cassation could perform both functions at the same time.

v. Constitutional difference

England, France and Italy have in common that the courts of last resort for civil matters do not have a political counterweight function.⁸⁸ In England, there is no court with such strong judicial review on legislation due to the sovereignty of Parliament.⁸⁹ In France and Italy that function is entrusted to a separate constitutional court: the *Conseil Constitutionnel*⁹⁰ and the *Corte Costituzionale*,⁹¹ respectively. Only in the US does the court of last resort for civil matters have a political counterweight function too.⁹²

C. Court attributes

The second topic, above which the general question stood, pointed at analysing the attributes of the courts of last resort in more detail and their relevance for the judicial functions. The specific question of this second topic was: 2.- *How are the specific attributes of the courts of last resort related to their functions?* The overall answer for this second topic is that each judicial function requires that the court entrusted with a certain function have a set of compatible attributes to perform it. Particularly, this study focused on eight specific attributes,⁹³ namely: scope of review, effects of the judgments, exposure or publicity of the decision, style of the opinions, number of cases, panel composition, total size of the court and preliminary screening (also known as ‘access filters’⁹⁴). On the one hand, different judicial functions may require incompatible configurations of these attributes. For example, the judicial lawmaking function requires a court focused on a reduced caseload comprised of the most transcendent disputes only; while the error-monitoring function requires, quite the contrary, a court capable of reviewing a much larger number of cases comprising every judicial mistake. On the other hand, certain configurations of the same attributes are compatible with more than one judicial function. Following the previous example, the same capability of reviewing a big caseload, functional to error-monitoring, could be altered to repeat the dispute resolution function too.

⁸⁸ *supra* Chap. II.D.1 (iv); Chap. II.D.2 (iv); Chap. II.D.4 (iii).

⁸⁹ *supra* Chap. II.D.4 (iii).

⁹⁰ *supra* Chap. II.D.1 (iv).

⁹¹ *supra* Chap. II.D.2 (iv).

⁹² *supra* Chap. II.D.3 (iii).

⁹³ For the definitions of the eight specific attributes, see the first paragraph of each subsection at *supra* Chapter II.B.

⁹⁴ On the reason why the concept of ‘preliminary screening’ is preferred over ‘access filters’ in this study, *supra* Chap. I.E.7.

1. Attributes of the ideal models

The first sub-question on this second topic discussed the ideal configuration of the court attributes based on ideal models. The sub-question was: 2.1.- *What are the specific attributes that each court model should combine to perform its functions?* The overall answer is that each ideal model of court requires its own set of specific attributes. The attributes of each model are different because they need to combine a set of tools effective to accomplish distinctive judicial functions. The following subsections detail the ideal configuration of the eight specific court attributes in the four ideal models of courts.

i. Constitutional court

The political counterweight function of a constitutional court requires a scope of review focused on the public acts of the executive and the legislature.⁹⁵ The effects of its judgments are strong on other disputes because judicial review can annul the public act under review and, consequently, the annulled public act could not apply in future.⁹⁶ This model of court receives the highest level of exposure due to the broad political relevance of its cases for the general public.⁹⁷ Accordingly, the style of its judgments is an extended debate divided between the majority and minority (political) opinions. This division reflects the strategic alliances between the judges of each of the two major party coalitions, which have opposing political ideologies.⁹⁸ The caseload will be bigger or smaller depending on whether the acts of the executive and legislature, or the legislature only, are under judicial review.⁹⁹ Because the total size of the court relates to its caseload, the total size of the constitutional court will be bigger or smaller depending on the same previous variable. If the constitutional court is mainly limited to the judicial review of legislation, the total size of the court could be small, as well.¹⁰⁰ Due to the political relevance of annulling a piece of legislation, however, the panel of judges in a constitutional court should be stable so as to maintain the (fragile) ideological balance between the party coalition appointments.¹⁰¹ Finally, a constitutional court needs a preliminary screening able to detect the disputes with a higher public relevance based on the political agenda of its judges.¹⁰²

ii. Court of precedents

The judicial lawmaking function of a court of precedents requires a scope of review concentrated on cases that involve a general problem of interpretation of the

⁹⁵ *supra* Chap. III.B.1 (a).

⁹⁶ *supra* Chap. III.B.2 (a).

⁹⁷ *supra* Chap. III.B.3 (a).

⁹⁸ *supra* Chap. III.B.8 (a).

⁹⁹ *supra* Chap. III.B.4 (a).

¹⁰⁰ *supra* Chap. III.B.7 (a).

¹⁰¹ *supra* Chap. III.B.6 (a).

¹⁰² *supra* Chap. III.B.5 (a).

law.¹⁰³ The judgments should have the strong effect of becoming stable guidelines used by the other courts.¹⁰⁴ Accordingly, the court of precedents' decisions tend to have a high level of exposure through publication in order to be known by the other courts and litigants that need to apply them.¹⁰⁵ Because the court of precedents solves problems of interpretation, the style of its decisions should include the dialectic between competing theories of interpretation, for example, by including dissenting opinions.¹⁰⁶ Consequently, the caseload of a court of precedents should be reduced to a small number of cases that involve such general interpretation problems.¹⁰⁷ For this model it is better to have a large panel of judges comprised of specialists in the different legal fields which are at stake, in order to foresee the repercussions that a precedent could have in those fields.¹⁰⁸ Even if the panel should be large enough to bring together the pertinent specialists, the total size of the court remains relatively small.¹⁰⁹ This reduced total size is possible because, as previously mentioned, the court of precedents reviews a small number of cases. The reduced caseload is also due to a restrictive preliminary screening focused on choosing cases with a public relevance in the sense of their presenting interpretation problems replicable in future disputes.¹¹⁰

iii. Court of error

The error-monitoring function of a court of error requires a scope of review open to every particular judicial mistake. However, in this model the court will review a case as long as the higher court has a better perspective than the lower court to evaluate the alleged error. According to that better perspective, the court of error reviews the points of law but usually refrains from re-evaluating the facts based on evidence directly observed by the lower court.¹¹¹ Their judgments do not have general effect one by one, but rather when several decisions in the same direction configure a stable criterion of correction.¹¹² Due to the lack of general effects, the decision of a court of error will not be as widely published as that of the court of precedents. Still, litigants need to have public access to their judgments in order to identify the stable trends of correction.¹¹³ The court of error has a much bigger caseload than a court of precedents because the former reviews not only the most transcendent interpretation problems but also every claimed mistake of the lower courts in particular disputes.¹¹⁴ Because the court of error reviews a large number

¹⁰³ *supra* Chap. III.B.1 (b).

¹⁰⁴ *supra* Chap. III.B.2 (b).

¹⁰⁵ *supra* Chap. III.B.3 (b).

¹⁰⁶ *supra* Chap. III.B.8 (b).

¹⁰⁷ *supra* Chap. III.B.4 (b).

¹⁰⁸ *supra* Chap. III.B.6 (b).

¹⁰⁹ *supra* Chap. III.B.7 (b).

¹¹⁰ *supra* Chap. III.B.5 (b).

¹¹¹ *supra* Chap. III.B.1 (c).

¹¹² *supra* Chap. III.B.2 (c).

¹¹³ *supra* Chap. III.B.3 (c).

¹¹⁴ *supra* Chap. III.B.4 (c).

of cases that could be in the nature of relatively simple mistakes, this model does not need extended judgments comprised of several individual opinions, but just one concise and collective judgment.¹¹⁵ Due to the lack of general effects, the court of error does not need a numerous panel combining several specialists, but a small and compact team of judges experienced in the same legal field.¹¹⁶ As a result, the court of error operates with several of these small teams in parallel. These teams combined create a court big in total size, growing in proportion to the lower court decisions that need to be monitored.¹¹⁷ At the screening stage, this model of court performs a preliminary evaluation of error so as to exclude cases in which, at first sight, no mistake needs to be corrected.¹¹⁸

iv. Trial court

The dispute resolution function of a trial court model covers all the contested points among the parties, including points of law and questions of fact.¹¹⁹ Its judgments have particular effect only, due to the subjective and adaptive approach to resolving each dispute.¹²⁰ The same particularistic approach implies that in this model the judgments have little interest for other courts and, thus, their exposure to the general public is minimal to the extent that some level of privacy could be promoted.¹²¹ The style of the judgments in a trial court could be particularly extensive in the analysis of pieces of evidence to clarify the questions of fact.¹²² This function requires the capability to deal with the biggest caseload comprised of all the possible disputes brought by the parties.¹²³ To handle this immense caseload, the court needs to work divided into small panels, or even by single judges.¹²⁴ In its total size, the trial court is the biggest court but probably divided into local units.¹²⁵ In this model the preliminary screening, if any, would not be meant to exclude cases but to allocate them in different tracks depending on the value in dispute.¹²⁶

2. Attributes of the real courts

The second sub-question on the same topic shifted from the ideal models to the real configuration of these attributes. Therefore, the sub-question was: 2.2.- *How are*

¹¹⁵ *supra* Chap. III.B.8 (c).

¹¹⁶ *supra* Chap. III.B.6 (c).

¹¹⁷ *supra* Chap. III.B.7 (c).

¹¹⁸ *supra* Chap. III.B.5 (c).

¹¹⁹ *supra* Chap. III.B.1 (d).

¹²⁰ *supra* Chap. III.B.2 (d).

¹²¹ *supra* Chap. III.B.3 (d).

¹²² *supra* Chap. III.B.8 (d).

¹²³ *supra* Chap. III.B.4 (d).

¹²⁴ *supra* Chap. III.B.6 (d).

¹²⁵ *supra* Chap. III.B.7 (d).

¹²⁶ *supra* Chap. III.B.5 (d).

these specific attributes configured in the courts of last resort of each jurisdiction? The answer is that the eight specific attributes under analysis are not configured in the same manner in the four jurisdictions. Due to their common historical origins, however, the four jurisdictions can be grouped into two pairs based on their relative similarities. On the one hand, the US Supreme Court (*infra* i) has specific attributes closer to the UK Supreme Court (*infra* ii). On the other hand, the French *Cour de cassation* (*infra* iii) has similar attributes to the Italian *Corte Suprema di Cassazione* (*infra* iv). The next subsections present the attributes of the courts of last resort in each jurisdiction.

i. US

The US Supreme Court focuses its scope of review on decisions of higher federal or state courts in ‘important questions of federal law’, which could be either of ordinary (federal) legislation or the constitutional review of the law.¹²⁷ In general, the US Supreme Court judgments count as binding precedents for future disputes. But the precedents on constitutional matters tend to be less stable over time than the ones on the ordinary law.¹²⁸ Most of its judgments receive a high level of publicity, not only their inclusion in the official reports but also their exposure to wide media coverage.¹²⁹ The US Supreme Court delivers lengthy judgments of a more political-consequentialist than syllogism-deductive style, with a clear division between majority and minority opinions.¹³⁰ The court itself performs a discretionary preliminary screening (*certiorari*) guided by the examples of Rule 10, which refers to contradictions among higher courts.¹³¹ Thanks to the discretionary screening, the court decides on the merits only around 100 cases a year, from a total of 8,000 petitions.¹³² The US Supreme Court has had a stable total size of nine judges for more than a century.¹³³ The same nine judges review together every case in a full bench, assisted by their law clerks.¹³⁴

ii. England

The UK Supreme Court’s scope of review is defined as ‘points of law of general public importance’, which involves cases in which the intervention of the court is necessary to clarify and develop the law.¹³⁵ Due to the *stare decisis* doctrine, its judgments count as strong and relatively stable binding precedents because the court is reluctant to explicitly overrule.¹³⁶ The UK Supreme Court enjoys a high

¹²⁷ *supra* Chap. III.B.1. (i).

¹²⁸ *supra* Chap. III.B.2. (i).

¹²⁹ *supra* Chap. III.B.3. (i).

¹³⁰ *supra* Chap. III.B.8. (i).

¹³¹ *supra* Chap. III.B.5. (i).

¹³² *supra* Chap. III.B.4. (i).

¹³³ *supra* Chap. III.B.7. (i).

¹³⁴ *supra* Chap. III.B.6. (i).

¹³⁵ *supra* Chap. III.B.1. (i).

¹³⁶ *supra* Chap. III.B.2. (i).

level of exposure, especially among the legal community, because most of its decisions are included in the semi-official reports.¹³⁷ Its lengthy judgments reveal a more individualistic style, in which each judge could write his or her separate opinion.¹³⁸ The UK Supreme Court usually reviews around seventy cases, or fewer, per year from a total of 200 petitions.¹³⁹ This reduced caseload is mainly due to a discretionary preliminary screening (permission to appeal, previously called ‘leave’). This screening is performed by both the *a quo* and *ad quem* courts according to which, in principle, there is no right to appeal.¹⁴⁰ The total size of the supreme court is slightly bigger in the UK (twelve judges) than in the US (nine).¹⁴¹ The UK Supreme Court, however, does not always sit as a full bench, unlike in the US. Instead, the UK Supreme Court works in changing panels of judges, which could be five, but with a tendency towards seven, chosen by the Chief Justice.¹⁴²

iii. France

The scope of review of the French *Cour de cassation* is limited to the application of the substantive and formal law, excluding the review of evidence and questions of fact, with few exceptions.¹⁴³ Each judgment (*arrêt*) delivered by the cassation chambers does not have binding force *per se*, but judgments gain doctrinal authority when they form a stable case law (*jurisprudence constante*).¹⁴⁴ Their publication is remarkably selective, and only a few of the exceptionally relevant *arrêts* are included in the annual court report.¹⁴⁵ The style of the *arrêts* is extremely concise, briefly deductive and signed collectively by the whole panel of judges as a single court.¹⁴⁶ The court of cassation’s caseload has grown over time, reaching its current 22,000 civil cases per year (30,000 including criminal cases).¹⁴⁷ The civil chambers work is divided into smaller panels consisting of five judges sharing a similar specialisation according to their chamber, or in an even reduced composition of three judges (*formations restreintes*).¹⁴⁸ This reduced composition of three judges performs a type of preliminary screening because, among other tasks, it is meant to give an early and summary rejection to easier cases such as non-admissible petitions or cases in which the decision appears obvious.¹⁴⁹

¹³⁷ *supra* Chap. III.B.3. (i).

¹³⁸ *supra* Chap. III.B.8. (i).

¹³⁹ *supra* Chap. III.B.4. (i).

¹⁴⁰ *supra* Chap. III.B.5. (i).

¹⁴¹ *supra* Chap. III.B.7. (i).

¹⁴² *supra* Chap. III.B.6. (i).

¹⁴³ *supra* Chap. III.B.1. (ii).

¹⁴⁴ *supra* Chap. III.B.2. (ii).

¹⁴⁵ *supra* Chap. III.B.3. (ii).

¹⁴⁶ *supra* Chap. III.B.8. (ii).

¹⁴⁷ *supra* Chap. III.B.4. (ii).

¹⁴⁸ *supra* Chap. III.B.6. (ii).

¹⁴⁹ *supra* Chap. III.B.5. (ii).

Notwithstanding these small teams, the total size of the French *Cour de cassation* is numerous, having grown close to 200 judges of different status.¹⁵⁰

iv. Italy

The Italian *Corte Suprema di Cassazione*'s scope of review should be, in principle, limited to the application of law, but the court has a tendency towards expanding its review to questions of fact too.¹⁵¹ From the Italian legal perspective, previous judgments do not have a *de iure* binding force for future cases but, similarly as in France, a stable case law could become influential *de facto*.¹⁵² The publication of judgments is entrusted to the *Ufficio Massimario*, which selectively publishes the few most transcendent decisions, by including only the principle of law stated in the court's holding (*massima*) in their reports.¹⁵³ The judgments of the Italian cassation chambers are not as brief as the French *arrêts* but, to an important extent, they share the syllogistic, deductive and collective style.¹⁵⁴ The caseload of the Italian *Corte Suprema di Cassazione* is 50 per cent bigger than in France, climbing up to 30,000 civil cases per year (80,000 including criminal cases) with a critical backlog.¹⁵⁵ To cope with the enormous caseload, the total size of the Italian Court of Cassation is also enormous, having grown to more than 400 judges.¹⁵⁶ The panel of judges that hears each case (*collegio giudicante*) is comprised of five judges.¹⁵⁷ Finally, the reform of 2009 introduced a preliminary screening based on which the sixth chamber (*sesta sezione civile*) may exclude cases if the violation of due process is manifestly unfounded or the lower court judgment is aligned with the court of cassation case law.¹⁵⁸

3. Attributes and manifest functions

The third sub-question of the second topic aimed at contrasting the manifest declaration of each court's functions with the actual configuration of its attributes. The sub-question was formulated as follows: 2.3.- *To what extent does the court of last resort of each jurisdiction combine the specific attributes needed according to its manifest functions?* The overall answer is that the US Supreme Court has the attributes of a constitutional court model, which is relatively compatible with performing both of its manifest functions: political counterweight and judicial lawmaking too (*infra i*). In England, the UK Supreme Court has the attributes of a court of precedents

¹⁵⁰ *supra* Chap. III.B.7. (ii).

¹⁵¹ *supra* Chap. III.B.1. (ii).

¹⁵² *supra* Chap. III.B.2. (ii).

¹⁵³ *supra* Chap. III.B.3. (ii).

¹⁵⁴ *supra* Chap. III.B.8. (ii).

¹⁵⁵ *supra* Chap. III.B.4. (ii).

¹⁵⁶ *supra* Chap. III.B.7. (ii).

¹⁵⁷ *supra* Chap. III.B.6. (ii).

¹⁵⁸ *supra* Chap. III.B.5. (ii).

model, which are aligned with its single manifest function of judicial lawmaking (*infra* ii). The French and Italian cassation chambers combine the attributes of a court of error model, which are functional to one of their two (incompatible) manifest functions: the error-monitoring instead of the judicial lawmaking (*infra* iii, iv). The next four subsections provide, per each jurisdiction, the set of individual observations and comparisons which lead to this answer.

i. US

US legal actors say that their supreme court should combine a different pair of manifest functions than the cassation courts in France and Italy, namely, judicial lawmaking and political counterweight, but not the error-monitoring.¹⁵⁹ Unlike the French and Italian combination of manifest functions, the US combination appears as less problematic. That is so because the attributes of a court of precedents model are, to an extent, more compatible with a constitutional court too. In the case of the US, the supreme court's attributes incline towards the constitutional court model performing the political counterweight function. Still, that inclination does not prevent it entirely from also operating as a court of precedents to an important degree.¹⁶⁰ In particular on the eight attributes, the US Supreme Court's review, focused on important questions of federal law,¹⁶¹ can be used to review both the constitutionality of acts of the executive and legislature¹⁶² and general problems of legal interpretation too.¹⁶³ The binding force of its judgments¹⁶⁴ could be due to the constitutional annulment of a piece of legislation,¹⁶⁵ or the settling of a guideline for future interpretation.¹⁶⁶ The high exposure of its decisions¹⁶⁷ can be justified by the political relevance for the general public,¹⁶⁸ and also by the requirement on the other courts to repeat its interpretation criteria.¹⁶⁹ The lengthy style of dissenting opinions¹⁷⁰ could be used to express either the political division between two opposite parties¹⁷¹ or the dialectic between the judges' different interpretation theories.¹⁷² The reduced number of cases of the US Supreme Court¹⁷³ could be compatible with the also reduced caseload of a court of precedents model¹⁷⁴ and

¹⁵⁹ *supra* Chap. VI.B.3 (i).

¹⁶⁰ *supra* Chap. III.C.

¹⁶¹ *supra* Chap. III.B.1 (i).

¹⁶² *supra* Chap. III.B.1 (a) (iii).

¹⁶³ *supra* Chap. III.B.1 (b) (iii).

¹⁶⁴ *supra* Chap. III.B.2 (i).

¹⁶⁵ *supra* Chap. III.B.2 (a) (iii).

¹⁶⁶ *supra* Chap. III.B.2 (b) (iii).

¹⁶⁷ *supra* Chap. III.B.3 (i).

¹⁶⁸ *supra* Chap. III.B.3 (a) (iii).

¹⁶⁹ *supra* Chap. III.B.3 (b) (iii).

¹⁷⁰ *supra* Chap. III.B.8 (i).

¹⁷¹ *supra* Chap. III.B.8 (a) (iii).

¹⁷² *supra* Chap. III.B.8 (b) (iii).

¹⁷³ *supra* Chap. III.B.4 (i).

¹⁷⁴ *supra* Chap. III.B.4 (b) (iii).

also a constitutional court if the latter mainly focuses on the judicial review of legislation.¹⁷⁵ This limited caseload is possible due to the writ of certiorari's discretionary selection.¹⁷⁶ Rule 10, governing the certiorari preliminary screening criterion, is broad to the extent that the court can use it both to choose cases based on its own political agenda¹⁷⁷ and to exclude cases without relevance for guiding the decision-making in future cases.¹⁷⁸ The reduced caseload, thanks to the discretionary certiorari, allows the court to maintain a stable and reduced total size over time,¹⁷⁹ which is useful in both the constitutional court¹⁸⁰ and the court of precedents model.¹⁸¹ The US full bench panel¹⁸² could be needed in both models too, that is to say, to maintain the fragile political balance,¹⁸³ and also comprising an exhaustive diversity of specialists in different fields of law.¹⁸⁴

These compatibilities in the eight specific attributes should not lead one to conclude that the US Supreme Court is *equally* functional to both political counterweight and judicial lawmaking manifest functions. There are some attributes in which the US inclination towards the political counterweight function could latently deviate, moving away from judicial lawmaking. These partial incompatibilities will be presented in the next answer on latent deviations.¹⁸⁵

ii. *England*

English legal actors say that the UK Supreme Court has a single manifest function, namely, judicial lawmaking.¹⁸⁶ This configuration of the manifest function appears as less problematic. The absence of a combination of two different manifest functions avoids, in principle, the questions of attributes incompatibility present in France and Italy.

In general, the UK Supreme Court specific attributes incline towards a court of precedents model performing the corresponding judicial lawmaking function.¹⁸⁷ Particularly, its scope of review on points of law of general public importance¹⁸⁸ is used to review general problems of interpretation.¹⁸⁹ The *stare decisis* effect of the

¹⁷⁵ *supra* Chap. III.B.4 (a) (iii).

¹⁷⁶ *supra* Chap. III.B.5 (i).

¹⁷⁷ *supra* Chap. III.B.5 (a) (iii).

¹⁷⁸ *supra* Chap. III.B.2 (b) (iii).

¹⁷⁹ *supra* Chap. III.B.7 (i).

¹⁸⁰ *supra* Chap. III.B.7 (a) (iii).

¹⁸¹ *supra* Chap. III.B.7 (b) (iii).

¹⁸² *supra* Chap. III.B.6 (i).

¹⁸³ *supra* Chap. III.B.6 (a) (iii).

¹⁸⁴ *supra* Chap. III.B.6 (b) (iii).

¹⁸⁵ *infra* Chap. VI.C.4 (i).

¹⁸⁶ *supra* Chap. VI.B.3 (ii).

¹⁸⁷ *supra* Chap. III.C.

¹⁸⁸ *supra* Chap. III.B.1 (i).

¹⁸⁹ *supra* Chap. III.C.1 (b) (iii).

UK Supreme Court’s judgments¹⁹⁰ appears strong and stable enough for guiding the interpretation of the application of the law in future disputes.¹⁹¹ The publicity of the majority of its decisions in the semi-official reports¹⁹² is also high enough to be known by the lower courts guided by a court of precedents at the top.¹⁹³ The style of the UK Supreme Court’s judgments contemplates multiple dissenting opinions,¹⁹⁴ allowing the expression of also multiple interpretation theories that could be competing.¹⁹⁵ The court’s caseload of approximately seventy cases per year¹⁹⁶ appears small enough to focus only on the most transcendent cases of interpretation problems.¹⁹⁷ The permission to appeal requirement¹⁹⁸ operates as a restrictive preliminary screening to select only a few cases with relevance for the interpretation guidance.¹⁹⁹ Due to the permission to appeal and the reduced caseload, the UK Supreme Court has a total size of twelve judges,²⁰⁰ which is bigger than the US Supreme Court but still small enough according to a court of precedents model.²⁰¹ As we observed, the composition of the panel of the UK Supreme Court changes according to the Chief Justice’s selection.²⁰² The Chief Justice, however, does not select randomly, but based on the pertinent specialisation of each judge, as the judicial lawmaking function requires.²⁰³

iii. France

Let us remember that the French Court of Cassation has two manifest functions: judicial lawmaking and error-monitoring (*mission normative* and *mission disciplinaire*).²⁰⁴ Between these two manifest functions, a minor portion of the *Cour de cassation*’s caseload is handled by the plenary sessions, which seem to be more compatible with the court of precedents model.²⁰⁵ The ordinary chambers, which are the ones that handle the vast majority of the court’s caseload, appear configured for the court of error model instead.²⁰⁶ In particular, the French cassation’s openness to reviewing every point of law, but excluding questions of fact,²⁰⁷ is aligned with the error-monitoring function. In the court of error model,

¹⁹⁰ *supra* Chap. III.B.2 (i).

¹⁹¹ *supra* Chap. III.B.2 (b) (iii).

¹⁹² *supra* Chap. III.B.3 (i).

¹⁹³ *supra* Chap. III.B.3 (b) (iii).

¹⁹⁴ *supra* Chap. III.B.8 (i).

¹⁹⁵ *supra* Chap. III.B.8 (b) (iii).

¹⁹⁶ *supra* Chap. III.B.4 (i).

¹⁹⁷ *supra* Chap. III.B.4 (b) (iii).

¹⁹⁸ *supra* Chap. III.B.5 (i).

¹⁹⁹ *supra* Chap. III.B.5 (b) (iii).

²⁰⁰ *supra* Chap. III.B.7 (i).

²⁰¹ *supra* Chap. III.B.7 (b) (iii).

²⁰² *supra* Chap. III.B.6 (i).

²⁰³ *supra* Chap. III.B.6 (b) (iii).

²⁰⁴ *supra* Chap. VI.B.3 (iii).

²⁰⁵ *infra* Chap. VI.D.2.

²⁰⁶ *supra* Chap. III.C.

²⁰⁷ *supra* Chap. III.B.1 (ii).

the court reviews every aspect in which the higher court has a better perspective than the lower court.²⁰⁸ Therefore, the exclusion of the questions of fact from the cassation review could be the result of the worse perspective of the court of cassation, when compared to the lower court's perspective, in assessing the evidence presented at the lower proceedings. The *jurisprudence constante* effect of the French cassation chambers' decisions²⁰⁹ is consistent with the court of error model in which only the stable patterns of correction may guide future disputes.²¹⁰ As a result, to a court of error model, a selective publicity of the few decisions reflecting that stable correction pattern suffices.²¹¹ According to this court of error model, the French *arrêts* are subject to a similar publication selectivity in the annual report.²¹² The concise, collective and deductive opinion style of the French *arrêts*²¹³ appears adequate for the vast majority of relatively simple mistakes that a court of error needs to correct.²¹⁴ The French extremely simplified style of judgments is also functional for saving time when reviewing a caseload of more than 20,000 cases.²¹⁵ Precisely that capability to review a big caseload of litigants' claims of judicial mistakes is what the error-monitoring function needs.²¹⁶ The court of error also requires a growing number of judges in order to maintain enough monitoring capacity in proportion to the also growing number of lower court decisions.²¹⁷ Consistently, the French *Cour de cassation* has grown to its current 200 judges,²¹⁸ which appears numerous enough for maintaining that monitoring capacity.²¹⁹ For the error-monitoring on thousands of cases, however, the big court of error needs to operate divided into several small and homogenous panels of judges.²²⁰ Following that trend, the *Cour de cassation* is gradually reducing the composition of its panels from five to three judges, especially with the introduction of the *formation restreinte*.²²¹ The French cassation preliminary screening is phrased as a recourse manifestly not of a nature as to result in quashing (*cassation*).²²² Accordingly, non-admissible or clearly ill-grounded petitions will be screened out at an early stage. In this sense, the French cassation preliminary screening is an early evaluation of error according to a court of error model too.²²³

208 *supra* Chap. III.B.1 (c).
 209 *supra* Chap. III.B.4 (ii).
 210 *supra* Chap. III.B.2 (c) (iii).
 211 *supra* Chap. III.B.3 (c).
 212 *supra* Chap. III.B.3 (ii,iii).
 213 *supra* Chap. III.B.8 (ii).
 214 *supra* Chap. III.B.8 (c) (iii).
 215 *supra* Chap. III.B.4 (ii).
 216 *supra* Chap. III.B.4 (c) (iii).
 217 *supra* Chap. III.B.7 (c).
 218 *supra* Chap. III.B.7 (ii).
 219 *supra* Chap. III.B.7 (iii).
 220 *supra* Chap. III.B.6 (c).
 221 *supra* Chap. III.B.6 (ii).
 222 *supra* Chap. III.B.5 (ii).
 223 *supra* Chap. III.B.5 (c) (iii).

iv. Italy

The Italian *Corte Suprema di Cassazione* has a configuration of the eight specific attributes similar to what is found in France and, moreover, they share the same combination of manifest functions: judicial lawmaking (*uniformità*) and error-monitoring (*nomofilaquia*).²²⁴ Therefore, the analysis of the compatibility between specific attributes and manifest functions in Italy is, to a large extent, equivalent to the analysis previously made for France. Repeating here the same answer would be redundant.²²⁵ The general conclusion that we should keep in mind is that, among the previous two manifest functions, the plenary session of the *Corte Suprema di Cassazione* has specific attributes more compatible with the court of precedents,²²⁶ while the configuration of the Italian ordinary chambers is closer to a court of error model instead.²²⁷ Still, some differences between France and Italy remain. These Italian differences on the specific attributes of the ordinary chambers, however, appear more related to its latent deviation than to its manifest functions. For that reason, the Italian particularities will be analysed in the next section,²²⁸ which is devoted to the relation between specific attributes and latent deviations indeed.

4. Attributes and latent deviations

The final sub-question of the second topic pointed at identifying latent deviations of these courts based on the mismatch between the actual configuration of their attributes and their functions manifestly declared. This fourth sub-question was: 2.4.- *To what extent do the specific attributes of each court of last resort indicate the presence of different functions at a latent level?* The overall answer is that each court of last resort of the four jurisdictions exhibits latent deviations, either moving away from their manifest functions or moving closer to latent functions.²²⁹ The US Supreme Court shows a partial latent deviation moving away from its manifest judicial lawmaking function due to the predominance of the constitutional court configuration which, in precise attributes, is somewhat different than a pure court of precedents model (*infra* i); while in England, the UK Supreme Court risks a latent deviation moving closer to a latent political counterweight function in the long run because its attributes of a court of precedents are partially compatible with a constitutional court model (*infra* ii). The third level in France and Italy, namely, their cassation chambers, have a latent deviation moving away from their

²²⁴ *supra* Chap. VI.B.3 (*iv*).

²²⁵ For the Italian particulars, the reader may go back to the previous subsection, *supra* Chap. VI.C.3 (*iii*), and check the internal references to Chapter II that point at paragraphs devoted not only to France but also to Italy.

²²⁶ Further discussed at *infra* Chap. VI.D.2.

²²⁷ *supra* Chap. III.C.

²²⁸ *supra* Chap. VI.C.4 (*iv*).

²²⁹ For this distinction on latent deviation, *supra* Chap. II.B.6.

manifest judicial lawmaking function since their court of error attributes are, to an important degree, incompatible with a court of precedents model. France and Italy also exhibit a deviation moving closer to a latent dispute resolution function (a deviation more pronounced in Italy than in France), because their court of error attributes are partially compatible with a trial court model too (*infra* i, ii). The following subsections explain, per each jurisdiction, the individual observations and comparisons based on which of these latent deviations were identified.²³⁰

i. US

The US Supreme Court's shift from political counterweight to judicial lawmaking, and vice versa, cannot be considered deviations towards latent functions because those two functions are its manifest functions indeed.²³¹ The latent deviation of the US Supreme Court consists, in reality, in the fact that some of its attributes of a constitutional court are, in precise aspects, not entirely functional to judicial lawmaking. This latent deviation away from the judicial lawmaking function in the US can be observed mainly in three attributes. First, the effects of the judgment in a proper court of precedents require stability, in the long run, to put order in the lower courts' interpretation.²³² In the US Supreme Court, however, the constitutional precedents tend to be less stable due to the political changes in the majority-minority balance within the court.²³³ Second, the style of the court of precedents decision should be open to two or more dissenting opinions because the competing interpretation theories could be more than two, as well.²³⁴ In the US Supreme Court, nonetheless, the style of the opinions tends to be restricted to only two, majority and minority, because of the internal tendency of forming alliances among the judges closer to each of the two opposing political parties.²³⁵ Third, the panel composition in a proper court of precedents requires combining judges with a specialisation in a legal field pertinent to the current case.²³⁶ Different cases involve different legal fields and, thus, certain specialist judges will sit on the panels of certain cases but not on the panels of other cases where their specialisation is not pertinent. In the US Supreme Court, however, the panels are normally a full bench.²³⁷ Due to the fragile political balance in the appointment of judges in a constitutional court model, all nine appointed judges of the US Supreme Court will be involved in every case, regardless of whether they have a pertinent specialisation or not.²³⁸

²³⁰ Due to the relevance of finding these latent deviations, the demonstration of them will require a more detailed explanation, especially on France (*infra* iii) and Italy (*infra* iv).

²³¹ *supra* Chap. VI.B.3 (iii).

²³² *supra* Chap. III.B.2 (b) (i).

²³³ *supra* Chap. III.B.2 (a) (iii).

²³⁴ *supra* Chap. III.B.8 (b) (i).

²³⁵ *supra* Chap. III.B.8 (a) (iii).

²³⁶ *supra* Chap. III.B.6 (b).

²³⁷ *supra* Chap. III.B.6 (i).

²³⁸ *supra* Chap. III.B.6 (b) (iii).

ii. *England*

Due to the sovereignty of Parliament, political counterweight is excluded from the UK Supreme Court manifest functions.²³⁹ Some judges warn, however, that the court could deliver its own version of *Marbury v. Madison*, hypothetically empowering itself to perform a strong judicial review of legislation, as in the US.²⁴⁰ This means that the political counterweight could be a latent function not yet displayed.²⁴¹ This latency of the political counterweight function in the UK Supreme Court is possible because, as we observed in the US, the attributes of a court of precedents are also partially compatible with a constitutional court model.

Still, some similarities with the US should be observable in the functioning of the UK Supreme Court's attributes if this latent political counterweight function emerges in the future. First, the effects of the UK Supreme Court judgments could become less stable over time. A constitutional court is less deferential to the previous decisions than a court of precedents.²⁴² The constitutional court could look upon previous generations of judges of the same court as defeated political enemies.²⁴³ Therefore, the stability of a constitutional court's precedents depends on keeping the majorities in the internal political balance over time. If the political counterweight function emerges, the UK Supreme Court's precedents could become less stable because every appointment of a new judge could alter that fragile balance.²⁴⁴ Second, the dissenting opinions could become less individualistic. The internal political tension in a constitutional court model encourages the judges to form a group with their political allies and, by doing so, gain more power collectively.²⁴⁵ The current style of several dissenting or concurring opinions of the UK Supreme Court would not be maintained, because that would be inconvenient for these political coalitions' strategies. If the political counterweight function emerges, the UK Supreme Court will tend to have a more bipartisan style of judgments, consisting of majority and minority opinions only.²⁴⁶ Third, panel composition should tend to change less. Again, changing panels is too problematic for the internal tension of a constitutional court.²⁴⁷ The Chief Justice may use the panel selection power to appoint his or her political allies only. If the latent political counterweight function emerges in the UK Supreme Court, there would be a demand for making the panels' composition more stable, because

²³⁹ *supra* Chap. VI.B.3 (ii).

²⁴⁰ See again, NEUBERGER 2009, p. 11.

²⁴¹ *supra* Chap. II.D.3 (iii).

²⁴² *supra* Chap. III.B.2 (b) (i).

²⁴³ *supra* Chap. III.B.2 (a).

²⁴⁴ *supra* Chap. III.B.2 (iii).

²⁴⁵ *supra* Chap. III.B.8 (a).

²⁴⁶ *supra* Chap. III.B.8 (i,iii).

²⁴⁷ *supra* Chap. III.B.6 (a).

preserving the fragile political balance case-by-case would become more critical than bringing together only the pertinent specialists.²⁴⁸

iii. *France*

(a) *Away from judicial lawmaking.* The French cassation chambers show, first, a latent deviation moving away from their manifest judicial lawmaking function, as defined in this study.²⁴⁹ This deviation seems to be the result of aiming to combine, at a manifest level, two judicial functions which require incompatible models of courts. In particular, French legal actors say that the *Cour de cassation* manifest functions are a combination of error-monitoring and judicial lawmaking, phrased as *mission disciplinaire* and *mission normative*.²⁵⁰ As discussed in the ideal models of courts, however, the error-monitoring and the judicial lawmaking functions to an important extent require court models with incompatible attributes.²⁵¹

That latent deviation moving away from the judicial lawmaking function can be observed in the configuration of the eight attributes of the French cassation chambers. Their specific configuration clearly privileges the model of court of error over a court of precedents. In particular, the French chambers' scope of review is focused not only on general problems of interpretation,²⁵² but also on the particular application of the law.²⁵³ Individually considered, their judgments, one-by-one, are not influential guidelines for future disputes;²⁵⁴ but when several cases are combined in the same direction, and only then, they are so considered.²⁵⁵ The chambers' decisions are not widely publicised,²⁵⁶ and even when they are, only an exceptional selection of them.²⁵⁷ The style of the cassation judgments is not a detailed dialectic between opposite theories,²⁵⁸ but a single and concise syllogistic deduction.²⁵⁹ The chambers' caseload is not a hundred transcendent cases,²⁶⁰ but several thousand reviews of particular mistakes.²⁶¹ Accordingly, the total size of the court is not dozens of judges,²⁶² but hundreds of judges.²⁶³ The chambers' panels do not bring together several judges with different specialisations,²⁶⁴ but a

²⁴⁸ *supra* Chap. III.B.6 (i,iii).

²⁴⁹ *supra* Chap. III.C.

²⁵⁰ *supra* Chap. VI.B.3 (iii).

²⁵¹ *supra* Chap. VI.C.1 (ii,iii).

²⁵² *supra* Chap. III.B.1 (b) (ii).

²⁵³ *supra* Chap. III.B.1 (c) (iii).

²⁵⁴ *supra* Chap. III.B.2 (b) (ii).

²⁵⁵ *supra* Chap. III.B.2 (c) (iii).

²⁵⁶ *supra* Chap. III.B.3 (b) (ii).

²⁵⁷ *supra* Chap. III.B.3 (c) (iii).

²⁵⁸ *supra* Chap. III.B.8 (b) (ii).

²⁵⁹ *supra* Chap. III.B.8 (c) (iii).

²⁶⁰ *supra* Chap. III.B.4 (b) (ii).

²⁶¹ *supra* Chap. III.B.4 (c) (iii).

²⁶² *supra* Chap. III.B.7 (b) (ii).

²⁶³ *supra* Chap. III.B.7 (c) (iii).

²⁶⁴ *supra* Chap. III.B.6 (b) (ii).

compact team of three or five from the same legal field.²⁶⁵ Finally, the French chambers do not have a restrictive preliminary screening limited to the public relevance of the case for guiding future disputes,²⁶⁶ but a summary evaluation of palpable errors at an early stage.²⁶⁷

(b) *Closer to dispute resolution.* Secondly, the French cassation's chambers have a latent deviation not only moving away from one of its manifest functions but also moving closer to a latent function. This second latent deviation is due to the fact that attributes of a court of error model, which the French chambers have, are partially compatible not only with the error-monitoring function but also with the dispute resolution function too.²⁶⁸ In particular, the cassation scope of review exclusively restricted to the points of law²⁶⁹ could be subtly expanded to include some indirect review of the facts, as well.²⁷⁰ The lack of general effects of each cassation judgment,²⁷¹ originally due to the purely error-monitoring function,²⁷² could be useful to conceal a subjective and adaptive case-specific dispute resolution.²⁷³ The minimal exposure through the restricted publication of most cassation decisions²⁷⁴ could be the result of their little interest for future disputes due to the same case-specific approach.²⁷⁵ The originally concise style of cassation opinions²⁷⁶ could be extended to subtly discussing questions of fact as if they were merely legal reasoning.²⁷⁷ The big cassation caseload²⁷⁸ could be a symptom that, in practice, most parties can bring their dispute to the court more or less at will, and not only when a real judicial error is at stake.²⁷⁹ This big caseload common to the models of court of error²⁸⁰ and trial court²⁸¹ creates in both a tendency towards reducing the number of judges in each panel composition to increase the capacity of resolving more cases faster.²⁸² The big caseload also produces big courts which tend to increase their total size in both models.²⁸³ Finally, the court of error should exercise a preliminary screening aimed at an early rejection of the cases in which

²⁶⁵ *supra* Chap. III.B.6 (c) (ii).

²⁶⁶ *supra* Chap. III.B.5 (b) (ii).

²⁶⁷ *supra* Chap. III.B.5 (c) (iii).

²⁶⁸ *supra* Chap. VI.C.1 (iii,iv).

²⁶⁹ *supra* Chap. III.B.1 (ii).

²⁷⁰ *supra* Chap. III.B.1 (d) (iii).

²⁷¹ *supra* Chap. III.B.2 (ii).

²⁷² *supra* Chap. III.B.2 (c).

²⁷³ *supra* Chap. III.B.2 (d) (iii).

²⁷⁴ *supra* Chap. III.B.3 (ii).

²⁷⁵ *supra* Chap. III.B.3 (d) (iii).

²⁷⁶ *supra* Chap. III.B.8 (ii).

²⁷⁷ *supra* Chap. III.B.8 (d) (iii).

²⁷⁸ *supra* Chap. III.B.4 (ii).

²⁷⁹ *supra* Chap. III.B.4 (d) (iii).

²⁸⁰ *supra* Chap. III.B.6 (c).

²⁸¹ *supra* Chap. III.B.6 (d).

²⁸² *supra* Chap. III.B.6 (ii,iii).

²⁸³ *supra* Chap. III.B.7 (c,d) (ii,iii).

there is manifestly no error involved.²⁸⁴ But the exercise of such cassation screening could be made with such lenience that, in practice, it is not a relevant obstacle for the parties to access the court.²⁸⁵

At a manifest level, however, French legal actors emphatically deny that the repetition of mere dispute resolution could be a legitimate function of the *Cour de cassation* – cassation should not be a ‘third degree of full jurisdiction’, they say.²⁸⁶ Such emphatic denial, however, is not disproof of the potential latent deviation, but its confirmation. The need for this explicit denial indicates that French legal actors suspect that such latent deviation potentially exists, and they repeat the denial to prevent their *Cour de cassation* from actually deviating in practice.

This constant denial in France appears as justified because of the compatibility of attributes between the models of court of error and (third) trial court, as previously explained. Indeed, the *Cour de cassation* seems to be relatively successful at maintaining the court of error model and avoiding the latent deviation closer to dispute resolution. Compared to Italian cassation attributes – as we will discuss in the next subsection (*infra* ii) – most of the French cassation attributes appear less distorted by the latent dispute resolution function.²⁸⁷

Still, one symptom of latent deviation moving closer to repeating dispute resolution could be observed in France, particularly in the panel composition in the chambers panel. Nowadays, the *formation restreinte* of three judges in the *Cour de cassation* represents around 50 per cent of the civil caseload.²⁸⁸ Three judges are also the number of the panel composition in the intermediate appellate courts (*Cour d’appel*),²⁸⁹ and the first instance big-claims courts (*Tribunal de grande instance*),²⁹⁰ which perform a dispute resolution function in France.²⁹¹ Therefore, the latent deviation towards the dispute resolution function could be observed in this 50 per cent of cassation civil cases resolved by the *formation restreinte*. The French Court of Cassation, an error-monitoring court at a purely manifest level, in reality, resolves half of its cases with a panel composition similar in number to the lower courts, which are trial court models instead.

iv. Italy

(a) *Away from judicial lawmaking.* The chambers of the Italian *Corte Suprema di Cassazione* also show a latent deviation moving away from one of their manifest functions, particularly, away from judicial lawmaking. The previous analysis on

²⁸⁴ *supra* Chap. III.B.5 (c) (iii).

²⁸⁵ *supra* Chap. III.B.5 (d) (ii,iii).

²⁸⁶ *supra* Chap. II.D.1 (iii).

²⁸⁷ *infra* Chap. VI.C.4 (iv) (b).

²⁸⁸ *supra* Chap. III.B.6 (ii); see again, WEBER 2010A, p. 69.

²⁸⁹ ELLIOTT, JEANPIERRE & VERNON 2006, p. 99.

²⁹⁰ ELLIOTT, JEANPIERRE & VERNON 2006, p. 87.

²⁹¹ *supra* Chap. II.D.1 (iii).

France's first latent deviation, moving likewise away from judicial lawmaking, also applies to Italy to an important extent. That French latent deviation was due to the incompatibility between the judicial lawmaking function, on the one hand, and the cassation chambers' attributes of a court of error model, on the other.²⁹² The Italian cassation chambers indeed have attributes of a court of error model, as well.²⁹³ Consequently, Italian cassation chambers share the French incompatibility with judicial lawmaking and, thus, create a latent deviation away from that manifest function too. For that reason, here it appears redundant to repeat for Italy the same answer given for France.²⁹⁴

(b) *Closer to dispute resolution.* Italy also has a deviation moving closer to a latent function, particularly, closer to repeating dispute resolution.²⁹⁵ This second latent deviation is more pronounced in Italy than in France. Italian legal actors also deny that their *Corte Suprema di Cassazione* could have a manifest function of repeating dispute resolution. Italian legal actors, however, appear more sceptical about the effectiveness of this denial than their French colleagues.²⁹⁶ The *Corte Suprema di Cassazione* attributes have equivalent compatibilities with the trial court model, as previously explained for France.²⁹⁷ The Italian scepticism seems based on the fact that, compared with the French *Cour de cassation*, more Italian cassation attributes appear deviated towards dispute resolution repetition. Let us mention four symptoms.

First, Italian cassation scope appears more open than the French one to review not only the particular application of the law but also other aspects of the dispute, such as the questions of fact.²⁹⁸ For example, the Italian reform of 2012 allows reviewing the facts if the parties discussed them but they were not resolved explicitly by the lower court.²⁹⁹ But even before that reform, reviewing the facts was something relatively common in Italian cassation through the review of the evidentiary reasoning of the lower court's judgment.³⁰⁰ Second, the style of the Italian cassation judgments is more extended than the French concise *arrêts*.³⁰¹ This additional extension could be a symptom of the previous dispute resolution deviation, about which not only a precise syllogism on the application of the law is under discussion but a broader debate about the whole dispute, including (more or less

²⁹² *supra* Chap. VI.C.4 (iii) (a).

²⁹³ *supra* Chap. VI.C.3 (iv).

²⁹⁴ Again, the reader may find the particulars on Italy in the footnotes of the previous subsection (*supra* i), which have internal references to Chapter II including information on Italy.

²⁹⁵ *supra* Chap. III.C.

²⁹⁶ *supra* Chap. II.D.2 (iii).

²⁹⁷ *supra* Chap. VI.C.4 (iii) (b).

²⁹⁸ *supra* Chap. III.B.1 (ii) (d).

²⁹⁹ See again, FERRARIS 2015, p. 222-226.

³⁰⁰ See again, TARUFFO 1991, p. 135 ff.

³⁰¹ *supra* Chap. III.B.8 (ii).

explicitly) the evidentiary re-evaluation of the facts, as well.³⁰² Third, the population of Italy is slightly smaller than that of France. Still, the civil caseload of the Italian Court of Cassation is 150 per cent bigger than its French counterpart.³⁰³ This considerably bigger caseload in Italy could indicate that the *Corte Suprema di Cassazione* has been open to review not only serious judicial errors but most of the disputes brought by the parties.³⁰⁴ Fourth, despite the similar populations in France and Italy, the total size of the Italian Court of Cassation more than doubles its French counterpart.³⁰⁵ This much bigger total size could indicate that the Italian cassation court is more deviated towards providing all the judges needed to satisfy an ever-growing social demand of dispute resolution and not only the strictly necessary ones to review the lower courts' errors.³⁰⁶

The diagonal symmetry developed in this study corroborates the scepticism that some Italian scholars have about the effectiveness of the reform aimed at solving this problem.³⁰⁷ Indeed, Italy has shown the intention to resolve this latent deviation towards repeating the dispute resolution function by way of several reforms. The 2009 reform, particularly, introduced an intentionally restrictive access filter.³⁰⁸ However, the diagonal symmetry demonstrates that there are several attributes of Italian cassation confirming a general deviation towards repeating the trial court model at a latent level. A reform focused on correcting just one of the attributes may not be enough to amend the overall latent functioning of Italian cassation. As will be discussed in the next section on policy recommendations,³⁰⁹ a more effective reform should be an integral set of changes dealing with affecting all the related functional attributes at once.

D. Courts hierarchical level

The general research question stood above a final third topic which inquired into the level of the courts performing similar or different judicial functions. The specific question of this third topic was: 3.- *Where, in the judicial hierarchy, are the courts that perform similar functions in each jurisdiction located?* The overall answer for this third topic is that the courts that perform similar functions are not located at the same level of each jurisdiction but at different levels. From a horizontal perspective, at the same third court level of each pair of jurisdictions, different functions are performed. At the third court level in the US and England, their

³⁰² *supra* Chap. III.B.8 (d) (iii).

³⁰³ *supra* Chap. III.B.4 (ii).

³⁰⁴ *supra* Chap. III.B.6 (d) (iii).

³⁰⁵ *supra* Chap. III.B.7 (ii).

³⁰⁶ *supra* Chap. III.B.7 (d) (ii).

³⁰⁷ See again, SILVESTRI 2017, p. 242-243.

³⁰⁸ *supra* Chap. III.B.5 (ii); In general, FERRARIS 2015.

³⁰⁹ *infra* Chap. VI.E.3 (ii).

supreme courts perform mainly a judicial lawmaking function.³¹⁰ In the parallel third level in France and Italy, the cassation *chambers* perform mainly an error-monitoring function instead.³¹¹

The main finding of this study is the diagonal symmetry of judicial functions between courts located at different levels. As demonstrated, in France and Italy the courts performing similar functions as their US and English counterparts are located at higher levels. From a diagonal perspective, the judicial lawmaking function is performed at the third level in the US and England (supreme courts) and at a hidden fourth level in France and Italy (cassation *plenary sessions*).³¹² The error-monitoring function is performed at the second level in the US and England (intermediate appellate courts) and at the third level in France and Italy (cassation chambers).³¹³ The following answers detail this conclusion.

1. Horizontal asymmetry: Courts of last resort

The first sub-question of the last specific topic aimed at comparing the same third court level of each jurisdiction. Accordingly, the sub-question was: 3.1.- *What are the differences in the functional attributes when comparing the courts of last resort from a horizontal perspective?* The overall answer is that the specific attributes of the horizontal courts of last resort exhibit several functional differences at the third level of each pair of jurisdictions.³¹⁴ The US and UK supreme courts have specific attributes functional to judicial lawmaking (compatible with the political counterweight in the US).³¹⁵ Instead, the cassation chambers of France and Italy have specific attributes functional to the error-monitoring function (more deviated towards repeating dispute resolution in Italy).³¹⁶

In particular, the scope of review of the French and Italian cassation chambers is open to every particular application of the law,³¹⁷ while in the US and UK the supreme courts are more focused on general problems of interpretation.³¹⁸ Each judgment delivered by the French and Italian cassation chambers becomes an influential guideline, not one-by-one but when a number of them form a trend (*jurisprudence constante*);³¹⁹ whereas, the US and UK supreme courts' judgments can be influential interpretation guidelines when individually considered.³²⁰ Only a

³¹⁰ *supra* Chap. VI.C.3 (i,ii).

³¹¹ *supra* Chap. VI.C.3 (iii,iv).

³¹² In general, Chap. IV.

³¹³ In general, Chap. V.

³¹⁴ *supra* Chap. III.C.

³¹⁵ *supra* Chap. VI.B.3 (iii,iv).

³¹⁶ *supra* Chap. VI.B.3 (i,ii).

³¹⁷ *supra* Chap. III.B.1 (ii).

³¹⁸ *supra* Chap. III.B.1 (i,iii).

³¹⁹ *supra* Chap. III.B.2 (ii).

³²⁰ *supra* Chap. III.B.2 (i,iii).

few of the most outstanding decisions of the French and Italian chambers are published in official reports,³²¹ whereas most of the US and UK supreme court decisions are published in that form.³²² The style of the French and Italian cassation chambers' decisions is shorter than those of the US and UK supreme courts.³²³ Also, the former are collective opinions written as a single deductive legal reasoning;³²⁴ whereas the latter have dissenting opinions reflecting a more dialectic debate among the judges.³²⁵ The caseload in French and Italian cassation is enormous compared to that in the US and UK supreme courts.³²⁶ The number of cassation chambers' decisions just in civil cases per year usually is around 20,000 and 30,000, respectively (a number that may double if we include criminal cases).³²⁷ In contrast, the total number of decisions in the supreme courts under study rarely exceeds 100 per year.³²⁸ The panel composition in the French and Italian cassation chambers varies from three to five judges with a relatively homogeneous legal specialisation among the cassation judges.³²⁹ In the US and UK supreme courts, the panel tends to be five, seven or nine, aiming at combining a diversity of legal specialisations.³³⁰ Even if each panel of the cassation chambers tends to be smaller than the panels of the supreme courts, the picture is the opposite when comparing the total size.³³¹ The French and Italian courts of cassation have between 200 and 400 judges, respectively;³³² whereas the US Supreme Court has only nine judges and its UK counterpart twelve.³³³ Finally, the preliminary screening of the French and Italian cassation chambers is a less restrictive evaluation of manifest errors.³³⁴ In the US and UK supreme courts, instead, there is a much more restrictive selection of the public-relevant cases only.³³⁵

2. Diagonal symmetry (I): Courts of precedents

The second sub-question of this third topic aimed at identifying the court level at which the cassation jurisdictions under study perform a judicial lawmaking function comparable to their common law counterparts. This sub-question was

321 *supra* Chap. III.B.3 (ii).
 322 *supra* Chap. III.B.3 (i,iii).
 323 *supra* Chap. III.B.8 (iii).
 324 *supra* Chap. III.B.8 (ii).
 325 *supra* Chap. III.B.8 (i).
 326 *supra* Chap. III.B.4 (iii).
 327 *supra* Chap. III.B.4 (ii).
 328 *supra* Chap. III.B.4 (i).
 329 *supra* Chap. III.B.6 (i).
 330 *supra* Chap. III.B.6 (i,iii).
 331 *supra* Chap. III.B.7 (iii).
 332 *supra* Chap. III.B.7 (ii).
 333 *supra* Chap. III.B.7 (i).
 334 *supra* Chap. III.B.5 (ii).
 335 *supra* Chap. III.B.5 (i,iii).

formulated as follows: 3.2.- *Which courts in France and Italy perform a similar function as the supreme courts in the US and England?* The overall answer is that the courts performing a similar function in France and Italy are the plenary sessions of the courts of cassation, located at a hidden (or nested) fourth level.³³⁶ The third level supreme courts of the US and England (UK) perform a judicial lawmaking function and, accordingly, combine the specific attributes of a court of precedents model.³³⁷ The French and Italian cassation plenary sessions also combine the specific attributes of a court of precedents to an important extent and, therefore, they are configured to perform a similar judicial lawmaking function too.³³⁸

In particular, the scope of the French and Italian cassation plenary sessions' review focuses on contradicting legal interpretations in the case law, either internal among the cassation chambers (*chambre mixte, sezione unite*) or external with the lower courts (*assemblée plénière, avis*).³³⁹ This scope of review is similar to those of the US and UK supreme courts which are mainly focused on case law contradictions too.³⁴⁰ In general, previous judicial decisions do not count as binding precedents for future disputes in France and Italy.³⁴¹ When it comes to the cassation plenary sessions, however, a more or less explicit exception applies which empowers them with a strong guiding influence.³⁴² As a result, the judgments of the cassation plenary sessions have a kind of *stare decisis* force comparable to the judgments of the US and UK supreme courts, but French and Italian legal scholars circumvent calling it so, in such explicit terms, by using alternative denominations.³⁴³ Due to their importance as to guidance in future disputes, the decisions of the cassation plenary sessions have a high level of exposure.³⁴⁴ In fact, most of the plenary session judgments are published in the official reports to a similar degree as the judgments of the US and UK supreme courts are.³⁴⁵ The diagonal symmetry in the style of the judgments is more subtle.³⁴⁶ As we observed previously, the style of the judgments of the US and UK supreme courts is more extended and allows dissenting opinions.³⁴⁷ The judgments of the French and Italian cassation plenary sessions tend to be longer than the chambers' decisions. Still, the equivalent space for dissenting opinions of the US and UK supreme courts are not included in the cassation plenary session's judgment itself, but in additions such as notes of comments or the reporting judge's briefs.³⁴⁸ The diagonal symmetry on the

336 In general, Chap. IV.

337 *supra* Chap. III.C.

338 *supra* Chap. IV.D.

339 *supra* Chap. IV.C.1 (i,ii).

340 *supra* Chap. IV.C.1 (iii).

341 *supra* Chap. III.B.2 (ii).

342 *supra* Chap. IV.C.2 (i,ii).

343 *supra* Chap. IV.C.2 (iii).

344 *supra* Chap. IV.C.3 (i,ii).

345 *supra* Chap. IV.C.3 (iii).

346 *supra* Chap. IV.C.6 (iii).

347 *supra* Chap. III.B.8 (i).

348 *supra* Chap. IV.C.6 (i,ii).

caseload can be observed not in an exact equivalency in the absolute numbers, but in a similarity in the proportions and trends.³⁴⁹ Like the US and UK supreme courts, both the French and Italian cassation plenary sessions review a minor fraction of cases compared to the courts immediately below them, thus they deal with a caseload which is relatively stable over time.³⁵⁰ The diagonal symmetry in the panel composition is not an exact equivalency in the absolute numbers either, but has similarities in the proportions and interdisciplinarity of the panel of judges.³⁵¹ The panels of the French and Italian plenary sessions are more numerous than those of the lower courts and also more diversified in the legal specialisations of the judges, comparable to the also numerous and diversified panel composition of the US and UK supreme courts.³⁵² The total size of the cassation plenary sessions has the opposite trend compared to the cassation chambers: instead of growing, they have got smaller over time.³⁵³ As a result of this trend, the plenary sessions – which originally were much bigger than the US and UK supreme courts – now are getting closer to their absolute numbers.³⁵⁴ Finally, the French and Italian courts of cassation also have more or less discretionary preliminary screening before a case is directed to the plenary sessions.³⁵⁵ The screening criterion of the cassation plenary sessions selects on the basis of the public importance of the case for future disputes, similar to the certiorari or permission to appeal screening found in the US and UK supreme courts, respectively.³⁵⁶

3. Diagonal symmetry (II): Courts of error

The final sub-question of the also final third topic aimed at identifying in the common law jurisdictions under study the court level at which they perform an equivalent error-monitoring function as the court of cassation chambers. This third sub-question was: 3.3.- *Which courts in the US and England perform a similar function as the courts of cassation of France and Italy?* The overall answer is that the courts that perform a similar function in the US and England are the intermediate appellate courts, located at their second level.³⁵⁷ The third-level courts of cassation of France and Italy, namely their chambers, perform an error-monitoring function and, accordingly, combine the specific attributes of a court of error model.³⁵⁸ The US and English intermediate appellate courts also combine the specific attributes of a court of error to an important extent and, therefore, they are configured to perform

³⁴⁹ *supra* Chap. IV.C.7 (iii).

³⁵⁰ *supra* Chap. IV.C.7 (i,ii).

³⁵¹ *supra* Chap. IV.C.4 (iii).

³⁵² *supra* Chap. IV.C.4 (i,ii).

³⁵³ *supra* Chap. IV.C.5 (i,ii).

³⁵⁴ *supra* Chap. IV.C.5 (i,ii).

³⁵⁵ *supra* Chap. IV.C.8 (i,ii).

³⁵⁶ *supra* Chap. IV.C.8 (iii).

³⁵⁷ In general, Chap. V.

³⁵⁸ *supra* Chap. III.D.

a similar error-monitoring function too.³⁵⁹ As a result, the US and English intermediate appellate courts are courts of last resort *in practice* in an equivalent manner as the French and Italian cassation chambers are. Unlike the third-level supreme courts and fourth-level cassation plenums which have the *absolute* final-word power, the *normal* final word is located at the second level in the US and England and at the third level in France and Italy.³⁶⁰

In particular, the scope of the US and English intermediate appellate courts is an open review of both law and facts according to their rules.³⁶¹ In practice, however, these intermediate courts pay an important degree of deference to the lower courts' determinations on the facts and evidence.³⁶² Therefore, both the second level in the US and England, on the one hand, and the third level in France and Italy, on the other, focus their scope of review mainly on the points of law in their actual practices.³⁶³ In theory, the effects of the judgments in the US and England should be the *stare decisis* binding precedents.³⁶⁴ In reality, however, the effects of the judgments of the intermediate appellate courts in these jurisdictions are much weaker than those of their supreme courts.³⁶⁵ Therefore, both the second level in the US and England and the third level in France and Italy deliver judgments whose effects can be properly described as not strictly binding but of a lower persuasive influence, especially when they form consistent trends.³⁶⁶ The exposure of decisions of the intermediate appellate courts of the US and England is much lower than that of the third-level supreme courts.³⁶⁷ As a result, a selection of only an extraordinarily few of the second-level decisions is published in official reports, selective publicity comparable to the third-level cassation chambers of France and Italy.³⁶⁸ Through different paths, the style of the judgments delivered by the intermediate appellate courts in the US and England evolved from an extended individual approach to a short collective one,³⁶⁹ now more similar to the also short and collective style of the French and Italian cassation chambers.³⁷⁰ Unlike the third level in the US and England, the second level intermediate appellate courts have a growing caseload that could be counted in the thousands,³⁷¹ caseload characteristics that can be found in the third-level cassation chambers of France and Italy, as well.³⁷² Diagonal similarities can be found in the panel composition

359 *supra* Chap. V.D.

360 *supra* Chap. I.E.1 (ii); Chap. V.B.

361 *supra* Chap. V.C.1.

362 *supra* Chap. V.C.1 (i,ii,iii).

363 *supra* Chap. V.C.1 (vi,vii).

364 *supra* Chap. V.C.3 Chap. III.B.2 (i).

365 *supra* Chap. V.C.4 (i,ii).

366 *supra* Chap. V.C.3 (iii).

367 *supra* Chap. V.C.2 (i,ii).

368 *supra* Chap. V.C.2 (iii).

369 *supra* Chap. V.C.4 (i,ii).

370 *supra* Chap. V.C.4 (iii).

371 *supra* Chap. V.C.7 (i,ii).

372 *supra* Chap. V.C.7 (iii).

too. In the US and English intermediate appellate courts, the panel tends to be smaller than the third level supreme courts. According to their rules, the panel could have a maximum of five judges, with a tendency of being comprised of only three in practice.³⁷³ The third-level cassation chambers of France and Italy share this aspect and have panels comprised of three to five judges, the French *formation restreinte* being one example.³⁷⁴ As regards the total size, the French and Italian courts of cassation are big and growing courts, comprised of hundreds of judges.³⁷⁵ The second level intermediate appellate courts of the US and England, all together, could be seen as big growing courts comprising hundreds of judges too, especially if we add the English High Court which also now has appeals jurisdiction.³⁷⁶ Finally, the US and English intermediate appellate courts exclude at an early stage petitions which are considered frivolous or fanciful.³⁷⁷ In a similar practice, the French and Italian cassation chambers have an initial exclusion of the manifestly unfounded cases.³⁷⁸ Therefore, these courts at different hierarchical levels show, and despite the different wordings, comparable preliminary screenings based on an early evaluation of error.³⁷⁹

E. Policy recommendations

The courts of last resort need to be subject to change from time to time. Problems of delay, work overload, case law inconsistencies, among others, have motivated jurisdictions to develop reform projects.³⁸⁰ These reforms consist of modifications to the organisation and procedures of the court of last resort. Examples of these reforms are the provisional enforcement of the lower judgment, cost-shifting rules, adding more judges to the court of last resort or reducing the panels' composition, to name a few.³⁸¹ A recurring reform project is the introduction of restrictive access filters to the courts of cassation.³⁸² Let us use this reform on cassation access filters as an example of the policy recommendations that derive from this study.

Developments in the understanding of the functioning of the courts of last resort from a comparative perspective contribute to the implementation of this kind of reform. The diagonal symmetry thesis demonstrated in this study, in particular, could help policymakers facing the problem of improvements to the courts of last

³⁷³ *supra* Chap. V.C.5 (i,ii).

³⁷⁴ *supra* Chap. V.C.5 (iii).

³⁷⁵ *supra* Chap. III.B.4 (ii).

³⁷⁶ *supra* Chap. V.C.6 (i,ii,iii).

³⁷⁷ *supra* Chap. V.C.8 (i,ii).

³⁷⁸ *supra* Chap. III.B.5 (i,ii).

³⁷⁹ *supra* Chap. V.C.8 (iii).

³⁸⁰ For example, in France (JEULAND 2018), Croatia (UZELAC & BRATKOVIC 2018), and Chile (BRAVO-HURTADO 2017).

³⁸¹ In detail, JOLOWICZ 2000, p. 328-351.

³⁸² For a comparative overview, VAN RHEE & FU 2017, p. 5-11.

resort. As we shall see, the diagonal symmetry clarifies the policy options (B.1), suggests a decision (B.2), guides the reform design (B.3) and provides answers to respond to opposition to the reform (B.4).

1. Clarifying the options

When reforming the court of last resort, policymakers face a complicated decision: What function should our court perform? From a horizontal perspective, that decision is complicated because, on the one hand, it requires assessing the function currently entrusted to the court, a function that could be loosely defined or subject to debate. On the other hand, taking that decision requires implementing the elimination or introduction of new court functions. In the example of cassation access, the policymaker needs to evaluate whether the introduction of filters alters the function that the court of last resort should perform, and whether that alteration of its function is desired.

Based on the diagonal symmetry thesis put forward in this study, however, this political decision becomes more manageable. From now on, the central political decision shifts from ‘what’ to ‘where’. This study demonstrated that the jurisdictions of the US, England, France and Italy perform similar functions but at different court levels. Therefore, the decision that policymakers face is, in reality: Where, among the different court levels of the judicial system, should the same functions be performed? From a diagonal perspective, the policymakers’ decision becomes simpler because it is limited to whether the same functions will be performed at higher or lower hierarchical levels. Should the error-monitoring and judicial lawmaking functions be performed at the second and third court levels (*i.e.*, the US and England) or at the third and fourth levels (*i.e.*, France and Italy)?

2. Taking the decision

Policymakers tend to aim at introducing reforms that improve (or maintain) public services but save the public budget. From that perspective, it appears preferable to lower the position of the judicial functions within the court hierarchy. If the same judicial functions will be performed, it seems more efficient to use fewer court levels to perform them. First, fewer court levels save public expenditures in the judicial system. Those public savings could be used to reduce taxes or reinvest in different aspects of the judicial system or another public sector.

Second, fewer court levels implies that litigants need to go through fewer judicial instances before they obtain a final decision. Therefore, lowering the position of the judicial functions in the court hierarchy could save time and money for the litigants too. If a jurisdiction is facing a problem of unreasonable delay in civil

proceedings, performing the same functions at lower positions of the court hierarchy could be a solution to shorten the length of proceedings.

Still, lowering the position of the judicial functions in the court hierarchy has some challenges that policymakers need to take into account. As we will discuss later on, the response to opposition, first, to entrusting the error-monitoring functions to the intermediate appellate courts requires implementing better mechanisms to coordinate the criteria among the different intermediate appellate courts. Second, reducing the number of court levels – and, accordingly, having fewer opportunities of review – requires improving the conditions of the lower courts in order to guarantee the quality of their decisions.

3. Designing a reform

Once the policy decision has been made, the next step is to design the reform project that implements it. Designing a reform of the courts of last resort is difficult because a modification in a specific attribute may have unexpected impacts on other attributes of the functioning of the court. The findings of this study can help to deal with difficulties when designing such reforms.

i. Interrelations

First, the diagonal symmetry shows how a number of court attributes are related to certain judicial functions. Therefore, the policymaker now knows how the reform of certain court attributes could affect the functioning of other attributes. As we observed, the scope of review; effects, style and exposure through publication of the judgments; the court's total size, panel composition, caseload; and the preliminary screening are closely interrelated. For example, a particular reform in the preliminary screening – such as introducing restrictive access filters to a court of cassation – could have, in the short term, an impact on reducing the court's caseload and, in the long term according to TARUFFO's theorem,³⁸³ increasing the effects of its judgments on future disputes.

ii. Integral reforms

Second, the diagonal symmetry helps to design an integral reform. The relocation of the judicial functions cannot be achieved through the modification of a single attribute of the court. In reality, a proper relocation of functions requires addressing several court attributes at the same time. Following the example of access filters to a court of cassation, the restriction of the preliminary screening should be accompanied by an increase in the judgments' effects on future disputes, an explicit dialectic of legal interpretation theories in the opinion style, a more numerous and interdisciplinary composition of the panel of judges, among other

³⁸³ See again TARUFFO 2011A, p. 29-30; *supra* Chap III.B.4 (b).

changes. If these other aspects are not modified altogether, the court will not have an adequate set of attributes to perform its new function effectively.

iii. Relocating functions

Third, the relocation of judicial functions requires introducing reforms at several court levels. A reform to the functioning of the court of cassation, for example, cannot be limited to that third-level court. The diagonal symmetry could help to identify the correlative modifications that should be introduced at the other court levels. If the court of last resort will perform a new function, another court level should be entrusted with the previous function of the court of last resort. For example, if the chambers of the courts of cassation will now perform the judicial lawmaking function, the policymaker should take care as to which court level will perform the error-monitoring function previously entrusted to the cassation chambers. From a diagonal perspective, therefore, entrusting the judicial lawmaking function to the cassation chambers should be accompanied by improving the attributes of a court of error in the intermediate appellate courts, as well. Moreover, as we will observe in the responses to the counter-reform arguments, such relocation should be accompanied by better coordination between the intermediate appellate courts³⁸⁴ and improvements to the conditions in the lower courts in general.³⁸⁵

4. Responding to opposition

The diagonal symmetry thesis provides reasonable answers to at least four counter-reform arguments. Integral reforms to the court of last resort may stir opposition. If the arguments of the counter-reform movements do not receive a reasonable answer, the opposition may become strong to the extent of frustrating the reform project. And if the reform ends by being frustrated, the backlog and overload problems of the court of last resort will remain unsolved. For that reason, policymakers need answers to calm that opposition.

i. Against changing traditions

The first counter-reform argument could be resistance to change legal traditions. In general, traditions tend to provide legitimacy to the *status quo*. If a certain *status quo* is considered part of a long-standing tradition, introducing changes to that *status quo* would be opposed as a violation of the tradition. And the more ‘traditional’ a certain *status quo* is, the more resistance to change will arise.

Legal reforms are not entirely different in this aspect. In France, for example, the judicial functions are buttressed by legal traditions that can be traced back to the

³⁸⁴ *infra* Chap. VI.E.4 (ii).

³⁸⁵ *infra* Chap. VI.E.4 (iv).

eighteenth century. Since the French Revolution, the *Tribunal de cassation* – now ‘*Cour*’ – has been entrusted with the error-monitoring function to ensure equality before the law on a case-by-case basis. Therefore, replacing the error-monitoring function of the *Cour de cassation* with a new judicial lawmaking function would be strongly opposed in France. The counter-reform argument would be that such reform eliminates the traditional functions defined since the French Revolution.

The diagonal symmetry, however, provides an answer to that counter-argument based on legal traditions. The answer is that, in reality, the reform does not eliminate the traditional judicial functions in France. The reform only ‘relocates’ the same traditional functions. The case-by-case equality before the law, demanded by the values of the French Revolution, will continue protected by an error-monitoring court. As in a relay race, the court of cassation passes the baton of faith to the intermediate appellate courts. From a diagonal perspective, the reform keeps the legal tradition running, but now in the hands of a lower level court.

ii. *Against intermediate courts*

A second counter-reform argument could point at the differences between entrusting the error-monitoring function to a court of cassation or to the intermediate appellate courts. The main difference, according to this argument, would be that the court of cassation is a single and centrally located court for the entire jurisdiction. The intermediate appellate courts, instead, are several courts distributed in different locations of the jurisdiction territory.³⁸⁶

This difference is important, the argument may continue, because the error-monitoring function requires a serious coordination of the correction criteria used by the court performing that task. Without adequate coordination, the court of error would fail to guarantee equality before the law because the court itself will resolve equal cases differently due to the non-uniform criteria of correction. Such necessary criteria coordination, the argument concludes, would be harder to implement in several courts distributed throughout the territory than in a single and central court. Due to its coordination advantage, therefore, it would be better to maintain the error-monitoring function at a single court of cassation than relocate it in several intermediate appellate courts.

The diagonal symmetry could provide a response to this second counter-argument too. The coordination problems that several intermediate appellate courts could have are, to an important extent, replicated within a big court of cassation. The French and Italian courts of cassation, as we observed, work divided into relatively independent panels and chambers. These internal panels constantly have serious

³⁸⁶ This second counter-reform argument does not apply to England, however. Similar to the courts of cassation of France and Italy, the English intermediate appellate court – namely, the Court of Appeal – is also a single and central court for the whole jurisdiction territory of England. The following discussion assumes a jurisdiction in which the intermediate court level is distributed in several local appellate courts, such as France, Italy or the US.

problems of coordination too. In fact, the implementation of plenary sessions within these courts became necessary precisely to resolve that lack of internal coordination. In an overloaded court of cassation, the chambers can become independent to the extent that their main coordination device is these plenary sessions only.

The coordination of several cassation chambers through a single plenary session, therefore, could resemble the coordination of several intermediate appellate courts through a single supreme court. Someone may reply that, nevertheless, having several chambers co-located within the same premises of the court of cassation's building, physically next to the coordinating plenary session, constitutes an advantage over coordinating distant courts. Still, that advantage could have been decisive in a context where transport and communications are precarious. In the current times, however, that advantage does not appear as decisive anymore. The transport and communications advances could sufficiently facilitate the coordination between distant courts, as well. If the relocation of the error-monitoring function at the intermediate appellate courts is complemented by improvements in the coordination between these intermediate courts, then the second counter-reform arguments will be answered.

iii. Against legal transplants

A third counter-reform argument could be the reluctance to introduce foreign institutions. The orthodox view on comparative law usually attributes the judicial lawmaking function to the courts of common law jurisdictions. From that orthodox view, reforming the chambers of a court of cassation into a court of precedents model would be seen as the transplantation of a judicial function proper of common law jurisdictions into a civil law jurisdiction.

In general, legal transplants are frequent yet problematic.³⁸⁷ One of the main problems is the difficulty in predicting the repercussions of implementing the transplant. Introducing a legal institution from a foreign jurisdiction may have unexpected consequences. An institution that functions properly in the foreign jurisdiction may not operate equally well in the local jurisdiction.³⁸⁸ The transplant of a precise foreign institution could collide with other elements of the host legal system. These problems of implementation could be even more serious if the transplanted institution comes from a jurisdiction with a different legal tradition.

The diagonal symmetry, however, also provides an answer to this third counter-reform argument. The answer is that, in reality, the reform does not introduce foreign judicial functions. From a diagonal perspective, the reform only relocates judicial functions that have already been present in the local legal system (but they were performed at different levels). Judicial lawmaking, for example, is not a

³⁸⁷ On legal transplants, GRAZIEDEI 2006, p. 441-475.

³⁸⁸ *cfr.*, WATSON 1993, p. 95-96.

'foreign' function in France and Italy. The plenary sessions of the courts of cassation have been performing a judicial lawmaking function, as well. Therefore, reforming the ordinary chambers of the courts of cassation into courts of precedents is not the transplantation of a foreign model, but the relocation of a pre-existing internal model.

Consequently, the objections associated with predicting consequences of foreign legal transplants do not apply from a diagonal perspective. For example, France does have experience on how the judicial lawmaking function, similar to common law jurisdictions, would work in the French legal system. The knowledge on how that 'transplant' will function in France comes from the experience of the plenary sessions of the *Cour de cassation*, which have been performing a similar function for decades. Therefore, the prediction of the reform repercussions does not need to be based on the complex speculation as to how a foreign institution would work in France, but based on the local experience of how French cassation plenary sessions have already worked there.

iv. Against fewer reviews

A final counter-reform argument could be the direct opposition to having fewer court levels of review. Fewer court levels implies that fewer judges will review each dispute. On the one hand, the previously mentioned savings in public and private expenditures could be seen as a positive effect of having fewer reviews. But, on the other hand, each review level is an opportunity to check the correctness of a decision. Therefore, fewer review levels also implies fewer opportunities to correct wrong decisions.

This objection could be especially acute in a jurisdiction with weak trust in the decisions of lower courts. If, according to the local perception, lower courts commit errors frequently, that legal culture could tend to demand more opportunities for higher court reviews to correct them. Therefore, several levels of review could be the symptom of a general problem of trust in the lower courts.³⁸⁹ In that context, a reform that reduces the court levels would be strongly opposed, as well. Reducing the court levels, the argument continues, will not suffice to guarantee the correctness of the final decisions. With fewer reviews, they fear, too many wrong decisions will become final.

This counter-reform argument, however, is valid if and only if we share the diagnosis of weak trust in the lower courts. In jurisdictions such as the US or England, quite the contrary, first instance court judges do enjoy high social prestige.³⁹⁰ In these jurisdictions, accordingly, reducing the number of review levels is not seen as a major problem because they do trust that the first instance

³⁸⁹ A socio-legal study could be conducted to demonstrate whether this relation exists, *infra* Chap. VI.F.3.

³⁹⁰ ZWEIGERT & KÖTZ 1998, p. 210.

court judge will find the right solution. In these jurisdictions, moreover, the common perception is the opposite, that more reviews could diminish the quality of the decision.³⁹¹ The reason is that the first instance court judge is closer to the case than the higher court judge. Therefore, the higher court may not have a better perspective to reassess the case.

The diagonal symmetry could provide an answer to this final counter-argument too. If the problem of a jurisdiction is weak trust in the decisions of the lower courts, the solution is not to maintain several levels of court review but to improve the conditions in the lower courts. Accordingly, the reform consisting of relocating the judicial function to lower court levels should be accompanied by other measures. Examples of measures that could improve the conditions of the lower courts are: increasing the number of judges, providing more assistants, improving court facilities, offering more training courses and requiring more practical experience before sitting as a judge. If the reform complements the relocation of the judicial functions with improvements to the conditions in the lower courts, weak trust in the correctness of the final decisions would be compensated.

F. Further lines of research

The diagonal symmetry found in this study opens several lines of research. The diagonal perspective can be used to guide further studies in comparative law, legal history and socio-legal research, among other fields. First of all, there is one general guideline (or warning) for research projects including courts from more than one jurisdiction: *the comparable courts could be located at different levels*.

It seems intuitive to conduct comparative research on courts located at the same level of each jurisdiction. Moreover, this horizontal pair of courts could have a deceptively similar denomination, such as ‘Court of Appeal,’ ‘*Cour d’appel*’ or ‘*Corte d’appello*’ at the second level. Despite their common court level and denomination, such a horizontal perspective could lead to an apples-and-oranges contrast. In that situation, the value of the conclusions will be limited because the pair of courts under analysis could perform incomparable functions.³⁹²

This horizontal incompatibility does not mean that comparative research on courts cannot be conducted. In reality, the diagonal symmetry advises that comparative research should not be limited to the same-level, or similarly-named, courts between two jurisdictions. Instead, the research should be open to exploring, additionally, courts located at higher or lower levels. In sum, the researcher should not take for granted the hierarchical level of the comparable courts. Before starting the detailed comparison, it is advisable to evaluate at which court level each

³⁹¹ VAN RHEE & UZELAC 2014, p. 6-7.

³⁹² *supra* Chap. II.B.5.

jurisdiction performs the equivalent judicial function that the research project aims to analyse.

1. Comparative law

The first line of further research could be the application of the diagonal comparison to other jurisdictions. This further research would consist of analysing the eight functional attributes on a new court of last resort and intermediate appellate courts. By doing so, we could evaluate whether the diagonal symmetry is a particular phenomenon in the US, England, France and Italy or is a widespread phenomenon that includes more jurisdictions.

The diagonal perspective applies to jurisdictions in which the court of last resort is permanently divided into chambers or panels. As we observed, the multiplicity of chambers and panels creates the need for a coordination device.³⁹³ Therefore, these types of jurisdictions probably have formal plenary sessions or informal meetings of judges performing that coordination task.

However, the researcher needs to be aware that these plenary sessions could be more or less formalised. In a big-size court, comprised of hundreds of judges and dozens of panels working in parallel, probably the plenary sessions will be formally configured, with explicit rules in the procedural codes that define their functioning. In a middle-size court, however, the plenary sessions could be configured as merely informal meetings. In other words, in these other jurisdictions it could be that no explicit rules on the plenary session can be found. But that does not mean that there is no plenary session in practice there. Even if there are no explicit rules, it could be expected that the judges more or less frequently gather to discuss their work in the different chambers. These informal meetings of judges should be included in a further research because they may perform an equivalent coordination task as a formal plenary session. Unlike formal plenary sessions in which information can be found in the rules of procedure, research on informal plenary sessions requires different methodologies to obtain information – for example, interviews with the judges.

Germany, for example, is an interesting candidate on whom to apply the diagonal perspective in further research. In 2001, Germany implemented an important procedural reform. That reform is pertinent to this topic because it altered the functioning of the German higher courts. Particularly, the reform introduced an access filter to the German recourse of last resort (*Revision*).³⁹⁴ Based on the new filter, the chambers (*Senates*) of the court of last resort for civil and criminal matters (*Bundesgerichtshof*) can perform a preliminary screening based on the court of precedents model. Particularly, the screening criterion is that the dispute raises a

³⁹³ *supra* Chap. IV.B.

³⁹⁴ In detail, GOTTWALD 2008, p. 90-96; DOMEJ 2017, p. 139-141.

question of fundamental significance or the intervention of the court is needed to unify or develop the case law.³⁹⁵ The interesting aspect of the German reform is that the same screening criterion was already present at the plenary sessions (*Große Senate*).³⁹⁶ Therefore, the German example seems to support the diagonal symmetry thesis. The 2001 reform did not properly introduce a judicial lawmaking function to the German court of last resort. In reality, the German reform just lowered the judicial lawmaking function entrusted to the hidden fourth level *Groete Senate* to the third level ordinary *Senate*. The reform was not the introduction of new foreign functions, but the relocation of existing ones.

2. Legal history

This research focused mainly on contemporary law. The period covered was limited to the main reforms at the beginning of the twenty-first century, plus certain previous reforms which altered the court attributes under study.³⁹⁷ In that sense, this research is a photograph: it shows the current state of these courts.

Therefore, the second line of further research could be to expand the period under analysis. The focus of the research will shift from contemporary law to earlier time periods (*i.e.*, legal history). The benefit is that instead of a photograph, we would start to observe the movie. By expanding the period, interesting conclusions could be drawn on the gradual evolution of the diagonal symmetry of these courts, on how they got to their current symmetrical state over time. Based on such historical study, we could discuss not only the current diagonal symmetry in the present, but also their historical diagonal ‘convergence.’

The origins of these courts of last resort, or their immediate predecessors, can be traced back to the eighteenth and nineteenth centuries. Therefore, to understand the entire historical evolution of these courts would require a period that crosses four centuries, from the eighteenth to the twenty-first century. Covering more than 300 years of history in four jurisdictions, however, may seem ambitious for a single research project. Instead, future research could focus on a more precise period when the diagonal symmetry started to form. Particularly, this study found that the main procedural reforms that affected the judicial lawmaking function of the cassation plenary sessions in France and Italy come from the second half of the twentieth century.³⁹⁸ Therefore, deep historical research limited to the second half of the twentieth century could provide valuable insights on how the diagonal symmetry emerged.

³⁹⁵ MURRAY & STÜRNER 2004, p. 387; before the reform, STÜRNER & SCHUMACHER 1998, p. 219.

³⁹⁶ See again, German *Gerichtsverfassungsgesetz*, § 132 (4).

³⁹⁷ *supra* Chap. I.D.4.

³⁹⁸ *supra* Chap. IV.B.1; Chap. IV.B.2.

3. Socio-legal study

This study demonstrated that a diagonal symmetry exists. The next step would be to answer ‘why’ the diagonal symmetry came into being. The diagonal perspective showed that certain jurisdictions opt for performing the same judicial functions at higher court levels than other jurisdictions. The third line of further research could be to explore the social causes that lead a jurisdiction to choose one option over another. What causes led France and Italy to locate the error-monitoring and judicial lawmaking function at the third and fourth court levels, instead of performing these functions at the second and third court levels as in the US and England?

A legal historical approach – such as the one previously suggested as the second line of further research – would certainly contribute to providing an answer. The difference with this third line is using the socio-legal approach instead. The research would consist in, first, identifying all the social factors that could hypothetically influence why jurisdictions have the judicial functions located at higher or lower court levels and, second, in testing empirically these hypothetical factors based on comparative empirical data of the level of the judicial function in a number of jurisdictions.

One social factor that could be tested is, for example, the strong or weak trust in the performance of the lower court judges. As discussed earlier, weak trust in the lower courts could motivate opposition to reducing the number of court level reviews.³⁹⁹ This argument implies a relation of inverse proportion between the degree of judicial trust and the number of levels of court reviews. Hypothetically, jurisdictions with weaker judicial trust should tend to have more levels of court review, and vice versa.

Further socio-legal research could be conducted to test this hypothesis empirically. First, judicial perception data, such as the Rule of Law Index, could be used to determine the level of trust in the courts’ performance in a set of jurisdictions.⁴⁰⁰ Second, an extended comparative law study could identify the hierarchical location of the judicial functions in the set of jurisdictions.⁴⁰¹ Based on the two previous sources of information, finally, the research would conclude whether empirical data shows an inverse proportion, that is to say, that jurisdictions with weaker judicial trust are strongly correlated (or not) with the jurisdictions with more levels of court review.

³⁹⁹ *supra* Chap. VI.E.4 (iv).

⁴⁰⁰ See www.worldjusticeproject.org.

⁴⁰¹ *supra* Chap. VI.F.1.

G. Closing: Legal traditions revisited

The courts of last resort have played a crucial role in shaping the traditional identity of each jurisdiction. The jurisdiction's general characteristics, the current literature points, are a reflection of the court of last resort's particular characteristics. The orthodox view of the different legal traditions or families is usually built on an also stereotypical image, from a horizontal perspective, of their different courts of last resort. According to that orthodox view in comparative law, the common law tradition is seen as a group of jurisdictions characterised by having binding precedents.⁴⁰² This characterisation is consistent with the effects of the judgments delivered by the third-level courts in the US and English examples. In fact, the judgments of the US and UK supreme courts have binding force for future disputes,⁴⁰³ which is unlike what is found in the civil law tradition, the characterisation continues, which is seen as remarkably different from the common law. This other group of jurisdictions is different because of, quite the contrary, the absence of common law-type binding precedents.⁴⁰⁴ Again, this characterisation of the civil law tradition is also shaped by the reflection of their courts of last resort from a horizontal perspective. In civil law jurisdictions such as France and Italy, for example, the courts of cassation decisions indeed lack formal binding force, particularly if we look at the judgments delivered by the third-level chambers. Instead, the judgments of these cassation third-level chambers may gain an important influence only when they come together as a collective trend (*jurisprudence constante*).⁴⁰⁵

Such an orthodox characterisation, however, does not hold anymore when switching from a horizontal to a diagonal perspective. The diagonal symmetry demonstrates that this differentiation is not consistent with other court levels of the same jurisdictions. On the one hand, civil law jurisdictions such as France and Italy indeed have functional equivalents to the common law-type binding precedents. They have these functional equivalents not at the level of the cassation chambers but hidden at the plenary sessions of the same court of cassation.⁴⁰⁶ On the other hand, in common law jurisdictions such as the US and England, the stereotypical common law-type binding precedents could be a characteristic present at the third-level supreme courts but not as such in their lower level courts. The judgments delivered by the intermediate appellate courts in the US and England evolved into a weaker collective force, closer to the civil law *jurisprudence constante* instead.⁴⁰⁷ In sum, as represented in Figure VI.2, France and Italy resemble not the civil law but the common law stereotypes at the hidden fourth level of the cassation plenary

⁴⁰² See again, SIEMS 2014, p. 46-47.

⁴⁰³ *supra* Chap. III.B.2 (i).

⁴⁰⁴ See again, HEAD 2011, p. 163.

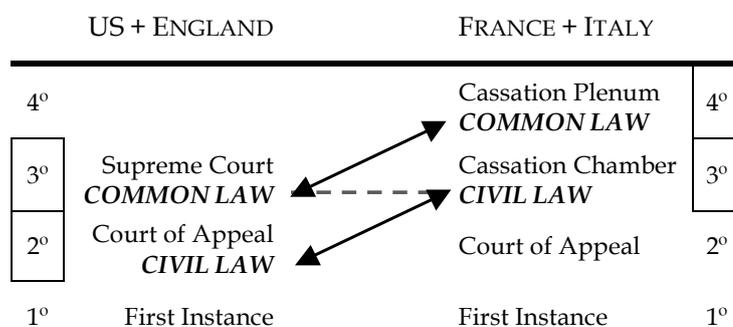
⁴⁰⁵ *supra* Chap. III.B.2 (ii).

⁴⁰⁶ *supra* Chap. IV.C.2 (i,ii).

⁴⁰⁷ *supra* Chap. V.C.3 (i,ii).

sessions,⁴⁰⁸ while the US and England resemble not the common law but the civil law stereotype at the second level of the intermediate appellate courts.⁴⁰⁹

Figure VI.2 : *Conclusion* – Legal traditions revisited



The diagonal symmetry demonstrated in this study, therefore, invites us to revisit seriously the distance between these traditional identities. If the identities of the jurisdictions are still reflected by their court of last resort configuration, then, the diagonal symmetry of judicial functions implies that these traditional identities should not be seen as too distant after all. The diagonal symmetry shortens the gap between them and, by doing so, helps the comparative circulation of solutions. The closer two jurisdictions' identities are perceived, the more the jurisdictions could benefit from sharing each other's judicial experiences.

April, 2018

⁴⁰⁸ *supra* Chap. IV.C.2 (iii).

⁴⁰⁹ *supra* Chap. V.C.3 (iii).

BIBLIOGRAPHY

A

AARNIO 1987

Aulis Aarnio; *The Rational as Reasonable: A Treatise on Legal Justification*. Dordrecht [etc.]: D. Riedel Publishing Company, 1987.

ACIERNO, CURZIO & GIUSTI 2015

María Acierno, Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015.

ADAMS & BOMHOFF 2012

Maurice Adams and Jacco Bomhoff; *Practice and Theory in Comparative Law*. Cambridge [etc.]: Cambridge University Press, 2012.

AKKERMANS 2013

Bram Akkermans; 'The Use of the Functional Method in European Union Property Law'. *European Property Law Journal* 2(1), 2013, p. 95-114.

ALVAZZI DEL FRATE 2008

Paolo Alvazzi del Frate; 'Aux origines du référé législatif: interprétation et jurisprudence dans les cahiers de doléances de 1789'. *Revue Historique de droit français et étranger* 86(2), 2008, p. 253-262.

ALVAZZI DEL FRATE 2013

Paolo Alvazzi del Frate; 'Italy since 1796'. In: A.A. Wijffels and C.H. van Rhee (Eds.); *European Supreme Courts. A Portrait through History*. London: Third Millenium Publishing, 2013, p. 52-61.

AMOROSO 2012

Giovanni Amoroso; *Il Giudizio Civile di Cassazione*. Milano: Giuffrè, 2012.

AMOROSO 2015

Giovanni Amoroso; 'La Corte di Cassazione ed il precedente'. In: María Acierno, Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015, p. 47-92.

AMRANI-MEKKI 2005

Soraya Amrani-Mekki; 'Les textes organisant la non-admission des pourvois en cassation en droit français'. In: Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005. p. 19-31.

AMRANI MEKKI 2011

Soraya Amrani Mekki; 'Présentation générale'. In: Loïc Cadiet and Dominique Loriferne (Eds.); *La réforme de la procédure d'appel*. Paris: IRJS Éditions, 2011 p. 17-27.

AMRANI MEKKI 2014

Soraya Amrani Mekki; 'L'accès aux cours suprêmes : rapport français'. In: Warsaw Conference; *The functions of the Supreme Court – issues of process and administration of justice*. Warsaw, 2014 (June). p. 1-12. Available online at: colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/06/AMRANI_MEKKI_L%E2%80%99ACCES-AUX-COURS-SUPREMES-final.pdf.

AMRANI-MEKKI & CADIET 2005

Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005.

ANDREWS 2003

Neil Andrews; *English Civil Procedure. Fundamentals of the New Civil Justice System*. Oxford: Oxford University Press, 2003.

ANDREWS 2008

Neil Andrews; *The Modern Civil Process. Judicial and Alternative Forms of Dispute Resolution in England*. Tübingen: Mohr Siebeck, 2008.

ANDREWS 2012

Neil Andrews; 'The United Kingdom Supreme Court: A Final Appellate Court Created in Haste and Without Manifest Need'. In: Chiara Besso and Sergio

Chiarloni (Eds.); *Problemi e prospettive delle corti supreme: esperienze a confronto*. Napoli: Edizioni Scientifiche Italiane, 2012, p. 105-122 .

ANDREWS 2013

Neils Andrews; *Andrews on Civil Processes. Court Proceedings*, volume I. Cambridge [etc.]: Intersentia, 2013.

ANDREWS 2014A

Neil Andrews; 'Restrictions on Appeals in English Law'. In: Alan Uzelac and C.H. van Rhee (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 73-94.

ANDREWS 2014B

Neil Andrews; 'Case Management and Procedural Discipline in England and Wales: Fundamentals of an Essential New Technique'. In: C.H. (Remco) van Rhee and Fu Yulin (Eds.); *Civil Litigation in China and Europe*. Springer, 2014, p. 335-347.

ANDREWS 2017

Neils Andrews; 'The Supreme Court of the United Kingdom: A Selective Tribunal with the Final Say in Most Matters'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 37-52.

ASCHERI 2013

Mario Ascheri; 'Italy from Medieval Times to 1800'. In: A.A. Wijffels and C.H. van Rhee (Eds.); *European Supreme Courts. A Portrait through History*. London: Third Millenium Publishing, 2013, p. 38-51.

ASSOCIATION DES MAGISTRATS 1990

Association des Magistrats et Anciens Magistrats de la Cour de Cassation (Eds.); *Le Tribunal et la Cour de Cassation 1790-1990*. Paris: Litec, 1990.

ATKINS 1974

Burton Atkins; 'Opinion Assignments on the United States Courts of Appeals: The Question of Issue Specialization'. *The Western Political Quarterly* 27(3), 1974, p. 409-428.

ATKINS 1990

Burton Atkins; 'Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States'. *Law & Society Review* 24(1), 1990, p. 71-104.

B

BAMFORTH 2001

Nicholas Bamforth; 'The true "horizontal effect" of the Human Rights Act 1998'. *Law Quarterly Review* 117 (1), p. 34-41.

BANKOWSKI, MACCORMICK & MARSHALL 1997

Zenon Bankowski, Neil MacCormick and Geoffrey Marshall; 'Precedent in the United Kingdom'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. Aldershot [etc.] Ashgate/Darhmouth, 1997, p. 315-354.

BARAK 2002A

Aharon Barak; 'The Role of a Supreme Court in a Democracy'. *Hastings Law Journal* 53(5), 2002, p. 1205-1216.

BARAK 2002B

Aharon Barak; 'Foreword. A Judge on Judging: The Role of a Supreme Court in a Democracy'. *Harvard Law Review* 116(16), 2002, p. 19-162.

BARENDRECHT, BOLT & HOON 2006

Maurits Barendrecht, Korine Bolt and Machteld de Hoon; 'Appeal Procedures: Evaluation and Reform'. *Tilburg Law & Economics Center Discussion Paper 2006* (31), p. 1-56.

BARSOTTI & VARANO 1999

Vittoria Basotti and Vincenzo Varano; 'Italy'. In: John Anthony Jolowicz and C.H. van Rhee (Eds.); *Recourse against Judgements in the European Union*. The Hague [etc.]: Kluwer Law International, 1999, p. 207-237.

BARSOTTI & VARANO 2012

Vittoria Basotti and Vincenzo Varano (Eds.); *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale. Dialogo di diritto comparato*. Napoli, Italy: Edizioni Scientifiche Italiane, 2012.

BARTOLINI 2012

Francesco Bartolini; *Il nuovo giudizio di appello e di cassazione nel processo civile : guida esplicativa dopo la Riforma (L. n. 134/2012) : le nuove norme e la giurisprudenza*. Piacenza, Italy: La tribuna, 2012.

BAUM 2010

Lawrence Baum; *The Supreme Court*, 10th edition. Washington: CQ Press, 2010.

BAYER 2009

Aaron S. Bayer; 'Unpublished appellate opinions are still commonplace. The practice continues despite the U.S. Supreme Court's criticism of its use in consequential cases'. *The National Law Journal*, August 24, 2009.

BAYNES 1995

Kenneth Baynes; 'Democracy and Rechtsstaat: Habermas' Faktizität und

Geltung'. In: Stephen K. White (Ed.); *The Cambridge Companion to Habermas*. Cambridge: Cambridge University Press, 1995, p. 201-232.

BELGIUM-CENSUS 2014

Nationaal Instituut voor Statistiek; *Kerncijfers. Statistisch Overzicht van België*. 2014. Available online at: statbel.fgov.be/nl/binaries/NL_kerncijfers_2014_WEB_tcm325-259552.pdf.

BELL 2001

John Bell; *French Legal Cultures*. London [etc.]: Butterworths, 2001.

BELL 2004

John Bell; 'Reflections on continental European Supreme Courts'. *Legal Studies* 24(1-2), 2004, p. 156-168.

BELL 2011

John Bell; 'United Kingdom'. Allan Randolph Brewer-Carias (Ed.); *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge [etc.]: Cambridge University Press, 2011, p. 803-814.

BELL, BOYRON & WHITTAKER 2008

John Bell, Sophie Boyron and Simon Whittaker; *Principles of French Law*, 2nd edition. Oxford [etc.]: Oxford University Press, 2008.

BENVENISTI & DOWNS 2009

Eyal Benvenisti and George W. Downs; 'National Courts, Domestic Democracy, and the Evolution of International Law'. *European Journal of International Law* 20(1), 2009, p. 59-72.

BENNETT & CHECKEL 2015

Andrew Bennett and Jeffrey T. Checkel; 'Process Tracing: From Philosophical Roots to Best Practices'. In: Andrew Bennett and Jeffrey T. Checkel (Eds.); *Process Tracing in the Social Sciences± From Metaphor to Analytic Tool*. Cambridge: Cambridge University Press, 2015, p. 3-38.

BESSO & CHIARLONI 2012

Chiara Besso and Sergio Chiarloni (Eds.); *Problemi e prospettive delle corti supreme: esperienze a confronto*. Napoli: Edizioni Scientifiche Italiane, 2012.

BICKEL 1962

Alexander M. Bickel; *The Least Dangerous Branch. The Supreme Court and the Bar Politics*. Indianapolis: Bobbs-Merrill, 1962.

BILDER 1997

Mary Sarah Bilder; 'The Origin of Appeal in America'. *Hastings Law Journal* 48(5), 1997, p. 913-968.

BINGHAM 2011

Tom Bingham; *The Rule of Law*. London [etc.]: Penguin Books, 2011.

BIX 1991

Brian Bix; 'H.L.A. Hart and the "open texture" of the language'. *Law and Philosophy* 10(1), 1991, p. 51-72.

BLACK 1993

Donald J. Black; *Sociological Justice*. New York: Oxford University Press, 1993.

BLACK 2010

Donald J. Black; *The Behaviour of Law*, special edition. United Kingdom [etc.]: Emerald, 2010 [1976].

BLACKSTONE 2004

Charles Plant; *Blackstone's Civil Practice*. Oxford: Oxford University Press, 2004.

BLAKE & DREWRY 2004

Charles Blake and Gavin Drewry; 'The Role of the Court of Appeal in England and Wales as an Intermediate Court'. In: Andrew Le Sueur (Ed.); *Building the UK's New Supreme Court. National and Comparative Perspective*. Oxford [etc.]: Oxford University Press, 2004, p. 221-236.

BLOM-COOPER 2009

Louis Jacques Blom-Cooper; 'Style of Judgments'. In: Louis Jacques Blom-Cooper, Brice Dickson and Gavin Drewry (Eds.); *The Judicial House of Lords 1876-2009*. Oxford [etc.]: Oxford University Press, 2009, p. 145-163.

BLOM-COOPER, DICKSON & DREWRY 2009

Louis Jacques Blom-Cooper, Brice Dickson and Gavin Drewry (Eds.); *The Judicial House of Lords 1876-2009*. Oxford [etc.]: Oxford University Press, 2009.

BLONDEL 2005

Phillippe Blondel; 'Le critère de la non-admission : quelle rationalité ?' In: Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005. p. 83-102.

BOBEK 2009

Michal Bobek; 'Quantity or Quality? Re-Assessing the Role of Supreme Jurisdictions in Central Europe'. *American Journal of Comparative Law* 57(1), 2009, p. 33-65.

BÖCKENFÖRDE 1991

Ernst-Wolfgang Böckenförde; 'The Origin and Development of the Concept of the Rechtsstaat'. In Ernst-Wolfgang Böckenförde (Ed.); *State, Society and Liberty: Studies in Political Theory and Constitutional Law*. New York [etc.]: St. Martin's Press, 1991, p. 47-70.

BOGDAN 2013

Michael Bogdan; *Concise Introduction to Comparative Law*. Groningen, The Netherlands: Europa Law Publishing, 2013.

BOGDANOR 2005

Vernon Bogdanor; 'Constitutional Reform in Britain: The Quiet Revolution'. *Annual Review of Political Science* 7, 2005, p. 73-98.

BONFIELD 2006

Lloyd Bonfield; *American Law and the American Legal System*. St. Paul: Thomson/West, 2006.

BORÉ & BORÉ 2015

Jacques Boré and Louis Boré; *La cassation en matière civile*, 5th edition. Paris: Dalloz, 2015.

BOULET-SAUTEL 2000

Marguerite Boulet-Sautel; 'La cassation sous l'Ancien régime'. In: Association des Magistrats et Anciens Magistrats de la Cour de Cassation (Eds.); *Le Tribunal et la Cour de Cassation 1790-1990*. Paris: Litec, 1990, p. 1-24.

BOWIE, SONGER & SZMER 2014

Bowie, Songer & Szmer; *The View From the Bench and Chambers: examining judicial process and decision making on the U.S. Courts of Appeals*. Charlottesville: University of Virginia Press, 2014.

BRAVO-HURTADO 2013

Pablo Bravo-Hurtado; 'Hacia los precedentes en Chile: Reforma procesal civil y fuentes del Derecho'. *Revista Chilena de Derecho* 40(2), p. 549-576.

BRAVO-HURTADO 2014

Pablo Bravo-Hurtado; 'Two Ways to Uniformity: Recourse to The Supreme Court in the Civil Law and Common Law World'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 319-335.

BRAVO-HURTADO 2017

Pablo Bravo-Hurtado; 'The End of Cassation in Chile? Recourse to the Chilean Supreme Court in Civil Matters'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 149-174.

BRAZIER 2008

Rodney Brazier; *Constitutional Reform: Reshaping the British Political System*, 3rd edition. New York: Oxford University Press, 2008.

BRENNAN 1986

William J. Brennan Jr.; 'In Defence of Dissents'. *The Hastings Law Journal* 37(3),

1986, p. 427-438.

BREWER-CARÍAS 2011

Allan Randolph Brewer-Carías (Ed.); *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge [etc.]: Cambridge University Press, 2011.

BROWN 2013

Lord Brown of Eaton-under-Heywood; 'Dissenting Judgments'. In: Andrew Burrows, David Johnston & Reinhard Zimmermann (Eds.); *Judge and Jurist. Essays in Memory of Lord Rodger of Earlsferry*. Oxford: Oxford University Press, 2013, p. 29-38.

BROWN & LEE 2000

J. Robert Brown and Allison Herren Lee; 'Neutral Assignment of Judges at the Court of Appeals'. *Texas Law Review* 78(5), 2000, p. 1037-1116.

BRUHL 2014

Aaron-Andrew Bruhl; 'Measuring Circuit Splits: A Cautionary Note'. *Journal of Legal Metrics* 3(3), 2014, p. 361-383.

BUFFET 2005

Jean Buffet; 'Le critère de la non-admission : quelle rationalité ?' In: Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005. p. 103-109.

BURROWS 2013

Andrew Burrows; 'Numbers sitting in the Supreme Court'. *Law Quarterly Review* 129(3), 2013, p. 305-309.

BURTON 2013

Michael Burton; *Civil Appeals*. London: Sweet & Maxwell, 2013.

BUSSANI & MATTEI 2012

Mauro Bussani and Hugo Mattei; *The Cambridge Companion to Comparative Law*. Cambridge [etc.]: Cambridge University Press, 2012.

C

CABRILLO & FITZPATRICK 2008

Francisco Cabrillo and Sean Fitzpatrick; *The Economics of Courts and Litigation*. Northampton: Edward Edgar Publishing, 2008.

CADIET 2008

Loïc Cadiet; 'El sistema de la casación francesa'. In: Manuel Ortells R. (Ed.); *Los Recursos ante Tribunales Supremos en Europa: Appeals to Supreme Court in Europe*. Madrid: Difusión Jurídica, 2008, p. 21-45.

CADIET 2011A

Löic Cadiet; 'Le Role Institutionnel et Politique de la Court de Cassation en France: Tradition, Transition, Mutation?' *Annuario di Diritto Comparato e di Studi Legislativi 2011*, 2011, p. 183-222.

CADIET 2011B

Löic Cadiet; 'Introduction to French Civil Justice System and Civil Procedural Law'. *Ritsumeikan Law Review* 28, 2011, p. 331-393.

CADIET 2012A

Löic Cadiet; 'Civil Procedure'. In: George A. Berman and Eteinne Piccard (Eds.); *Introduction to French Law*. The Netherlands: Wolters Kluwer, 2012.

CADIET 2012B

Löic Cadiet; 'Problèmes et perspectives de la Court de cassation française'. In: Chiara Besso and Sergio Chiarloni (Eds.); *Problemi e prospettive delle corti supreme: esperienze a confronto*. Napoli: Edizioni Scientifiche Italiane, 2012.

CADIET 2012C

Löic Cadiet; 'Observations Conclusives'. In: Ordre des avocats au Conseil d'Etat et à la Cour de Cassation (Eds.); *Le Juge de Cassation en Europe*. Paris: Dalloz, 2012, p. 105-126.

CADIET & LORIFERNE 2011

Löic Cadiet and Dominique Loriferne (Eds.); *Le réforme de la procédure d'appel*. Paris: IRJS Editions, 2011.

CALAMANDREI 1920A

Piero Calamandrei; *La Cassazione Civile, I: Storia e Legislazioni*. Torino: Fratelli Bocca, 1920.

CALAMANDREI 1920B

Piero Calamandrei; *La Cassazione Civile, II: Disegno Generale Dell'istituto*. Torino: Fratelli Bocca, 1920.

CALDEIRA & WRIGHT 1990

Gregory A. Caldeira and John R. Wright; 'The Discuss List: Agenda Building in the Supreme Court'. *Law & Society Review* 24(3), 1990, p. 807-836.

CALVI & COLEMAN 2016

James V. Calvi and Susan Coleman; *American Law and Legal Systems*, 7th edition. New York: Routledge, 2016.

CAMINKER 1994

Caminker, E.H. (1994); 'Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking'. *Texas Law Review* 73(1), 1994, p. 1-82.

CANIVET 2005

Guy Canivet; 'Préface'. In: Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005, p. 5-11.

CANIVET 2006

Guy Canivet; 'Vision prospective de la Cour de cassation'. In: *Conférence à la Académie des sciences morales et politiques*, 2016 (November), p. 1-12. Available online at:

www.courdecassation.fr/IMG/File/pdf_2006/13-11-2006_canivet.pdf.

CAPPELLETTI 1970

Mauro Cappelletti; 'Judicial Review in Comparative Perspective'. *California Law Review* 55(5), 1970, p. 1017-1053.

CAPPELLETTI 1971

Mauro Cappelletti; *Judicial Review in the Contemporary World*. Indianapolis: Bobbs-Merrill, 1971.

CAPPELLETTI 1989

Mauro Cappelletti; *The Judicial Process in Comparative Perspective*. New York: Clarendon University Press, 1989.

CAPPELLETTI 1994

Mauro Cappelletti; *Dimensioni della Giustizia nelle Società Contemporanee. Studi di Diritto Giudiziario Comparato*. Bologna, Italy: Il Mulino, 1994.

CARPENTER 1910

William L. Carpenter; 'Courts of Last Resort'. *The Yale Law Journal* 19(4), 1910, p. 280-292.

CARRINGTON 1987

Paul D. Carrington; 'The Function of the Civil Appeal: A Late-Century View'. *South Carolina Law Review* 38(3), 1987, p. 411-435.

CASSAZIONE CIVILE 2006

Corte Suprema di Cassazione - Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Anno : 2006)*. 2006. Available online at:

www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2006_movimento_annuale_civile_distretto.pdf.

CASSAZIONE CIVILE 2007

Corte Suprema di Cassazione - Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : Anno 2007)*. 2007. Available online at:

www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2007_MGG00114_civile_annuale.pdf.

CASSAZIONE CIVILE 2008

Corte Suprema di Cassazione – Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : Anno 2008)*. 2008. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2008_istat_annuale_civile.pdf.

CASSAZIONE CIVILE 2009

Corte Suprema di Cassazione – Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : Anno 2009)*. 2009. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2009_MGG00114_Civile_annuale.pdf.

CASSAZIONE CIVILE 1/2010

Corte Suprema di Cassazione – Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : 1 sem '10)*. 2010. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2010_MGG00114_civile_1sem.pdf.

CASSAZIONE CIVILE 2/2010

Corte Suprema di Cassazione – Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : 2 sem '10)*. 2010. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2010_MGG00114_civile_2sem.pdf.

CASSAZIONE CIVILE 1/2011

Corte Suprema di Cassazione – Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : 1° semestre 2011)*. 2011. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2011_MGG00114_civile_1sem.pdf.

CASSAZIONE CIVILE 2/2011

Corte Suprema di Cassazione – Ufficio di statistica; *Rilevazione del Movimento dei Procedimenti Civili (Periodo : 2° semestre 2011)*. 2011. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2011_MGG00114_civile_2sem.pdf.

CASSAZIONE CIVILE 1/2012

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento (periodo: 1/1/2012 - 30/06/2012)*. 2012. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2012_MGG00114_civile_1sem.pdf.

CASSAZIONE CIVILE 2/2012

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento (periodo: 1/7/2012 - 31/12/2012)*. 2012. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2012_MGG00114_civile_2sem.pdf.

CASSAZIONE CIVILE 1/2013

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Modalità di esaurimento e durate medie (periodo: 1/1/2013 - 30/06/2013)*. 2013. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2013_c_MGG00114_1sem.pdf.

CASSAZIONE CIVILE 2/2013

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento e durate medie (periodo: 1/7/2013 - 31/12/2013)*. 2013. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2013_c_MGG00114_2sem.pdf.

CASSAZIONE CIVILE 1/2014

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento e durate medie (periodo: 1/1/2014 - 30/06/2014)*. 2014. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2014_MGG00114_1.pdf.

CASSAZIONE CIVILE 2/2014

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento e durate medie (periodo: 1/7/2014 - 31/12/2014)*. 2014. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2014_c_MGG00114_2.pdf.

CASSAZIONE CIVILE 1/2015

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento e durate medie (periodo: 1/1/2015 - 30/06/2015)*. 2015. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2015_c_MGG00114_1.pdf.

CASSAZIONE CIVILE 2/2015

Corte Suprema di Cassazione – Ufficio di statistica; *Movimento dei ricorsi ordinari e speciali per Autorità e distretto di provenienza - Analisi delle modalità di esaurimento e durate medie (periodo: 1/7/2015 - 31/12/2015)*. 2015. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2015_2_civ_MGG00114.pdf.

CASSAZIONE PENALE 2008

Corte Suprema di Cassazione – Ufficio statistico. *Modalità di esaurimento dei procedimenti penali classificati secondo l' sito ed il tipo de provvedimento (01/01/2007 – 31/12/2007)*. 2008. Available online at: <http://www.cortedicassazione.it/cassazione->

resources/resources/cms/documents/2007_definiti_esito_tipologia.pdf.

CASSAZIONE PENALE 2016

Corte Suprema di Cassazione – Ufficio di statistica. *La Cassazione penale. Anno 2015*. 2016. Available online at:
http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/AG2016_penale.pdf.

CASTANIAS & KLONOFF 2008

Gregory A. Castanias and Robert H. Klonoff; *Federal Appellate Practice and Procedure*. St. Paul: Thomson West, 2008.

CHAN 2012

P.C.H. Chan; 'Mediation options for resolving commercial disputes in China: A guide for foreign enterprises'. *Tijdschrift voor Civiele Rechtspleging* 20(2), 2012, p. 49-56.

CHARRUAULT 2012

Christian Charruault; 'Remarques sur la mission disciplinaire du juge de cassation'. In: *Ordre des avocats au Conseil d'Etat et à la Cour de Cassation* (Eds.); *Le Juge de Cassation en Europe*. Paris: Dalloz, 2012, p. 23-26.

CHEMERINSKY 2002

Erwin Chemerinsky; *Constitutional Law: Principles and Policies*, 2nd edition. New York: Aspen Law & Business, 2002.

CHIARLONI 2012

Sergio Chiarloni; 'Un ossimoro occulto: nomofilachia e garanzia costituzionale dell'accesso in cassazione'. In: Chiara Besso and Sergio Chiarloni (Eds.); *Problemi e Prospettive delle Corti Supreme: Esperienze a confronto*. Napoli: Ed. Scientifiche Italiane, 2012, p. 19-26.

CHIARLONI 2014

Sergio Chiarloni; 'General Judicial Functions of the Supreme Courts in the European Legal Culture with some critical remarks about the Italian Corte di Cassazione'. In: Adolphsen *et al.* (Eds.); *Festschrift für Peter Gottwald zum 70. Geburtstag*. München: C.H. Beck, 2014, p. 81-88.

CHILTON & LEVY 2015

Adam S. Chilton and Marin Levy; 'Challenging the Randomness of Panel Assignments in the Federal Courts of Appeals'. *U. of Chicago, Public Law Working Paper N° 529*, 2015, p. 1-51.

CHORUS, GERVER & HONDIUS 2006

Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius; *Introduction to Dutch Law*, 4th edition. Alphen aan den Rijn: Kluwer Law International, 2006.

CHRISS 2013

James J. Chriss; *Social Control: An Introduction*, 2nd edition. Cambridge: Polity Press, 2013.

CLINTON 1989

Robert Lowly Clinton; *Marbury v. Madison and Judicial Review*. Lawrence: University Press of Kansas, 1989.

COCCIA 2015

Alessandro Coccia; 'Storia e Struttura della Corte di Cassazione'. In: Luigi Levita (Ed.); *Il Ricorso Per Cassazione. La Nuova disciplina del giudizio di legittimità*. Matelica: Nuova Giuridica, 2015, p. 13-33.

COFFIN 1994

Frank M. Coffin; *On Appeal. Courts, Lawyers and Judging*. New York: W.W. Norton, 1994.

COLLINGS 2015

Justin Collings; *Democracy's Guardian: A History of the German Federal Constitutional Court 1951-2001*. Oxford: Oxford University Press, 2015.

COLLINS 1995

Michael Collins; 'Privacy and Confidentiality in Arbitration'. *Texas International Law Journal* 30(1), 1995, p. 121-135.

COLLINS & COOPER 2012

Todd A. Collins and Christopher Cooper; 'Case Salience and Media Coverage of Supreme Court Decisions. Toward a New Measure'. *Political Research Quarterly* 65(2), 2012, p. 396-407.

COMOGLIO, FERRI & TARUFFO 2011

Luigi Paolo Comoglio, Corrado Ferri and Michele Taruffo; *Lezioni sul processo civile. I. il processo ordinario di cognizione*, 5th edition. Bologna: Il Mulino, 2011.

CONSTANTINO 2012

Giorgio Constantino; *Il nuovo giudizio di cassazione dopo la legge n. 134 del 2012*. Roma, Italy: Consiglio Superiore della Magistratura, 2012. Available online at: www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20121108_RelazioneCostantino.pdf.

CORDRAY & CORDRAY 2004

Margaret Meriwether Cordray and Richard Cordray; 'The Philosophy of Certiorari: Consideration in the Supreme Court Case Selection'. *Washington University Law Quarterly* 82(2), 2004, p. 389-452.

CORNU 1987

Gérard Cornou (Ed.); *Vocabulaire Juridique*. 4th edition. Paris: Presses Universitaires de France, 1987.

CORNU 2007

G rard Cornu (Ed.); *Vocabulaire juridique*, 8th edition. Paris: Quadrige, 2007.

CORTE SUPREMA DI CASSAZIONE 2013

Corte Suprema di Cassazione; *Tabella di Organizzazione*. Rome: Institutional website, 2013. Available online at:
www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Tabella_di_organizzazione.pdf.

CORTE SUPREMA DI CASSAZIONE 2014

Corte Suprema di Cassazione (Ufficio di Statistica); *La Cassazione Civile. Anno 2013*. Rome: Institutional website, 2014. Available online at:
www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2013_c_AG2014.pdf.

CORTE SUPREMA DI CASSAZIONE 2015A

Corte Suprema di Cassazione; *Le funzioni della Corte*. Rome: Institutional website, 2015. Available online at:
www.cortedicassazione.it/corte-di-cassazione/it/funzioni_della_corte.page;jsessionid.

CORTE SUPREMA DI CASSAZIONE 2015B

Corte Suprema di Cassazione (Ufficio di Statistica); *La Cassazione Civile. Anno 2014*. Rome: Institutional website, 2014. Available online at:
www.cortedicassazione.it/cassazione-resources/resources/cms/documents/AG2015_CIVILE.pdf.

COTTERRELL 1992

Roger Cotterrell; *The Sociology of Law. An Introduction*. New York: Oxford University Press, 1992.

COUCHEZ 2004

G rard Couchez; *Proc dure civile*. 13th edition. Paris, Armand Colin, 2004.

COUR DE CASSATION 2012

Cour de Cassation; *Rapport Annuel 2012: La preuve dans la jurisprudence de la Cour de cassation*. Paris: Institutional webpage, 2012. Available online at:
https://www.courdecassation.fr/IMG/pdf/rapport_ccassation_2012.pdf.

COUR DE CASSATION 2013

Cour de Cassation; *2013 Statistiques*. Paris: Institutional webpage, 2012. Available online at:
<https://www.courdecassation.fr/IMG///CC-STATISTIQUES-2013-HD-A4.pdf>.

COUR DE CASSATION - MEMBERS 2016

Cour de Cassation; *Les membres de la Cour de cassation*. Institutional webpage:
www.courdecassation.fr/cour_cassation_1/presentation_2845/membres_cour_

cassation_30991.html.

COUTURE 1995

Eduardo J. Couture; 'The Nature of the Judicial Process'. *Tulane Law Review* 25(1), 1950, p. 1-28.

COWNIE, BRADNEY & BURTON 2013

Fiona Cownie, Anthony Bradney and Mandy Burton; *English Legal System in Context*, 6th edition. Oxford: Oxford University Press, 2013.

CROSS 2007

Frank B. Cross; *Decision Making in the U.S. Courts of Appeals*. Stanford: Stanford University Press, 2007.

CROSS & HARRIS 1991

Ruper Cross and J.W. Harris; *Precedent in the English Law*, 4th edition. Oxford: Clarendon Press, 1991.

CROSS & LINQUIST 2006

Frank B. Cross and Stefanie Linquist; 'The Decisional Significance of the Chief Justice'. *University of Pennsylvania Law Review* 154(6), 2006, p. 1665-1707.

CROSS & TILLER 1998

Frank B. Cross and Emerson H. Tiller; 'Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals'. *The Yale Law Journal* 107(7), 1998, p. 2155-2176.

CUNIBERTI 2011

Gilles Cuniberti; *Grands systèmes de droit contemporains : introduction au droit comparé*, 2nd edition. Paris, France: L.G.D.J., 2011.

D

DALTON 1985

Harlon Leigh Dalton; 'Taking the Right to Appeal (More or Less) Seriously'. *The Yale Law Journal* 95(1), 1985, p. 62-107.

DAMAŠKA 1986

Mirjan R. Damaška; *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*. New Haven: Yale University Press, 1986.

DANNEMANN 2006

Gerhard Dannemann; 'Comparative Law: Study of Similarities or Differences?' In: Mathias Reimann and Reinhard Zimmermann (Eds.); *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2006, p. 383-420.

DARBYSHIRE 2011

Penny Darbyshire; *Sitting in Judgment: The Working Lives of Judges*. Oxford [etc.]: Hart Publishing, 2011.

DARBYSHIRE 2015

Penny Darbyshire; 'The UK Supreme Court - is there anything left to think about?' *European Journal of Current Legal Issues* 21(1), 2015. p. 1-15 [html] webjcli.org/article/view/416/530.

DAVID & BRIERLEY 1978

René David and John E.C. Brierley; *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 2nd edition. New York [etc.]: The Free Press, 1978.

DAWSON 1968

John P. Dawson; *The Oracles of the Law*. Buffalo: William s Hein & Company, 1968.

DE BENITO 2017

Marco De Benito; 'Civil Cassation in Spain: Past, Present and Future'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 97-130.

DE FRANCHIS 1996

Francesco De Franchis; *Dizionario Giuridico : Law Dictionary*. Milano, Italy: Giuffrè Editore, 1996.

DEFLEM 2008

Mathieu Deflem; *Sociology of Law: Visions of a Scholarly Tradition*. Leiden: Cambridge University Press, 2008.

DEL GIUDICE 2008

Federico Del Giudice (Ed.); *Nuovo Dizionario Giuridico*, 6th edition. Napoli, Italy: Edizioni Simone, 2008.

DELPEUCH, DUMOULIN & GALAMBERT 2014

Thirerry Delpeuch, Laurence Dumoulin and Claire de Galambert; *Sociologie du Droit et de la Justice*. Paris: Armand Colin, 2014.

DEUMIER 2015

Pascale Deumier; 'Accès à la cour de cassation et traitement des questions jurisprudentielles'. In: Guillaume Drago, Bénédicte Fauvarque-Cosson and Marie Goré (Ed.); *L'accès au juge de cassation. Colloque du 15 juin 2015*. Paris: Société de Législation Comparée, 2015, p. 83-105.

DI CERBO 2015

Vicenzo Di Cergo; 'Informática e giudizio di cassazione'. In: María Acierno,

Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015, p. 577-592.

DICEY 2013

Albert Venn Dicey; *The Law of the Constitution*, 10th edition. London: Oxford University Press, 2013.

DICKSON 1999

Brice Dickson; 'The Lords of Appeal and their Work. 1967-1996'. In: Brice Dickson and Paul Carmichael (Ed.); *The House of Lords. Its Parliamentary and Judicial Roles*. Oxford [etc.]: Hart Publishing, 1999, p. 127-157.

DICKSON 2007

Brice Dickson; 'Judicial Activism in the House of Lords 1995-2007'. In: Brice Dickinson (Ed.); *Judicial Activism in Common Law Supreme Courts*. New York: Oxford University Press, 2007, p. 363-414.

DICKSON 2013A

Brice Dickson; *Human Rights and the United Kingdom Supreme Court*. Oxford: Oxford University Press, 2013.

DICKSON 2013B

Brice Dickson; *Law of Northern Ireland*, 2nd edition. Oxford [etc.]: Hart Publishing, 2014.

DICKSON & CHARMICHAEL 1998

Brice Dickson and Paul Charmichael (Eds.); *The House of Lords: its Parliamentary and Judicial Role*. Oxford: Hart Publishing, 1998.

DINGWALL & CLOATRE 2006

Dingwall and Cloatre; 'Vanishing Trial? An English Perspective'. *Journal of Dispute Resolution* 2006(1), 2006, p. 51-70.

DOGAN 2009

Mattei Dogan; 'Political legitimacy: new criteria and anachronistic theories'. *International Social Science Journal* 60(196), 2009, p. 195-210.

DOMIJ 2014

Tanja Domej; 'What is an important case? Admissibility of Appeals to the Supreme Courts in the German-Speaking Jurisdictions'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 277-290.

DOMIJ 2017

Tanja Domej; 'Squaring the Circle: Individual Rights and the General Interest Before the Supreme Courts of the German-Speaking Countries'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western:*

Adjudication at the Service of Public Goals. Cham: Switzerland: Springer, 2017, p. 131-148.

DRAGO, FAIVARQUE-COSSON & GORE 2015

Guillaume Drago, Bénédicte Fauvarque-Cosson and Marie Goré (Eds.); *L'accès au juge de cassation. Colloque du 15 juin 2015*. Paris: Société de Législation Comparée, 2015.

DRAHOZAL 1998

Christopher R. Drahozal; 'Judicial Incentives and the Appeal Process'. *SMU Law Review* 51(3), 1998, p. 469-503.

DREWRY & BLOM-COOPER 1998

Gavin Drewry and Louis Blom-Cooper; 'The Appellate Function'. In: Brice Dickson and Paul Charmichael (Eds.); *The House of Lords: its Parliamentary and Judicial Role*. Oxford: Hart Publishing, 1998, p. 113-126.

DREWRY, BLOM-COOPER & BLAKE 2007

Gavin Drewry, Louis Blom-Cooper, Charles Blake; *The Court of Appeal*. Oxford: Hart Publishing, 2007.

DREWRY & BLOM-COOPER 2009

Gavin Drewry and Louis Blom-Cooper; 'The House of Lords and the English Court of Appeal'. In: Louis Jacques Blom-Cooper, Brice Dickson and Gavin Drewry (Eds.); *The Judicial House of Lords 1876-2009*. Oxford [etc.]: Oxford University Press, 2009, p. 48-63

DRION 2016

Coen E. Drion; 'Een Grote Kamer voor de Hoge Raad?' *Nederlands Juristenblad (NJB)* 591, 2016, p. 785.

DUHAMEL & CARCASSONNE 2015

Olivier Duhamel and Guy Carcassonne; *QPC. La question prioritaire de constitutionnalité*. Paris: Dalloz, 2015.

DULITZKY 2015

Areil E. Dulitzky; 'An Alternative Approach to the Conventionality Control Doctrine'. *American Journal of International Law* 109(1), 2015, p. 100-108.

DURKHEIM 1933/1997

Emile Durkheim; *The Division of Labour in Society*. Great Britain: The Free Press, 1997 [1993].

DWORKIN 1975

Ronald Dworkin, 'Hard Cases'. *Harvard Law Review* 88(6), 1975, p. 1057-1109.

E

ECHR 2013

Research Division of the European Court of Human Rights; *Guide on Article 6. Right to a Fair Trial*. Strasbourg: European Council (institutional webpage), 2013. Available online at www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

EDLIN 2013

Douglas Edlin; 'Will Britain Have a Marbury'. *UK Constitutional Law Association Blog*, 1993 (June 7). Available online at: www.ukconstitutionallaw.org/2013/06/07/douglas-edlin-will-britain-have-a-marbury/.

ELLIOTT, JEANPIERRE & VERNON 2006

Catherine Elliott, Eric Jeanpierre and Catherine Vernon; *French Legal System*, 2nd edition. Edinburgh: Pearson, 2006.

ESKRIDGE 1988

William N. Eskridge; 'Overruling Statutory Precedents'. *The Georgetown Law Journal* 76(4), 1988, p. 1361-1439.

F**FABRINI 2008**

Federico Fabrini; 'Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation'. *German Law Journal* 9(10), 2008, p. 1297-1312.

FAVOREAU & MASTOR 2011

Louis Favoreau and Wanda Mastor; *Les Cours Constitutionnelles*. Paris: Dalloz, 2011.

FAVRE 2012

Claire Favre; 'Le procedure de non-admission des pourvois en cassation'. In: *Ordre des avocats au Conseil d'État et à la Cour de cassation* (Eds.); *Le Juge de Cassation en Europe*. Paris: Dalloz, 2012.

FELDMAN 2009

David Feldman; 'Human Rights'. In: Louis Jacques Blom-Cooper, Brice Dickson and Gavin Drewry (Eds.); *The Judicial House of Lords 1876-2009*. Oxford [etc.]: Oxford University Press, 2009, p. 541-573.

FENNELL 2008

Monica A. Fennell; 'Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States'. *Temple International & Comparative Law Journal* 22(2), 2008. p. 279-305.

FERRAND 2005A

Frédérique Ferrand; 'La sélection des pourvois en cassation à l'étranger'. In: Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005. p. 51-78.

FERRAND 2005B

Frédérique Ferrand; 'The Respective Role of the Judge and the Parties in The Preparation of the Case in France'. In: Nicolò Trocker and Vincenzo Varano (Eds.); *The reform of civil procedure in comparative perspective*. Torino: G. Giappichelli, 2005, p. 7-32.

FERRAND 2010

Frédérique Ferrand; 'Les cas de d'overture à cassation en droit français'. In: José Bonet Navarro and José Martín Pastor (Eds.); *El Recurso de Casación Civil*. Navarra: Aranzadi/Thomson-Reuters, 2010.

FERRAND 2015

Frédérique Ferrand; 'La juridiction judiciaire suprême en droit comparé : missions, filtrage, intensité du contrôle'. In: Guillaume Drago, Bénédicte Fauvarque-Cosson and Marie Goré (Ed.); *L'accès au juge de cassation. Colloque du 15 juin 2015*. Paris: Société de Législation Comparée, 2015, p. 147-218.

FERRAND 2017

Frédérique Ferrand; 'The French Court of Cassation: On The Threshold of a Quiet Revolution?' In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 175-206.

FERRARESE 2011

María Rosaria Ferrarese; 'Dal 'verbo' legislativo a chi dice 'l'ultima parola': Le Corti Costituzionali e la rete Giudiziaria'. *Annuario di Diritto Comparato e di Studi Legislativi 2011*, 2011, p. 64-89.

FERRARI 2012

Francesca Ferrari; 'The Recent Amendments to the Italian Appeals System'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 259-274.

FERRARIS 2015

Federico Ferraris; *Rationing Justice. La selezione dei ricorsi nelle Corti Supreme di Stati Uniti e Italia*. Torino: G. Giappichelli Editore, 2015.

FERRER MAC-GREGOR 2015

Eduardo Ferrer Mac-Gregor; 'Conventionality Control the New Doctrine of the Inter-American Court of Human Rights'. *American Journal of International Law* 109(1), 2015, p. 93-99.

FERRER & BATTISTA 2012

Jordi Ferrer and Giovanni Battista (Eds.); *The Logic of Legal Requirements: Essays on Defeasibility*. Oxford: Oxford University Press, 2012.

FERRERES COMELLA 2004

Víctor Ferreres Comela; 'The European Model of Constitutional Review of Legislation: Toward decentralization'. *International Journal of Constitutional Law* 2(3), 2004, p. 461-491.

FERRERES COMELLA 2009

Víctor Ferreres Comela; *Constitutional Courts and Democratic Values. An European Perspective*. New Haven [etc.]: Yale University Press, 2009.

FERRERES COMELLA 2011

Víctor Ferreres Comela; 'The rise of specialized constitutional courts'. In: Tom Ginsburg and Rosalind Dixon (Eds.); *Comparative Constitutional Law*. Cheltenham: Edward Elgar, 2011, p. 265-277.

FINCK 1992

Danielle E. Finck; 'Judicial Review: The United States Supreme Court Versus the German Constitutional Court'. *Boston College International and Comparative Law Review* 20(1), 1992. p. 123-158.

FISS 1983

Owen M. Fiss; 'The Bureaucratization of the Judiciary'. *The Yale Law Journal* 92(8), 1983, p. 1442-1468.

FLAUSS 2005

Jean-François Flauss; 'La selection des recours et la Convention européenne des droits de l'homme'. In: Soraya Amrani Mekki and Loïc Cadiet (Eds.); *La Sélection des Pourvois à la Cour de Cassation*. Paris: Economica, 2005. p. 43-50.

FLETCHER 1995

George P. Fletcher; 'The Right and the Reasonable'. *Harvard Law Review* 98(5), 1995, p. 949-982.

FLETCHER & SHEPPARD 2005

George F. Fletcher and Steve Sheppard; *American Law in Global Context: The Basics*, 1st edition. New York: Oxford University Press, 2005.

FORDHAM 2012

Michael Fordham; *Judicial Review Handbook*, 6th edition. Portland: Hart Publishing, 2012.

FORMAN 2002

Nigel Forman; *Constitutional Change in the UK*. London: Routledge, 2002.

FRANCE-CENSUS 2016

National Institute of Statistics and Economic Studies (INSEE); *Population on January First*. 2016. Available online at www.insee.fr/en/themes/series-longues.asp?indicateur=pop-debut-annee.

FRANKENBERG 1985

Günter Frankenberg; 'Critical Comparisons: Re-Thinking comparative law'. *Harvard International Law Journal* 26(2), 1985, p. 411-456.

FRANTZIOU 2015

Eleni Frantziou; 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality'. *European Law Journal* 21(5), 2015, p. 657-659.

FRENCH COURT OF CASSATION – FIRST CHAMBER 2016

French Court of Cassation; *Première chambre civile*. 2016. Available online at: www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/.

FRENCH COURT OF CASSATION – STATISTICS 2016

Cour de Cassation; *2014 Statistiques*. 2014. Available online at: www.courdecassation.fr/IMG///CC-STATISTIQUES-2015.pdf.

FRIEDMAN 1998

Barry Friedman; 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy'. *New York University Law Review* 73(2), 1998. p. 333-433.

FRIEDMAN 2000A

Barry Friedman; 'The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner'. *New York University Law Review* 76(5), 2001, p. 1383-1455.

FRIEDMAN 2000B

Barry Friedman; 'The History of the Countermajoritarian Difficulty, Part Four: Law's Politics'. *University of Pennsylvania Law Review* 148(4), 2000. p. 971-1064.

FRIEDMAN 2002A

Barry Friedman; 'The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court'. *Georgetown Law Journal* 91(1), 2002, p. 1-66.

FRIEDMAN 2002B

Barry Friedman; 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five'. *The Yale Law Journal* 112(2), 2002, p. 153-259.

FRIEDMAN 1975

Lawrence M. Friedman; *The Legal System. A social science perspective*. New York: Russel Sage Foundation, 1975.

FU 2017

Yulin Fu; 'The Chinese Supreme People's Court in Transition'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 13-36.

FULLER 1958

Lon Fuller; 'Positivism and Fidelity to Law – A reply to professor Hart'. *Harvard Law Review* 71(4), 1958, p. 630-672.

G**GALANTER 2004**

Marc Galanter; 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts'. *Journal of Empirical Legal Studies* 1(3), 2004, p. 459-570.

GALIC 2014A

Ales Galic; 'A civil law perspective on the supreme court and its functions'. In: Warsaw Conference; *The functions of the Supreme Court – issues of process and administration of justice*. Warsaw, 2014 (June). p. 1-32. Available online at: colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/Ales-Galic.pdf.

GALIC 2014B

Ales Galic; 'Does a Decision of the Supreme Court Denying Leave to Appeal Need to Contain Reasons?' In: Adolphsen *et al.* (Eds.); *Festschrift für Peter Gottwald zum 70. Geburtstag*. München: C.H. Beck, 2014, p. 159-174.

GALIC 2014C

Ales Galic; 'Reshaping the Role of Supreme Courts in The Countries of the Former Yugoslavia'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 291-317.

GARAPON & PAPADOPOULOS 2003

Antoine Garapon and Ioannis Papadopoulos; *Juger en Amérique et en France: Culture juridique française et common law*. Paris: Odile Jacob, 2003.

GARDBAUM 2003

Stephen Gardbaum; 'The "Horizontal Effect" of Constitutional Rights'. *Michigan Law Review* 102(3), 2003, p. 387-459.

GARLICKI 2007

Lech Garlicki; 'Constitutional Courts versus Supreme Courts'. *International*

Journal of Constitutional Law 5(1), 2007, p. 44-68.

GARNER 2009

Bryan A. Garner (Ed.); *Black's Law Dictionary*, 9th edition. St. Paul: West, 2009.

GEEROMS 2002

Sophie M.F. Geeroms; 'Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated ...'. *American Journal of Comparative Law* 50(1), 2002, p. 201-228.

GEEROMS 2004

Sophie M.F. Geeroms; *Foreign Law in Civil Litigation. A Comparative and Functional Analysis*. Oxford: Oxford University Press, 2004.

GIANNINI 2016

Leandro Giannini; *El certiorari. La jurisdicción discrecional de las Cortes Supremas, I and II*. Librería Editora Platense, 2016.

GIBSON-MORGAN 2014

Elizabeth Gibson-Morgan; 'The United Kingdom Supreme Court and Devolution Issues: Towards Constitutional Review?' *Revue Miroirs* 1, 2014, p. 84-111.

www.revuemiroirs.fr/links/Article8.pdf.

GIDDENS *et al.* 2014

Anthony Giddens, Mitchel Duneier, Richard P. Appelbaum and Deborah Carr; *Introduction to Sociology*, 9th edition. New York [etc.]: Norton & Company, 2014.

GILLET 2012

J.L. Gillet; 'L'Arrêt de la Cour de Cassation. Motivation, Style et Structure'. In: Fabrice Hourquebie and Marie-Claire Ponthoreau (Eds.); *La motivation des décisions des cours suprêmes et cours constitutionnelles*. Brussels: Bruylant, 2012, p. 167-181.

GINSBURG 2010

Ruth Bader Ginsburg; 'The Role of Dissenting Opinions'. *Minnesota Law Review* 95(1), 2010, p. 1-8.

GINSBURG 2011

Tom Ginsburg; 'Building Reputation in Constitutional Courts: Political and Judicial Audiences'. *Arizona Journal of International & Comparative Law* 28(3), 2011, p. 539-568.

GLEDHILL 2015

Kris Gledhill; *Human Rights Acts: The Mechanism Compared*. Oxford [etc.]: Hart Publishing, 2015.

GLENDON, CAROZZA & PICKER 2008

Mary Ann Glendon, Paolo G. Carozza and Colin B. Picker; *Comparative Legal Traditions*, 3rd edition. St. Paul: Thomson/West, 2008.

GLENN 1998

Patrick Glenn; 'The Grounding of Codification'. *Davis Law Review* 31(3), 1998, p. 765-782.

GLENN 2006

Patrick Glenn; 'Comparative Legal Families and Comparative Legal Traditions'. In: Mathias Reimann and Reinhard Zimmermann (Eds.); *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2006, p. 421-440.

GLOAG & HENDERSON 2007

W.M. Gloag and R. Candlish Henderson; *The Law of Scotland*. 12th edition. Edinburg: W.Green-Thomson, 2007.

GOLDSTEIN 1998

Stephen Goldstein; 'Common Law Countries'. In: Pelayia Yessiou-Faltsi (Ed.); *The Role of the Supreme Courts at a National and International Level*, Thessaloniki: Sakkoulas Publications, 1998, p. 279-359.

GOLDSWORTHY 2010

Jeffrey D. Goldsworthy; *Parliamentary Sovereignty. Contemporary Debates*. New York: Cambridge University Press, 2010.

GÓMEZ FERNANDEZ 2007

Itziar Gómez Fernandez; *El tribunal constitucional: normativa procesal constitucional*. Valencia: Tirant lo Blanch, 2007.

GONOD 2014

Pascale Gonod; *Le Conseil d'Etat et la refondation de la justice administrative*. Paris: Dalloz, 2014.

GOTTWALD 2008.

Peter Gottwald; 'Review Appeal to the German Federal Supreme Court after the Reform of 2001'. In: Manuel Ortells R. (Ed.); *Los Recursos ante Tribunales Supremos en Europa: Appeals to Supreme Court in Europe*. Madrid: Difusión Jurídica, 2008, p. 87-106.

GOUTAL 1976

Jean Louis Goutal; 'Characteristics of Judicial Style in France, Britain and the U. S. A.'. *The American Journal of Comparative Law* 24(1), 1976, p. 43-72.

GRABER & DUNAWAY 2015

Doris A. Graber and Johanna Dunaway; *Mass Media in American Politic*, 9th edition. Los Angeles [etc.]: Sage/CQ Press, 2015.

GRAZIADEI 2003

Michele Graziadei; 'The Functionalist Heritage'. In: Pierre Legrand and Roderick Munday (Eds.); *Comparative Legal Studies: Traditions and Transitions*. Cambridge [etc.]: Cambridge University Press, 2003, p. 100-129.

GRAZIEDEI 2006

Michele Graziadei; 'Comparative Law as The Study of Transplants and Receptions'. In: Mathias Reimann and Reinhard Zimmermann (Eds.); *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2006, p. 441-475.

GREENHOUSE 2012

Linda Greenhouse; *The U.S. Supreme Court. A very short introduction*. Oxford [etc.]: Oxford University Press, 2012.

GRIFFITH 1997

J.A.G. Griffith; *The Politics of the Judiciary*, 5th edition. London: Fontana Press, 1997.

GRIVART DE KERSTRAT 1999

F. Grivat de Kerstrat; 'France'. In: John Anthony Jolowicz and C.H. van Rhee (Eds.); *Recourse against Judgements in the European Union*. The Hague [etc.]: Kluwer Law International, 1999, p. 113-152.

GROPPI 2009

Tania Groppi; 'The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review?' In: Andrew Harding and Peter Leyland (Ed.); *Constitutional Courts. A Comparative Study*. London: Wildy, Simmonds & Hill Publishing, 2009, p. 125-147.

GROSS 2012

Norbert Gross; 'L'Allemagne'. In: Ordre des avocats au Conseil d'Etat et à la Cour de Cassation (Eds.); *Le Juge de Cassation en Europe*. Paris: Dalloz, 2012, p. 27-36.

GUARNIERI & PEDERZOLI 2002

Carlo Guarnieri and Patrizia Pederzoli; *The Power of the Judges. A comparative study of courts and democracy*. Oxford [etc.]: Oxford University Press, 2002.

GUASTINI 2011

Riccardo Guastini; *Interpretare e argomentare*. Milano, Italy: Giuffrè, 2011.

H

HABERMAS 1996

Jürgen Habermas; *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge: The MIT Press, 1996.

HABERMAS 2008

Jürgen Habermas; 'On the Internal Relation Between Rule of Law and Democracy'. *European Journal of Philosophy* 3(1), 2008. p. 12-20.

HAGE 2014

Jaap Hage; 'Basic Concepts of Law'. In: Jaap Hage and Bruce Akkermans (Eds.); *Introduction to Law*. Cham [etc.]: Springer, p. 37-49.

HALE 2004

Brenda Hale; 'A Supreme Court for the United Kingdom?' *Legal Studies* 24(1-2), 2004, p. 36-54.

HALL, ELY & GROSSMAN 2005

Kermit L. Hall, James W. Ely and Joel B. Grossman (Eds.); *The Oxford Companion to the Supreme Court of the United States*, 2nd edition. Oxford [etc.]: Oxford University Press, 2005.

HALL 2008

Kermit L. Hall; 'The Courts, 1790-1920'. In: Michael Grossberg and Christopher Tomlins (Eds.); *The Cambridge History of Law in America, II: The Long Nineteenth Century (1790 – 1920)*. Cambridge [etc.]: Cambridge University Press, 2008, p. 106-132.

HALPERIN 1987

Jean Louis Halpérin; *Le Tribunal de Cassation et Les Pourvois sous la Révolution (1790-1799)*. Paris: Librairie Générale de Droit de Jurisprudence, 1987.

HALPERIN 2000

Jean-Louis Halpérin; 'Le Tribunal de cassation sous la Révolution (1790-1799)'. In: Association des Magistrats et Anciens Magistrats de la Cour de Cassation (Eds.); *Le Tribunal et la Cour de Cassation 1790-1990*. Paris: Litec, 1990, p. 25-52.

HARDING & LEYLAND 2009

Andrew Harding and Peter Leyland (Eds.); *Constitutional Courts. A Comparative Study*. London: Wildy, Simmonds & Hill Publishing, 2009.

HARDING, LEYLAND & GROPPi 2009

Andrew Harding, Peter Leyland and Tania Groppi; 'Constitutional Courts: Functions and Practice in Comparative Perspective'. In: Andrew Harding and Peter Leyland (Eds.); *Constitutional Courts. A Comparative Study*. London: Wildy, Simmonds & Hill Publishing, 2009, p. 1-27.

HARRIS et al. 2009

David Harris, Michael O'Boyle, Ed Bates, Carla Buckley, Paul Harvey, Michele Lafferty, Peter Cumper, Yutaka Arai, and Heather Green; *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, 3rd edition. Oxford: Oxford University Press, 2009.

HART 1958/2012

Herber L.A. Hart; *The Concept of Law*, 3rd edition. Oxford: Oxford University Press, 2012 [1958].

HAYEK 1944

Friedrich August Hayek; *The Road to Serfdom*. New York: George Routledge & Sons, 1944.

HAYEK 1955

Friedrich August Hayek; *The Political Ideal of the Rule of Law*. Cairo: National Bank of Egypt, 1955.

HAZARD & TARUFFO 1993

Geoffrey C. Hazard and Michele Taruffo; *American Civil Procedure: An Introduction*. New Haven: Yale University Press, 1993.

HEAD 2011

John W. Head; *Great Legal Traditions: Civil Law, Common Law and Chinese Law in historical and operational perspective*. Durkham: Carolina Academic Press, 2011.

HELM 1971

Paul Helm; 'Manifest and Latent Functions'. *The Philosophical Quarterly* 21 (82), 1971, p. 51-60.

HERINGA & KIIVER 2012

Aalt Willem Heringa and Philipp Kiiver; *Constitution Compared. An Introduction to Comparative Constitutional Law*, 3rd edition. Cambridge [etc.]: Intersentia, 2012.

HERZONG & WESER 1967

Peter Herzog & Martha Weser; *Civil Procedure in France*. The Hague, The Netherlands: Martinus Nijhoff, 1967.

HOEKSTRA 2003

Valerie Hoekstra; *Public Reactions to Supreme Court Decisions*. Cambridge [etc.]: Cambridge University Press, 2003.

HOFFER, HOFFER & HULL 2007

Peter Charles Hoffer, WilliamJames Hull Hoffer and N.E.H. Hull; *The Supreme Court: An Essential History*. Kansas: University Press of Kansas, 2007.

HOGUE 1986

Arthur R. Hogue; *Origins of the Common Law*. Indianapolis: Liberty Fund, 1986.

HOL 2009

A.M. Hol; 'Internationalisation and Legitimacy of Decisions by the Highest Courts'. In: A.S. Muller and M.A. Loth (Eds.); *Highest Courts and The Internationalisation of Law. Challenges and Changes*. The Hague, The Netherlands:

Hague Academic Press, 2009, p. 77-86.

HOOIJDONK & EIJSVOOGEL 2012

Mareike van Hooijdonk and Peter Eijssvoogel; *Litigation in The Netherlands: Civil Procedure, Arbitration and Administrative Litigation*, 2nd edition. The Hague: Kluwer Law International, 2012.

HOOPER, MILETICH & LEVY 2011

Laura Hooper, Dean Miletich and Angelia Levy; *Case Management Procedures in the Federal Courts of Appeals*, 2nd edition. US: Federal Judicial Center, 2011.
[www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/\\$file/caseman2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/$file/caseman2.pdf).

HOPE 2009

David Hope; 'The Law Lords in Parliament'. In: Louis Jacques Blom-Cooper, Brice Dickson and Gavin Drewry (Eds.); *The Judicial House of Lords 1876-2009*. Oxford [etc.]: Oxford University Press, 2009. p. 164-179.

HOPMAN 2017

Marieke J. Hopman; 'Lipstick law, or: the three forms of statutory law'. *The Journal of Legal Pluralism and Unofficial Law* 49(1), 2017, p. 54-66.

HOURQUEBIE 2012

Fabrice Hourquebie; 'L'Emploi de L'Argument Conséquentialiste par les Juges de Common Law'. In: Fabrice Hourquebie and Marie-Claire Ponthoreau (Eds.); *La motivation des décisions des cours suprêmes et cours constitutionnelles*. Brussels: Bruylant, 2012, p. 25-46.

HULS, ADAMS & BOMHOFF 2009

Nick Huls, Maurice Adams and JAcco Bomhoff (Eds.); *The Legitimacy of the Highest Courts' Rulings: Judicial Deliberations and Beyond*. The Hague: The Netherlands: T.M.C. Asser Press, 2009.

HUSA 2004

Jaako Husa; 'Classification of Legal Families Today - Is it Time for Memorial Hymn?' *Revue Internationale de Droit Comparé* 56(1), 2004, p. 11-38.

HUSA 2013

Jaako Husa; 'Functional Method in Comparative Law – Much Ado About Nothing?' *European Journal of Private Law* 2(1), 2013, p. 4-21.

HYRE 2004

James Hyre; 'The United Kingdom Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights under the Human Rights Act of 1998'. *Fordham Law Review* 73, 2004, p. 423-473.

INDERBITZIN, BATES & GAINNEY 2013

Michelle L. Inderbitzin, Kristin A. Bates and Randy R. Gainey; *Deviance and Social Control: A Sociological Perspective*. Los Angeles [etc.]: Sage, 2013.

INGMAN 2004

Terence Ingman; *The English Legal Process*, 10th edition. Oxford: Oxford University Press, 2004.

IRTI 1979

Natalino Irti; *L'età Della Decodificazione*, 3rd edition. Milan: Giuffrè, 1979.

ITALY-CENSUS 2016

National Institute of Statistics (ISTAT); *Demographic Indicators*. 2016. Available online at:
www.istat.it/en/archive/180497.

ITALIAN COURT OF CASSATION - FIRST CHAMBER 2016

Ufficio del Massimario; *Prima sezione*. 2016. Available online at:
www.cortedicassazione.it/corte-di-cassazione/it/prima_sezione.page].

J**JACOB 1998**

Joseph M. Jacob; 'The Bowman Review of the Court of Appeal'. *The Modern Law Review* 61(3), 1998, p. 390-400.

JACKSON & TUSHNET 2006

Vicki C. Jackson and Mark Tushnet; *Comparative Constitutional Law*, 2nd edition. New York: Foundation Press, 2006.

JEULAND 2018

Emmanuel Jeuland; 'Towards the Reform of the French Court of Cassation?'. In: Pablo Bravo-Hurtado (Ed.); *Overburdened Supreme Courts: Transplanting Solutions?* 2018 [forthcoming].

JOBARD-BACHELLIER, BACHELLIER & LAMENT 2013

Marie Noëlle Jobard-Bachelier, Xavier Bachelier and Julie Buk Lament; *La technique de cassation. Pourvois et arrêts en matière civile*, 8th edition. Paris: Dalloz, 2013.

JOLOWICZ 1998

J.A. Jolowicz; 'The Role of the Supreme Courts at the National and International Level. General Report'. In: Pelayia Yessiou-Faltsi (Ed.); *The Role of the Supreme Courts at the National and International Level*. Thessalonica: Sakkoulas Publisher, 1998, p. 37-63.

JOLOWICZ 1999

John Anthony Jolowicz; 'Introduction. Recourse against civil judgments in the European Union: A comparative survey'. In: John Anthony Jolowicz and C.H. van Rhee (Eds.); *Recourse against Judgements in the European Union*. The Hague [etc.]: Kluwer Law International, 1999, p. 1-18.

JOLOWICZ 2000

John Anthony Jolowicz; *On Civil Procedure*. Cambridge [etc.]: Cambridge University Press, 2000.

JOLOWICZ 2003

John Anthony Jolowicz; 'Adversarial and Inquisitorial Models of Civil Procedure'. *International and Comparative Law Quarterly* 52(2), 2003, p. 281-295.

JOLOWICZ & VAN RHEE 1999

John Anthony Jolowicz and C.H. van Rhee (Eds.); *Recourse against Judgements in the European Union*. The Hague [etc.]: Kluwer Law International, 1999

K**KAMENKA & TAY 1980**

Eugene Kamenka and Alice Erh-Soon Tay; *Law and Social Control*. New York: St. Martin's Press, 1980.

KANE 2018

Mary Kay Kane; *Civil Procedure*, 8th edition. St. Paul: Thomson/West, 2018.

KAPTEIN, PRAKKEN & VERHEIJ 2009

Hendrik Kaptein, Henry Prakken and Bart Verheij; *Legal evidence and proof: statistics, stories, logic*. Aldershot: Ashgate, 2009.

KARLEN 2014

Delmar Karlen; *Appellate Courts in the United States and England*, reprinted edition. New York: Quid Pro, 2014 [1964].

KAU 2007

Marcel Kau; *United States Supreme Court and Federal Constitutional Court of Germany: comparative and historical survey on the influence of the American model on German constitutional jurisdiction after 1945*. Berlin: Springer, 2007.

KELSEN 1931/2008

Hans Kelsen; *Wer soll der Hüter der Verfassung sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie*. Tübingen: Mohr Siebeck, 2008 [1931].

KELSEN 1942

Hans Kelsen; 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution'. *The Journal of Politics* 4(2), 1942, p. 183-200.

KESSLER 2017

Amalia D. Kessler; *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877*. New Haven [etc.]: Yale University Press, 2017.

KNIGHT 2012

C.J.S. Knight; 'The Supreme Court gives its reasons'. *The Law Quarterly Review* 128(4), 2012, p. 477-481.

KOCH 1999

Harald Koch; 'Germany'. In: John Anthony Jolowicz and C.H. van Rhee (Eds.); *Recourse against Judgements in the European Union*. The Hague [etc.]: Kluwer Law International, 1999.

KOCH & DIEDRICH 2006

Harald Koch and Frank Diedrich; *Germany*. The Netherlands: Kluwer Law International, 2006.

KODEK 2014

Georg.E. Kodek; 'Appellate Proceedings in Civil Cases – Traditional Remedies in Light of Contemporary Problems'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 35-52.

KORNHAUSER 2012

Lewis A. Kornhauser; 'Appeals and Supreme Courts'. In: Chris William Sanchirico (Ed.); *Procedural Law and Economics*, 2nd edition. Northampton [etc.]: Edward Edgar Publishing, 2012, p. 19-51.

KRAMER 2011

Adam Kramer; *Bewigged and Bewildered?: A Guide to Becoming a Barrister in England and Wales*, 2nd edition. Oxford [etc.]: Hart Publishing, 2011.

KRATKY DORÉ 1999

Laurie Kratky Doré; 'Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement'. *Notre Dame Law Review* 74(2), 1999, p. 283-402.

L**LA TORRE, PATTARO & TARUFFO 1991**

Massimo La Torre, Enrico Pattaro and Michele Taruffo; 'Statutory Interpretation in Italy'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Statutes. A Comparative Study*. Aldershot [etc.]: Dartmouth Publishing, 1991, p. 213-256.

LACABARATS 2007

Alain Lacabarats; 'Les outils pour apprécier l'intérêt d'un arrêt de la Cour de cassation'. *Recueil Dalloz* 2007(13), 2007, p. 889-891.

LAMANDA 2010

Vincent Lamanda; 'Préface'. In: Jean-François Weber; *La Cour de Cassation*. Paris: La documentation française, 2010, p. 7-9.

LAMARQUE 2012

Elisabetta Lamarque; *Corte costituzionale e giudici nell'Italia repubblicana*. Roma [etc.]: Laterza, 2012.

LASSER 2004

Mitchel Lasser; *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford [etc.], Oxford University Press, 2004.

LAWSON 1977

F.H. Lawson; 'Comparative Judicial Style'. *American Journal of Comparative Law* 25(2), 1977, p. 364-371.

LAYTON & MERCER 2014

Alexander Layton and Hugh Mercer (Eds.); *European Civil Procedure*, 2nd edition. London: Thomson, Sweet & Maxwell, 2014.

LE SUEUR 2004A

Andrew Le Sueur; 'The Conception of the New UK's Supreme Court'. In: Andrew Le Sueur (Ed.); *Building the UK's New Supreme Court. National and Comparative Perspective*. Oxford [etc.]: Oxford University Press, 2004, p. 3-20.

LE SUEUR 2004B

Andrew Le Sueur; 'Panning for Gold: Choosing Cases for Top-Level Courts'. In: Andrew Le Sueur (Ed.); *Building the UK's New Supreme Court. National and Comparative Perspective*. Oxford [etc.]: Oxford University Press, 2004, p. 271-292.

LE SUEUR & CORNES 2000

Andrew Le Sueur and Richard Cornes; 'What Do the Top Courts do?'. *Current Legal Problems* 53(1), p. 53-97.

LE SUEUR & CORNES 2001

Andrew Le Sueur and Richard Cornes; *The Future of the United Kingdom Highest Courts*. London: The Constitution Unit, 2001.
www.ucl.ac.uk/spp/publications/unit-publications/76.pdf.

LEABEATER et al. 2014

James Leabeater, James Purchas, Lynne McCafferly and Sean O'Sullivan; *Civil Appeals: Principle and Procedure*, 2nd edition. London: Sweet & Maxwell, 2014.

LECZYKIEWICZ 2013

Dorota Leczykiewicz; 'Horizontal Application of the Charter of Fundamental Rights'. *European Law Review* 38(4), 2013, p. 479-497.

LEE 1999

Thomas R. Lee; 'Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court'. *Vanderbilt Law Review* 52(647), 1999, p. 647-735.

LEGARRE & RIVERA 2006

Santiago Legarre and Julio César Rivera; 'Naturaleza y Dimensiones del "Stare Decisis"'. *Revista Chilena de Derecho* 33(1), 2006, p. 109-124.

LEGRAND 2003

Pierre Legrand; 'The Same and the Different'. In: Pierre Legrand and Roderick Munday (Eds.); *Comparative Legal Studies: Traditions and Transitions*. Cambridge [etc.]: Cambridge University Press, 2003, p. 240-311.

LEGRAND & MUNDAY 2003

Pierre Legrand and Roderick Munday (Eds.); *Comparative Legal Studies: Traditions and Transitions*. Cambridge [etc.]: Cambridge University Press, 2003.

LEIMAN 1957

Joan Maisel Leiman; 'The Rule of Four'. *Columbia Law Review* 57(7), 1957, p. 975-992.

LEMOSSE 2000

Maxime Lemosse; 'La Cour de cassation au dix-neuvième siècle'. In: Association des Magistrats et Anciens Magistrats de la Cour de Cassation (Eds.); *Le Tribunal et la Cour de Cassation 1790-1990*. Paris: Litec, 1990, p. 53-88.

LEVITA 2015

Luigi Levita (Ed.); *Il Ricorso Per Cassazione. La nuova disciplina del giudizio di legittimità*. Matelica: Nuova Giuridica, 2015.

LEYALAND 2016

Peter Leyland; *The Constitution of the United Kingdom. A Contextual Analysis*. Oxford [etc.]: Hart Publishing, 2016.

LINDBLOM 2000

Henrik Lindblom; 'The Role of the Supreme Courts in Scandinavia'. *Scandinavian Studies in Law* 39(1), 2000, p. 325-366.

LINZER 1979

Peter Linzer; 'The Meaning of Certiorari Denial'. *Columbia Law Review* 79(7),

1979. p. 1227-1305.

LIVINGSTON, MONATERI & PARISI 2015

Michael A. Livingston, Pier Giuseppe Monateri and Francesco Parisi; *The Italian Legal System. An Introduction*, 2nd edition. California: Stanford University Press, 2015.

LUCIDO & RAIMONDI 2015

Adriana Wilma Lucido and Roberta Raimondi; 'Gli Atti Processuali'. In: Luigi Levita (Ed.); *Il Ricorso Per Cassazione. La Nuova disciplina del giudizio di legittimità*. Matelica: Nuova Giuridica, 2015, p. 67-112.

LUHMANN 2008

Niklas Luhmann; *Law as a Social System*. New York: Oxford University Press, 2008.

LUNDMARK 2012

Thomas Lundmark; *Charting The Divide Between Common and Civil Law*. Oxford [etc.]: Oxford University Press, 2012.

LUXEMBOURG 2006

Fanny Luxembourg; 'La Cour de cassation : juge de fond'. *Recueil Dalloz* 2006 (34), 2006, p. 2358-2363.

M

MACCORMICK & SUMMERS 1997A

Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. Aldershot [etc.]: Ashgate/Darhmouth, 1997.

MACCORMICK & SUMMERS 1997B

Neil MacCormick and Robert S. Summers; 'Further General Reflections and Conclusions'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. Aldershot [etc.]: Ashgate/Darhmouth, 1997, p. 531-550.

MACIOCE 2015

Luigi Macioce; 'Il "filtro" per l'accesso al giudizio di legittimità'. In: Maria Acierno, Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015, p. 385-395.

MACKENZIE et al. 2010

Ruth Mackenzie, Cesare Romano, Yuval Shany with Philippe Sands; *Manual on International Courts and Tribunals*, 2nd edition. Oxford [etc.]: Oxford University Press, 2010.

MAK 2013

Elaine Mak; *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*. Oxford [etc.]: Hart Publishing, 2013.

MALINVAUD 2008

Philippe Malinvaud; *Introduction à l'étude du droit*, 12th edition. Paris: Litec, 2008.

MARCUS 2005

Richard Marcus; 'Putting American Procedural Exceptionalism into a Globalized Context'. *The American Journal of Comparative Law* 53(3), 2005, p. 709-740.

MARCUS 2014A

Richard Marcus; 'Appellate Review in the Reactive Model: The Example of The American Federal Courts'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 105-126.

MARCUS 2014B

Richard Marcus; 'A common law perspective on the Supreme Court and its functions'. In: Warsaw Conference; *The functions of the Supreme Court – issues of process and administration of justice*. Warsaw, 2014 (June). p. 1-32. Available online at: colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/Richard-Marcus.pdf.

MARCUS 2014C

Richard Marcus; "'American Exceptionalism" in Goals for Civil Litigation'. In Alan Uzelac (ed.); *Goals of civil justice and civil procedure in contemporary judicial systems*. Dordrecht [etc.]: Springer, 2014, p. 123-141.

MARINONI 2012

Luis Guilherme Marinoni; *Precedentes Obrigatórios*. Sao Paulo: Ed. Revista dos Tribunais, 2011.

MARSHALL 2011

Peter D. Marshall; 'Comparative Analysis of the Right to Appeal'. *Duke Journal of Comparative and International Law* 22(1), 2011, p. 1-46.

MASTERMAN 2010

Roger Masterman; *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*. New York: Cambridge University Press, 2010.

MASTOR 2012

Wanda Mastor; 'L'effet performatif des opinions séparées sur la motivation des décisions constitutionnelles majoritaires'. In: Fabrice Hourquebie and Marie-

Claire Ponthoreau (Eds.); *La motivation des décisions des cours suprêmes et cours constitutionnelles*. Brussels: Bruylant, 2012, p. 87-115.

MASTROBERTI & VINCI 2015

Francesco Mastroberti and Stefano Vinci (Eds.); *Le Supreme Corti de Giustizia nella Storia Giuridica del Mezzogiorno*. Napoli: Editoriale Scientifica, 2015.

MATHIEU 2011

Bertrand Mathieu; 'Le Conseil Constitutionnel "legislateur positif" ou la question des interventions du juge constitutionnel français dans l'exercice de la fonction législative'. In: Allan Randolph Brewer-Carías (Ed.); *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge [etc.]: Cambridge University Press, 2011. p. 471-496.

MERRYMAN & PEREZ-PERDOMO 2007

John Henry Merryman and Rogelio Pérez-Perdomo; *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America*, 3th edition. California: Stanford University Press, 2007.

MERTON 1968

Robert K. Merton; *Social Theory and Social Structure*, enlarged edition. New York: Free Press, 1968.

MICHAELS 2006

Ralf Michaels; 'The Functional Method of Comparative Law'. In: Mathias Reimann and Reinhard Zimmermann (Eds.); *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2006, p. 339-382.

MIDÓN 2011

Marcelo Sebastián Midón; 'Ventajas e inconvenientes de dividir en salas la Corte Suprema de Justicia de la Nación'. In: Eduardo Oteiza (Ed.); *Cortes Supremas: Funciones y Recursos Extraordinarios*. Santa Fe, Argentina: Rubinzal-Culzoni, 2011, p. 211-217.

MILLS 1982

Richard Henry Mills; 'Caseload Explosion: The Appellate Response'. *John Marshall Law Review* 16(1), 1982, p. 1-26.

MITIDEIRO 2013

Daniel Mitideiro; *Cortes Superiores e Cortes Supremas. Do Controle à Interpretação, da Jurisprudência ao Precedente*. São Paulo: Thomson Reuters/Revista dos Tribunais, 2013.

MITIDIERO 2015

Daniel Mitidiero; 'The Ideal Court of Last Resort: A Court of Interpretation and Precedent'. *International Journal of Procedural Law* 5(2), 2015, p. 201-218.

MONTESQUIEU 1747

Charles de Secondat Montesquieu; *De l'esprit des lois*. Oxford: Voltaire Foundation, 1998 [1747].

MORÉTEAU & PARISE 2009

Oliver Moreteau and Agustín Parise; 'Recodification in Louisiana and Latin America'. *Tulane Law Review* 83(4), 2009, p. 1103-1162.

MORRISON 1996

Alan B. Morrison; 'Litigation'. In: Alan B. Morrison (Ed.); *Fundamental of American Law*. New York: Oxford University Press, 1996.

MOSCHZISKER 1924

Robert von Moschzisker; 'Stare Decisis in Courts of Last Resort'. *Harvard Law Review* 37(4), 1924, p. 409-430.

MOSQUERA & MATURANA 2010

Mario Mosquera and Cristián Maturana; *Los Recursos Procesales*. Santiago [Chile]: Editorial Jurídica de Chile, 2010.

MULLER & LOTH 2009

Sam Muller and Marc Loth (Eds.) *Highest Courts and the Internationalization of Law. Challenges and Changes*. The Hague, The Netherlands: Hague Academic Press, 2009.

MULLER & RICHARDS 2010

Sam Muller and Sidney Richards (Eds.); *Highest Courts and Globalization*. The Hague, The Netherlands: Hague Academic Press, 2010.

MUNDAY 2002

Roderick Munday; 'All for One and One for All. The Rise to Prominence of the Composite Judgements within the Civil Division of the Court of Appeals'. *Cambridge Law Journal* 61(2), 2002, p. 321-350.

MUNSON 1910

F. Granville Munson; 'Does the Court Make or Interpret the Law?' *University of Pennsylvania Law Review and American Law Register* 58(6), 1910, p. 365-375.

MURRAY 2013

Charles Murray; *American Exceptionalism: An Experiment in History*. Washington D.C.: AEI Press, 2013.

MURRAY & STÜRNER 2004

Peter L. Murray and Rolf Stürner; *German Civil Justice*. Durham: Carolina Academy Press, 2004.

N

NELKEN & ORÜCÜ 2007

David Nelken and Esin Orücü (Eds.); *Comparative Law. A Handbook*. Oxford: Hart Publishing, 2007.

NELSON 2000

William E. Nelson; *Marbury v. Madison. The Origins and Legacy of Judicial Review*. Lawrence: University Press of Kansas, 2000.

NEUBAUER & MEINHOLD 2017

David W. Neubauer and Stephen S. Meinhold; *Judicial Process: Law, Courts, and Politics in the United States*, 7th edition. Boston: Cengage Learning, 2017.

NEUBERGER 2009

David Neuberger; 'The Supreme Court: Is the House of Lords 'losing part of itself''. *The Young Legal Group of the British Friends of Hebrew University*, 2009 (December), p. 1-16.

webarchive.nationalarchives.gov.uk/20131202164909/judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-supreme-court-lecture-dec-2009.pdf.

NEUDORF 2012

Lorne Neudorf; 'The Supreme Court and the New Judicial Independence'. *Cambridge Journal of International and Comparative Law* 1(2), 2012. p. 25-43.

NEWLAND 1961

Chester A. Newland; 'Personal Assistants to the Supreme Court Justices: The Law Clerks'. *Oregon Law Review* 40(4), 1961, p. 299-317.

NORKUS 2015

Rimvydas Norkus; 'The Filtering of Appeals to the Supreme Courts', In: Network of the Presidents of the Supreme Judicial Courts of the European Union; *Dublin Conference*, 2015, p. 1-16. Available online at:

[www.lat.lt/download/1369/introductory%20report%20-%20the%20filtering%20of%20appeals%20to%20supreme%20courts%20\(president%20rimvydas%20norkus\).pdf](http://www.lat.lt/download/1369/introductory%20report%20-%20the%20filtering%20of%20appeals%20to%20supreme%20courts%20(president%20rimvydas%20norkus).pdf).

NOWAK & ROTUNDA 2004

John E. Nowak and Ronald D. Rotunda; *Constitutional Law*. 7th edition. St. Paul, Minnesita: Thomson West, 2004.

NÚÑEZ OJEDA 2008

Raúl Núñez Ojeda; 'El sistema de recursos procesales en el ámbito civil en un Estado democrático deliberativo'. *Revista Ius et Praxis* 14(1), 2008, p. 199-223.

O

O'CALLAGHAN & DUKES 1992

Jerome O'Callaghan and James O. Dukes; 'Media Coverage of the Supreme Court's Caseload'. *Journalism & Mass Communication Quarterly* 69(1), 1992, p. 195-203.

O'CONNOR 1984

Sandra O'Connor; 'Our Judicial Federalism'. *Case Western Reserve Law Review* 35(1), 1984, p. 1-12.

OLFATHER 2010

Chad M. Oldfather; 'Error Correction'. *Indiana Law Journal* 85(1), 2010, p. 49-85.

OLIVER 2006

Dawn Oliver; *Constitutional Reform In The United Kingdom*. New York: Oxford University Press, 2006.

OLIVER 2016

Craig Oliver; *Unleashing Demons: The Inside Story of Brexit*. New York: Quercus, 2016.

ORDE DES AVOCATS 2012

Ordre des avocats au Conseil d'Etat et à la Cour de Cassation (Eds.); *Le Juge de Cassation en Europe*. Paris: Dalloz, 2012.

ORTELLS RAMOS 2008A

Manuel Ortells Ramos (Ed.); *Los Recursos ante Tribunales Supremos en Europa: Appeals to Supreme Court in Europe*. Madrid: Difusión Jurídica, 2008.

ORTELLS RAMOS 2008B

Manuel Ortells Ramos; '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*". In: Manuel Ortells Ramos (Ed.); *Los Recursos ante Tribunales Supremos en Europa: Appeals to Supreme Court in Europe*. Madrid: Difusión Jurídica, 2008, p. 233-243.

ORTELLS RAMOS 2010

Manuel Ortells Ramos; 'La casación en España: Selección de recursos y carga de trabajo del Tribunal Supremo'. In: José Bonet Navarro and José Martín Pastor (Eds.); *El Recurso de Casación Civil*. Navarra: Aranzadi - Thomson Reuters, 2010.

ÖRÜCÜ 2007

Esin Örüçü; 'A General View of "Legal Families" and of "Mixing Jurisdictions."' In: Esin Örüçü and David Nelken (eds.); *Comparative Law: A Handbook*. Oxford [etc.]: Hart Publishing, 2007, p. 169-187.

OTEIZA 2009

Eduardo Oteiza; 'La función de las Cortes Supremas en América Latina: Historia, paradigmas, modelos, contradicciones y perspectivas'. *Revista Peruana*

de Derecho Procesal 14, 2009, p. 341-398.

OVERTON 1984

Ben F. Overton; 'A Prescription for the Appellate Caseload Explosion'. *Florida State University Law Review* 12(2), 1984, p. 205-237.

P

PAILLÁS 2008

Enrique Paillás, *Recurso de Casación en Materia Civil. Derecho Chileno y Comparado*. Santiago [Chile]: Editorial Jurídica de Chile, 2018.

PARISI 2006

Francesco Parisi; 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis'. *International Review of Law and Economics* 26(4), 2006, p. 519-535.

PARISE 2016

Agustín Parise; 'Judicial Decision-Making in Latin America – Unveiling the Dynamic Role of the Argentine Supreme Court'. In: Jürgen Basedow, Holger Fleischer and Reinhard Zimmermann (Eds.); *Legislators, Judges, and Professors*. Tübingen, Germany: Mohr Siebeck, 2016. p. 151-190.

PARISE 2017

Agustín Parise; *Ownership Paradigms in American Civil Law Jurisdictions. Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th Centuries)*. Leiden [etc.]: Brill Nijhoff, 2017.

PARSONS 1949

Talcott Parsons; *The Structure of Social Action; a study in social theory with special reference to a group of recent European writers*. New York: Free Press, 1949.

PARSONS 1951

Talcott Parsons; *The Social System*. New York: Free Press, 1951.

PARSONS 1962

Talcott Parsons; 'The Law and Social Control'. In: W.M. Evan, *Law and Sociology. Exploratory Essays*. New York: Free Press of Glencoe, 1962, p. 56-72.

PARSONS & SHILS 1951

Talcott Parsons and Edward Shils; *Toward a General Theory of Action*. Cambridge: Harvard University Press, 1951.

PASUTTI 2011

José Luis Pasutti; 'El ejercicio en pleno y salas de la competencias de los superiores tribunales'. In: Eduardo Oteiza (ed.); *Cortes Supremas: Funciones y Recursos Extraordinarios*. Santa Fe, Argentina: Rubinzal-Culzoni, 2011, p. 169-

190.

PATERSON 2013

Alan Paterson; *Final Judgment: The Last Law Lords and the Supreme Court*. Oxford [etc.]: Hart Publishing, 2013.

PAULSSON 2013

Jan Paulsson; *The Idea of Arbitration*. Oxford: Oxford University Press, 2013.

PECZENIK 1997

Aleksander Peczenik; 'The Binding Force of Precedent'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. Aldershot [etc.]: Ashgate/Darhmouth, 1997, p. 461-479.

PECZENIK 2009

Aleksander Peczenik; *On Law and Reason*, 2nd edition. Dordrecht [etc.]: Springer, 2009.

PEDERZOLI 2008

Patrizia Pederzoli; *La Corte costituzionale. Le istituzioni politiche in Italia*. Bologna: Il Mulino, 2008.

PERDRIAU 1994

André Perdriau; 'Les formations restreintes de la Cour de cassation'. *La Semaine Juridique* 23, 1994, p. 273-284.

PEREENBOOM & SCANLON 2005

Randal Preenboom and Kathleen Scanlon; 'An Untapped Dispute Resolution.' *The China Business Review* 32(4), 2005, p. 36-41.

PÉREZ-RAGONE & PESSOA 2015

Álvaro Pérez-Ragone and Paula Pessoa Pereira; 'Función de las cortes supremas de Brasil y Chile en la generación y gestión del precedente judicial entre lo público y lo privado'. *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 44(1), 2015, p. 173-214.

PERRY 1994

H.W. Perry Jr.; *Deciding to Decide. Agenda Setting in the United States Supreme Court*. Cambridge, Mass: Harvard University Press, 1994.

PETERS 2013

Christopher J. Peters (Ed.); *Precedent in the United States*. New York [etc.]: Springer, 2013.

PHILLIPS 2012

Nicholas Phillips; 'The Birth and First Steps of the UK Supreme Court'. *Cambridge Journal of International and Comparative Law* 1(2), 2012. p. 9-12.

PHILLIPSON 1999

Gavin Phillipson; 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' *The Modern Law Review* 62(2), 1999, p. 824-849.

PICARDI 2010

Nicola Picardi; 'La Corte di Cassazione. Alle origini dello Stato Repubblicano'. In: Gian Paolo Trifone, Vincenzo Carbone, Umberto de Martino, Pietro Rescigno and Nicola Picardi (Eds.); *La Corte di Cassazione. Dalle origini alle origini nostril*. Roma: Gangemi Editore, 2010, p. 51-68.

PICIERNO, MARTORANA & PIAZZA 2015

Francesca Picierno, Fabiola Martorana and Paolo Piazza; 'Il giudizio innanzi alla corte di cassazione'. In: Luigi Levita (Ed.); *Il Ricorso Per Cassazione. La Nuova disciplina del giudizio di legittimità*. Matelica: Nuova Giuridica, 2015, p. 113-179.

PLOTNIKOFF & WOOLFSON 2003

Joyce Plotnikoff and Richard Woolfson; *Evaluation of the impact of the reforms in the Court of Appeals (Civil Division)*, Department of Constitutional Affairs, Research Unit, 2003. Available online at: lexiconlimited.co.uk/wp-content/uploads/2013/01/courtofappeal.pdf.

PLUCKNETT 2010

Theodore Plucknett; *Concise History of the Common Law*, 5th edition. Indianapolis: Liberty Fund, 2010.

PONTHOREAU & HOURQUEBIE 2009

Marie-Claire Ponthoreau and Fabrice Hourquebie; 'The French *Conseil Constitutionnel*: An Evolving Form of Constitutional Justice'. In: Andrew Harding and Peter Leyland (Eds.); *Constitutional Courts. A Comparative Study*. London: Wildy, Simmonds & Hill Publishing, 2009, p. 81-101.

POPE 1975

Whitney Pope; 'Durkheim as a Functionalist'. *The Sociology Quarterly* 16(3), 1975, p. 361-379.

POPKIN 2007

William D. Popkin; *Evolution of the Judicial Opinion: Institutional and Individual Styles*. New York [etc.]: New York University Press, 2007.

POSNER 1983

Richard A. Posner; 'Will the Federal Courts of Appeals Survive until 1984?: An Essay on Delegation and Specialization of the Judicial Function'. *South California Law Review* 56(3), 1983, p. 761-791.

POSNER 1999

Richard Posner; *The Federal Courts. Challenge and Reform*, revised edition. Cambridge: Harvard University Press, 1999.

POUND 1942

Roscoe Pound. *Social Control Through Law*. New Haven: Yale University Press, 1942.

PROVINE 1980

Dories Marie Provine; *Case selection in the United States Supreme Court*. Chicago: University of Chicago Press, 1980.

Q**R****RADCLIFFE-BROWN 1935**

Alfred Reginald Radcliffe-Brown; 'On The Concept of Function in Social Science'. *American Anthropology* 37(9), 1935, p. 394-402.

RAZ 2009

Joseph Raz; *The Authority of The Law*, 2nd edition. New York: Oxford University Press, 2009.

REHNQUIST 2002

William H. Rehnquist, *The Supreme Court*. New York: Vintage, 2002.

REIMANN 2012

Mathias Reimann; 'Comparative Law and Neighbouring Disciplines'. In: Mauro Bussani and Ugo Mattei (Eds.); *The Cambridge Companion for Comparative Law*. New York: Cambridge University Press, 2012, p. 13-34.

REIMANN & ZIMMERMANN 2006.

Mathias Reimann and Reinhard Zimmermann (Eds.); *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2006.

RENNER 1949

Karl Renner; *The Institution of Private Law and Their Social Functions*. London: Routledge & K. Paul, 1949.

REYNOLDS 2002

William L. Reynolds; *Judicial Process*, 3rd edition. St.Paul: West Publishing, 2002.

REYNOLDS & RICHMAN 1978

William L. Reynolds and William M. Richman; 'The Non-Precedential Precedent--Limited Publication and No-Citation Rules in the United States Courts of Appeals'. *Columbia Law Review* 78(6), 1978, p. 1167-1208.

REYNOLDS & RICHMAN 1979

William L. Reynolds and William M. Richman; 'Limited Publication in the Fourth and Sixth Circuits'. *Duke Law Journal* 1979(3), 1979, p. 807-841.

REYNOLDS & RICHMAN 1981

William L. Reynolds and William M. Richman; 'An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform'. *The University of Chicago Law Review* 48(3), 1981, p. 573-631.

RICHMAN & REYNOLDS 1996

William M. Richman and William L. Reynolds; 'Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition'. *Cornell Law Review* 81(1), 1996, p. 273-342.

RICHMAN & REYNOLDS 2013

William M. Richman and William L. Reynolds; *Injustice on Appeal. The United States Courts of Appeals in Crisis*. Oxford [etc.]: Oxford University Press, 2013.

ROACH 2007

Kent Roach; 'Judicial Activism in the Supreme Court of Canada'. In: Brice Dickinson (Ed.); *Judicial Activism in Common Law Supreme Courts*. New York: Oxford University Press, 2007. p. 69-120.

ROBERTS 2007

Paul Roberts; 'Comparative Law for International Criminal Justice'. In: David Nelken and Esin Orücü (Eds.); *Comparative Law. A Handbook*. Oxford: Hart Publishing, 2007, p. 339-370.

ROBERTSON 2013

Cassandra Burke Robertson; 'The Right to Appeal'. *North Carolina Law Review* 91(4), 2013, p. 1219-1281.

ROEHNER & ROEHNER 1953

Edward T. Roehner and Sheila M. Roehner; 'Certiorari: What is a Conflict between Circuits?'. *University of Chicago Law Review* 20 (4), 1953, p. 656-665.

ROGOWSKI & GAWRON 2016

Ralf Rogowski and Thomas Gawron; 'Constitutional Litigation as Dispute Processing. Comparing the U.S. supreme Court and the German Federal Constitutional Court'. In: Ralf Rogowski and Thomas Gawron (Eds.); *Constitutional courts in comparison: the U.S. Supreme Court and the German Federal Constitutional Court*, 2nd edition. New York: Berghahn Books, 2016, p. 1-22.

RORDORF 2015A

Renato Rordorf; 'Questioni di diritto e giudizio di fatto'. In: María Acierno, Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015, p. 31-45.

RORDORF 2015B

Renato Rordorf; 'La nomofilachia nella dialettica Sezioni semplici-Sezioni unite e Cassazione-Corte costituzionale'. In: María Acierno, Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015, p. 537-553.

ROSELLI 2015

Federico Roselli; 'La motivazione della sentenza di cassazione'. In: María Acierno, Pietro Curzio and Alberto Giusti (Eds.); *La Cassazione Civile. Lezioni dei magistrati della Corte Suprema Italiana*, 9th edition. Bari: Cacucci Editore, 2015, p. 451-462.

ROUSSILLON & ESPULGAS 2015

Henry Roussillon and Pierre Espulgas; *Le Conseil constitutionnel*, 8th edition. Paris: Dalloz, 2015.

RUSCIANO 2012

Silvia Rusciano; *Nomofilachia e Ricorso in Cassazione*. Torino: G. Giappichelli Editore, 2012.

S**SÁNCHEZ POS 2010**

María Victoria Sánchez Pos; 'La *summa gravaminis* como presupuesto de procedibilidad del recurso de casación. Particular referencia a sus especialidades en la casación foral'. In: José Bonet Navarro and José Martín Pastor (Eds.); *El Recurso de Casación Civil*. Navarra: Aranzadi - Thomson Reuters, 2010. p. 511-522.

SANDS 2010

Phillipe Sands; 'Introduction and Acknowledgments'. In: Ruth Mackenzie, Cesare Romano, Yuval Shany with Philippe Sands; *Manual on International Courts and Tribunals*, 2nd edition. Oxford [etc.]: Oxford University Press, 2010, p. ix-xxi.

SAUVAGEAU, SCHNEIDERMAN & TARAS 2006

Florian Sauvageau, David Schneiderman and David Taras; *The Last Word: Media Coverage of the Supreme Court of Canada*. Vancouver: UBC Press, 2006.

SCALIA 1998

Antonin Scalia; 'Dissents'. *OAH Magazine of History* 13(1), 1998, p. 18-23.

SCHAUER 1998

Friederick Schauer; 'On The Supposed Defeasibility of Legal Rules'. *Current Legal Problems* 51(1), 1998, p. 223-240.

SCHLAICH & KORIOTH 2015

Klaus Schlaich and Stefan Korioth; *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen*. München: Verlag C.H. Beck, 2013.

SCHMITT 1931/1996

Carl Schmitt; *Der Hüter der Verfassung*. Berlin, Germany: Duncker & Humblot, 1996 [1931].

SCHMITZ 2006

Amy Schmitz; 'Untangling the Privacy Paradox in Arbitration'. *Kansas Law Review* 54(5), 2006, p. 1211-1253.

SCHWARTZ 1993

Bernard Schwartz; *A History of the Supreme Court*. New York [etc.]: Oxford University Press, 1993.

SEGAL & SPAETH 1999

Jeffrey A. Segal and Harold J. Spaeth; *Majority Rule or Minority Will: adherence to precedent in the US Supreme Court*. Cambridge [etc.]: Cambridge University Press, 1999.

SEGAL & SPAETH 2002

Jeffrey A. Segal and Harold J. Spaeth; *The Supreme Court and the Attitudinal Model Revisited*. Cambridge [etc.]: Cambridge University Press, 2002.

SEGRE 2012

Sandro Segre; *Talcott Parsons. An Introduction*. Lanham: University Press of America, 2012.

SEVERINI 2001

Centro Studi Giuridici e Politici and Centro Internazionale Magistrati 'Luigi Severini'; *Le Corti Supreme. Atti del Convegno*. Milano, Italy: Giuffrè, 2001.

SHAPIRO 1980

Martin M. Shapiro; 'Appeals'. *Law and Society Review* 14(3), 1980, p. 629-661.

SHAPIRO 1981

Martin M. Shapiro; *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1986.

SHAVELL 1995

Steven Shavell; 'The Appeals Process as a Mean of Error Correction'. *The Journal of Legal Studies* 24(2), 1995. p. 379-462.

SIEMS 2014

Mathias Siems; *Comparative Law*. Cambridge: Cambridge University Press, 2014.

SILVESTRI 1986

Elizabetta Silvestri; 'Access to the Court of Last Resort: A Comparative Overview'. In *Civil Justice Quarterly*, vol. 5, 1986, p. 304-320.

SILVESTRI 2001

Elizabetta Silvestri; 'Corti Supreme Europee: Accesso, Filtri e Selezione'. In: Centro Studi Giuridici e Policitic and Centro Internazionale Magistrati; *Le Corti Supreme. Atti del Convengno*. Milano: Giuffrè, 2001, p. 105-116.

SILVESTRI 2017

Elizabetta Silvestri; 'The Italian Supreme Court of Cassation: Of Misnomers and Unaccomplished Missions'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 229-245.

SLAPPER & KELLY 2016

Gary Slapper and David Kelly; *The English Legal System*, 17th edition. London [etc.]: Routledge, 2016.

SLOTNICK 1991

Elliot E. Slotnick; 'Media Coverage of Supreme Court Decision Making: Problems and Prospects'. *Judicature* 75(3), 1991, p. 128-142.

SLOTNICK & SEGAL 1998

Elliot E. Slotnick and Jennifer A. Segal; *Television News and the Supreme Court: All the News that's Fit to Air?.* Cambridge [etc.]: Cambridge University Press, 1998.

SOMMER 2014

Udi Sommer; *Supreme Court Agenda Setting: Strategic Behaviour During Case Selection*. New York: Palgrave MacMillan, 2014.

SONGER, SEGAL & CAMERON 1994

Donald R. Songer, Jeffrey A. Segal and Charles M. Cameron; 'The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions'. *American Journal of Political Science* 38(3), 1994, p. 673-696.

SORABJI 2014A

John Sorabji; 'Access to the Supreme Court - The English Approach'. In: Warsaw Conference; *The functions of the Supreme Court - issues of process and administration of justice*. Warsaw, 2014 (June). p. 1-22. Available online at: colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/SORABJI_Access-to-the-Supreme-Court-English-Approach.pdf.

SORABJI 2014B

John Sorabji; *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis*. Cambridge, U.K.; Cambridge University Press, 2014.

SPERTI 2017

Angioletta Sperti; *Constitutional Courts, Gay Rights and Sexual Orientation Equality*. Oxford [etc.]: Hart Publishing, 2017.

SPRIGGS & HANSFORD 2001

James F. Spriggs and Thomas G. Hansford; 'Explaining the Overruling of U.S. Supreme Court Precedent'. *The Journal of Politics* 65(4), 2001, p. 1091-1111.

SQUIRE 2008

Pevevill Squire; 'Measuring the Professionalization of U.S. State Courts of Last Resort'. *State Politics & Policy Quarterly* 8(3), 2008, p. 223-238.

STATON 2006

Jeffrey K. Staton; 'Constitutional Review and the Selective Promotion of Case Results'. *American Journal of Political Science* 50(1), 2006, p. 98-112.

STEYN 2002

Johan Steyn; 'The Case for a Supreme Court'. *Law Quarterly Review* 118(3), 2002, p. 382-396.

STONE SWEET 1992

Alec Stone Sweet; *The Birth of the Judicial Politics in France. The Constitutional Council in Comparative Perspective*. New York [etc.]: Oxford University Press, 1992.

STONE SWEET 2013

Alec Stone Sweet; 'Constitutional Courts'. In: Michel Rosenfeld and András Sajó (Eds.); *Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, p. 816-830.

STONE SWEET & BRUNELL 2004

Alec Stone Sweet and Thomas Brunell; 'Constructing a Supranational Constitution'. In: Alec Stone Sweet (Ed.); *The Judicial Construction of Europe*. New York: Oxford University Press, 2004, p. 45-107.

STRAS 2007

David R. Stras; 'The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process'. *Texas Law Review* 85(4), 2007, p. 947-998.

STÜRNER & SCHUMACHER 1998

Rolf Stürner and Robert Schumacher; 'Germany, Austria, Switzerland and Hungary'. In: Pelayia Yessiou-Faltsi (Ed.); *The Role of the Supreme Courts at the National and International Level*. Thessalonica: Sakkoulas Publisher, 1998, p. 205-222.

SUMMERS 1991

Roeber Summers; 'Statutory Interpretation in the United States'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Statutes. A Comparative*

Study. Aldershot: Dartmouth Publishing, 1991, p. 407-459.

SUMMERS 1997

Robert Summers; 'Precedents in the United States (New York)'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. (Aldershot: Dartmouth Publishing, 1997, p. 355-405.

SUNDE 2017

Jørn Øyrehagen Sunde; 'From Courts of Appeal to Courts of Precedent – Access to the Highest Courts in the Nordic Countries'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 53-76.

SUNSTEIN *et al.* 2006

Cass R. Sunstein, David Schkade, Lisa M. Ellman and Andres Sawicki; *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington D.C.: Brookings Institution Press, 2006.

SURRENCY 2002

Erwin C. Surrency; *History of the Federal Courts*, 2nd edition. New York: Oceana Publications, 2002.

T

TAFFARI 2015

Silvia Taffari; 'Il Ricorso per Cassazione e Gli Altri Mezzi di Gravame'. In: Luigi Levita (Ed.); *Il Ricorso Per Cassazione. La Nuova disciplina del giudizio di legittimità*. Matelica: Nuova Giuridica, 2015, p. 35-66.

TAMANAH 2004

Brian Z. Tamanaha; *On the Rule of Law. History, Politics, Theory*. New York: Cambridge University Press, 2004.

TARUFFO 1991

Michele Taruffo; *Il Vertice Ambiguo. Saggi sulla Cassazione Civile*. Bologna: Il Mulino, 1991.

TARUFFO 1997

Michele Taruffo; 'Institutional Factors Influencing Precedents'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. Aldershot [etc.]: Ashgate/Dartmouth, 1997, p. 437-460.

TARUFFO 1998

Michele Taruffo; 'Civil Law Countries'. In: Pelayia Yessiou-Faltsi (Ed.); *The Role of the Supreme Courts at the National and International Level*. Thessalonica: Sakkoulas Publisher, 1998, p. 101-126.

TARUFFO 2001A

Michele Taruffo; 'Aspetti fondamentali del processo civile di civil law e di common law'. *Il Foro Italiano* 124(11), 2001. p. 345-360.

TARUFFO 2001B

Michele Taruffo; 'Le Corti Supreme Europee: Accesso, Filtri, Selezione'. In: Centro Studi Giuridici e Policittic and Centro Internazionale Magistrati; *Le Corti Supreme. Atti del Convengno*. Milano: Giuffrè, 2001, p. 95-104.

TARUFFO 2009

Michele Taruffo; 'Las Funciones de las Cortes Supremas'. In: Michele Taruffo (Ed.); *Páginas sobre Justicia Civil*. Madrid: Marcial Pons, 2009, p. 93-106.

TARUFFO 2011A

Michele Taruffo; 'Le funzioni delle Corti Supreme. Cenni generali'. *Annuario di Diritto Comparato e di Studi Legislativi 2011*, 2011, p. 11-36.

TARUFFO 2012

Michele Taruffo; 'L'incerta trasformazione della Corte di cassazione italiana'. In: Chiara Besso and Sergio Chiarloni (Eds.); *Problemi e prospettive delle corti supreme: esperienze a confronto*. Napoli: Edizioni Scientifiche Italiane, 2012, p. 123-137.

TARUFFO & LA TORRE 1997

Michele Taruffo and Massimo La Torre; 'Precedent in Italy'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Precedents*. Aldershot [etc.]: Ashgate/Darhmouth, 1997, p. 141-188.

TIRIO 2000,

Fabio Tirio; *Il writ of certiorari davanti alla Corte suprema. Principi, strategie, ideologie*. Milano: Giuffrè, 2000.

TREBILCOCK & DANIELS 2008

Michael J. Trebilcock and Ronald J. Daniels; *The Rule of Law Reform and Development. Charting the fragile path of progress*. Cheltenham: Edward Elgar Publishing, 2008.

TREVIÑO 2008

A. Javier Treviño; *Talcott Parsons on Law and Legal System*. Newcastle: Cambridge Scholars Publishing, 2008.

TRIFONE 2010

Gian Paolo Trifone; 'La Cassazione nella Storia'. In: Gian Paolo Trifone, Vincenzo Carbone, Umberto de Martino, Pietro Rescigno and Nicola Picardi (Eds.); *La Corte di Cassazione. Dalle origini alle giorni nostril*. Roma: Gangemi Editore, 2010, p. 99-176.

TRIFONE *et al.* 2010

Gian Paolo Trifone, Vincenzo Carbone, Umberto de Martino, Pietro Rescigno and Nicola Picardi (Eds.); *La Corte di Cassazione. Dalle origini alle giorni nostril*. Roma: Gangemi Editore, 2010.

TROCKER & VARANO 2005

Nicolò Trocker and Vincenzo Varano; 'Concluding remarks'. In: Nicolò Trocker and Vincenzo Varano (Eds.); *The reform of civil procedure in comparative perspective*. Torino: G. Giappichelli, 2005, p. 243-267.

TROPER & GRZEGORCZYK 1997

Michel Troper and Christophe Grzegorzczk; 'Precedent in France'. In: Neil MacCormick and Robert S. Summers, *Interpreting Precedents*. Aldershot [etc.]: Ashgate/Darhmouth, 1997, p. 103-140.

TROPER, GRZEGORCZYK & GARDIES 1991

Michel Troper, Christophe Grzegorzczk and Jean-Louis Gardies; 'Statutory interpretation in France'. In: Neil MacCormick and Robert S. Summers (Eds.); *Interpreting Statutes. A Comparative Study*. Aldershot: Darhmouth Publishing, 1991, p. 171-211.

TULLOCK 1994

Gordon Tullock; 'Court Errors'. *European Journal of Law and Economics* 1(1), 1994, p. 9-21.

TUSHNET 2007

Mark Tushnet; 'The United States of America'. In: Brice Dickinson (Ed.); *Judicial Activism in Common Law Supreme Courts*. New York: Oxford University Press, 2007. p. 415-436.

U**UFF 2002**

Keith Uff; 'Civil Procedure'. In: Herbert M. Kritzer (Ed.); *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia, Volume I*: 2002, p. 309-310.

UK-CENSUS 2011

Office for National Statistics; *2011 Census: Population Estimates for the United Kingdom*. 2011. Available online at: webarchive.nationalarchives.gov.uk/20160105160709/www.ons.gov.uk/ons/dcp171778_292378.pdf.

UK CONSTITUTIONAL REFORM 2003

Department of Constitutional Affairs; *Constitutional Reform: a Supreme Court for the United Kingdom*. 2003. Available on line at: webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/supre

mecourt/supreme.pdf

UK JUDICIAL STATISTICS 2011

UK Ministry of Justice, *Judicial and Court Statistics 2010*. 2011.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/217516/judicial-court-stats.pdf.

UK JUDICIAL STATISTICS 2012

UK Ministry of Justice, *Judicial and Court Statistics 2011*. 2012.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf.

ULMER 1984

S. Sidney Ulmer; 'The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable'. *American Political Science Review* 78(4), 1984, p. 901-911.

UROFSKY 2015

Melvin I. Urofsky; *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue*. New York: Pantheon Books, 2015.

US CENSUS 2016

United States Census Bureau; *U.S. and World Population Clock*. 2016. Available online at:

www.census.gov/popclock/?intcmp=home_pop.

US CHIEF JUSTICE REPORT 2016

John G. Roberts Jr.; *2016 Year-End Report on the Federal Judiciary*. Washington D.C.: US Supreme Court – Public Information Office, 2016, p. 1-14. Available online at:

www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf.

US SUPREME COURT – CASELOAD 2016

US Supreme Court; *The Justices' caseload*. Available online at:

www.supremecourt.gov/about/justicecaseload.aspx.

UZELAC 2014A

Alan Uzelac; 'Goals of Civil Justice and Civil Procedure in the Contemporary World'. In: Alan Uzelac (Ed.); *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*. Dordrecht [etc.]: Springer, 2014, p. 3-33.

UZELAC 2014B

Alan Uzelac; 'Supreme Courts in the 21st Century: should organization follow the function?' In: Warsaw Conference; *The functions of the Supreme Court – issues of process and administration of justice*. Warsaw, 2014 (June). p. 1-12. Available online at:

colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/UZELAC_Supreme-Courts-in-the-21st-Century.pdf.

UZELAC & BRATKOVIC 2018

Alan Uzelac and Marki Bratkovic; 'Croatia: Supreme Court between Individual Justices and System Management'. In: Pablo Bravo-Hurtado (Ed.); *Overburdened Supreme Courts: Transplanting Solutions?* 2018 [forthcoming].

UZELAC & VAN RHEE 2014

Alan Uzelac and C.H. van Rhee; 'Appeals and Other Means of Recourse Against Judgments in the Context of the Effective Protection of Civil Rights and Obligations'. In: Alan Uzelac and C.H. van Rhee, (Eds.); *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge [etc.]: Intersentia, 2014, p. 3-13.

V**VALCKE 2004**

Catherine Valcke; 'Comparative law as a Comparative Jurisprudence: The Comparability of Legal Systems'. *American Journal of Comparative Law* 52(3), 2004, p. 713-740.

VAN CAENEGEM 1971

R.C. Van Caenegem; 'History of the European Civil Procedure'. In: Mauro Cappelletti (Ed.); *International Encyclopaedia of Comparative Law, Volume XVI (Civil Procedure)*. Tübingen [etc.]: J.C.B. Mohr, 1971, p. 11-111.

VAN DAM 2014

Cees van Dam; *European Tort Law*, 2nd edition. Oxford: Oxford University Press, 2014.

VAN DE SCHYFF 2010

Gerhard van de Schyff; *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa*. Dordrecht [etc.]: Springer, 2010.

VAN ERP 2013

J.H.M. van Erp; 'The Functional Comparative Method in European Property Law – C. Godt Some Comments'. *European Property Law Journal* 2(1), 2013, p. 90-94.

VAN RHEE 2005

C.H. (Remco) van Rhee; 'Introduction'. In: C.H. van Rhee (Ed.); *European Traditions in Civil Procedure*. Antwerp [etc.]; Intersentia, 2005, p. 3-23.

VAN RHEE 2008

C.H. (Remco) van Rhee (Ed.); *Judicial Case Management and Efficiency in Civil Litigation*. Antwerp: Intersentia, 2008.

VAN RHEE & FU 2014

C.H. (Remco) van Rhee and Fu Yulin (Eds.); *Civil Litigation in China and Europe. Essays on the Role of the Judge and the Partise*. Dordrecht [etc.]: Springer, 2014.

VAN RHEE & FU 2017

C.H. (Remco) van Rhee and Fu Yulin; 'Introduction'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 1-12.

VAN RHEE & UZELAC 2010

C.H. (Remco) van Rhee and Alan Uzelac (Eds.); *Enforcement and Enforceability: Tradition and Reform*. Antwerp [etc.]: Intersentia, 2010.

VERKERK & VAN RHEE 2017

R.R. Verkerk and C.H. (Remco) van Rhee; 'The Supreme Cassation Court of The Netherlands: Efficient Engineer for the Unity and Development of the Law'. In: C.H. (Remco) van Rhee & Yulin Fu (Eds.); *Supreme Courts in China and in the Western: Adjudication at the Service of Public Goals*. Cham: Switzerland: Springer, 2017, p. 77-96.

VIGNEAU 2010

Vincent Vigneau; 'Le régime de la non-admission des pourvois devant la Cour de cassation'. *Recueil Dalloz* 2, 2010. p. 102-112.

VINING & WILHELM 2011

Richard L. Vining and Teena Wilhelm; 'Measuring Case Salience in State Courts of Last Resort'. *Political Research Quarterly* 64(3), 2011, p. 559-572.

VINX 2015

Lars Vinx (Ed.); *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the limits of law*. United Kingdom: Cambridge University Press, 2015.

W**WALDRON 1999**

Jeremy Waldron; *Law as Disagreement*. Oxford [etc.]; Oxford University Press, 1999.

WALDRON 2006

Jeremy Waldron; 'The Core of the Case Against Judicial Review'. *Yale Law Journal* 115(6), 2006, p. 1346-1406.

WALTON 2002

Douglas Walton; *Legal Argumentation and Evidence*. University Park: Pennsylvania State University Press, 2002.

WALUCHOW 2009

Wil J. Waluchow; *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge [etc.]: Cambridge University Press, 2009.

WARD & AKHTAR 2011

Richard Ward and Amanda Akhtar; *Walker & Walker's English Legal System*, 11th edition. Oxford [etc.]: Oxford University Press, 2011.

WARD & CASTILLO 2005

Kenneth D Ward and Cecilia R. Castillo (Eds.); *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory*. New York: State University of New York Press, 2005.

WATSON 1993

Alan Watson; *Legal Transplants: An Approach to Comparative Law*, 2nd edition. Georgia: A University of Georgia Press, 1993.

WEBER 1922

Max Weber; 'Die drei reinen Typen der legitimen Herrschaft'. *Preussische Jahrbücher* 187(1), 1922.

WEBER 2004

Jeremy Weber; 'Supreme Courts, independence and democratic agency'. *Legal Studies* 24(1-2), 2004, p. 55-72.

WEBER 2010A

Jean-François Weber; *La Cour de Cassation*. Paris: La documentation française, 2010.

WEBER 2010B

Jean-François Weber; *Du moyen à l'arrêt: la technique de cassation au service du droit*. Paris: Cour de Cassation, 2010, p. 1-5 [manuscript]. Available online at: www.courdecassation.fr/IMG/File/moyen_arrt_discours_JFWeber_150310.pdf

WEBER 2015

Jean-François Weber; 'L'accès au juge de cassation et le traitement des pourvois par la cour de cassation française'. In: Guillaume Drago, Bénédicte Fauvarque-Cosson and Marie Goré (Eds.); *L'accès au juge de cassation. Colloque du 15 juin 2015*. Paris: Société de Législation Comparée, 2015, p. 59-81.

WEBER et al. 2012

Jean-François Weber (Ed.); *Droit et pratique de la cassation en matière civile*. Paris: LexisNexis, 2012.

WHEELER 2004

Russel R. Wheeler; 'Intermediate Courts of Appeals and Their Relations with Top-level Courts: The US Federal Judicial Experience'. In: Andrew Le Sueur

(Ed.); *Building the UK's New Supreme Court. National and Comparative Perspective*. Oxford [etc.]: Oxford University Press, 2004, p. 237-270.

WHEELER & WILLIAMS 2007

Fiona Wheeler and John Williams; 'Restrained Activism in the Supreme Court of Australia'. In: Brice Dickinson (Ed.); *Judicial Activism in Common Law Supreme Courts*. New York: Oxford University Press, 2007, p. 19-68.

WHELAN 1990

Christopher J. Whelan (Ed.); *Small Claims Courts: A Comparative Study*. Oxford: Clarendon Press, 1990.

WHITE & OVEY 2010

Robin C.A. White and Clare Ovey; *The European Convention of Human Rights*. 5th edition. Oxford: Oxford University Press, 2010.

WIJFFELS 2013A

Alain Wijffels; 'Introduction. European Legal History and the Diversity of Supreme Judicature'. In: A.A. Wijffels and C.H. van Rhee (Eds.); *European Supreme Courts. A Portrait through History*. London: Third Millenium Publishing, 2013, p. 14-37.

WIJFFELS 2013B

Alain Wijffels; 'Late-Medieval and Early-Modern France'. In: A.A. Wijffels and C.H. van Rhee (Eds.); *European Supreme Courts. A Portrait through History*. London: Third Millenium Publishing, 2013, p. 62-73.

WIJFFELS 2013C

Alain Wijffels; 'France from the Revolution to the Present'. In: A.A. Wijffels and C.H. van Rhee (Eds.); *European Supreme Courts. A Portrait through History*. London: Third Millenium Publishing, 2013, p. 74-85.

WIJFFELS & VAN RHEE 2013

Alain Wijffels and C.H. van Rhee (Eds.); *European Supreme Courts. A Portrait through History*. London: Third Millenium Publishing, 2013.

WOODHOUSE 2004

Diana Woodhouse; 'The constitutional and political implications of a United Kingdom Supreme Court'. *Legal Studies* 24(1-2), 2004, p. 134-155.

WOODHOUSE 2007

Diana Woodhouse; 'United Kingdom The Constitutional Reform Act 2005 – defending judicial independence the English way'. 2007, p. 153-165.

WOODLEY 2009

Mich Woodley (Ed.); *Osborn's Concise Law Dictionary*, 11th edition. London: Sweet & Maxwell, 2009.

WOOLF 1996

Harry Woolf; *Access to Justice. Final Report*. London: HMSO, 1996.

X**Y****YESSIOU-FALTSI 1998**

Pelayia Yessiou-Faltsi (Ed.); *The Role of the Supreme Courts at the National and International Level*. Thessalonica: Sakkoulas Publisher, 1998.

Z**ZALESKI 2010**

Pawel Zaleski; 'Ideal Types in Max Weber's Sociology of Religion: Some Theoretical Inspirations for a Study of the Religious Field'. *Polish Sociological Review* 171(3), 2010, p. 319-325.

ZOPPELLARI 2010

Mario Zoppellari; 'Casación y Monofilaxis: el principio de derecho en el interés de la ley y el pronunciamiento a sesioni unite'. In: José Bonet Navarro and José Martín Pastor (Eds.); *El Recurso de Casación Civil*. Navarra: Aranzadi-Thomson Reuters, 2010, p. 663-675.

ZUCKERMAN 2006

Adrian Zuckerman; *Zuckerman on Civil Procedure*, 2nd edition. London: Thomson/Sweet & Maxwell, 2006.

ZUCKERMAN 2013

Adrian Zuckerman; *Zuckerman on Civil Procedure*, 3rd edition. London: Thomson/Sweet & Maxwell, 2013.

ZWEIGERT & KÖTZ 1998

Konrad Zweigert and Hein Kötz; *Introduction to Comparative Law*, 3rd edition (translation from German by Tony Weir). Oxford: Clarendon Press, 1998.

VALORISATION

TABLE OF CONTENTS

VALORISATION.....	435
A. Relevance.....	436
B. Target groups	437
C. Innovative activities	438
D. Diffusion.....	439

The purpose of scientific research is not solely to increase knowledge. Scientific research aims at having an impact beyond the walls of the university, as well. The new knowledge needs to translate into concrete actions that help to improve society.¹ This practical purpose guides not only the hard sciences – physics, chemistry and biology, Accordingly, this section on ‘valorisation’ is meant to highlight the value of the concrete actions that result from this comparative law research. As we shall see in the following paragraphs, the findings are relevant in several ways, which are of interest for different target groups, allowing a number of innovative applications that deserve diffusion beyond the particular jurisdictions under study.

¹ Regulation governing the attainment for doctoral degree in the Maastricht University (2013), p. 51.

A. Relevance

In general, the value of comparative research on the courts of last resort comes from the important role that this type of court plays for the Rule of Law. Democratic states aim at implementing legal systems in which rights and obligations apply in the same manner to every case.² Achieving such legal uniformity is relevant from both a societal and an economic perspective. From a social point of view, achieving legal uniformity ensures the right to equality before the law of all citizens.³ From an economic perspective, a well-functioning court of last resort that guarantees the uniform application of the law promotes a predictable legal environment for long-term investments and business. Comparative research on courts of last resort reveals that, even if jurisdictions may share this final goal of legal uniformity, they follow quite different paths to (try to) achieve it.⁴ In particular, this research demonstrated that a 'Diagonal Symmetry' exists among the US, England, France and Italy. The Diagonal Symmetry Thesis means that these four jurisdictions perform similar judicial functions but at different levels of the court hierarchy.

First, legislation that enshrines these rights and obligations tend to have an 'open texture' that could create problems of interpretation – such as contradictions, ambiguities and loopholes, among others.⁵ If these interpretation problems remain unsolved, the Rule of Law will not be accomplished, because the law will not apply in an equal manner due to the diversity of possible interpretations.⁶ Accordingly, one of the main functions of the courts of last resort is to solve these interpretation problems through judgments that can be used by lower courts as interpretation guidelines (judicial lawmaking).⁷ According to the Diagonal Symmetry Thesis, the US and English (UK) jurisdictions perform this judicial lawmaking function at the third hierarchical level of their supreme courts; whereas France and Italy perform an equivalent judicial lawmaking function at the (hidden) fourth level of the plenary sessions in their cassation courts.

Second, even if the interpretation problems were already solved, it is important to make sure that lower courts follow the uniform interpretation guidelines.⁸ For that purpose, a court or set of courts that perform an error-monitoring function becomes necessary too.⁹ According to the Diagonal Symmetry Thesis, the US and England perform that error-monitoring function at the second hierarchical level of their intermediate appellate courts; whereas France and Italy perform an

² HABERMAS 2008, p. 12-20.

³ DICEY 1979, p. 100.

⁴ BRAVO-HURTADO 2014, p. 325-327.

⁵ HART 1958/2012, p. 124-136; cfr., FULLER 1958, p. 630-672.

⁶ RAZ 2009, p. 214.

⁷ HAZARD & TARUFFO 1993, p. 183.

⁸ SHAPIRO 1980, p. 629.

⁹ UZELAC & VAN RHEE 2014, p. 3.

equivalent error-monitoring function at the third level of the ordinary chambers in their cassation courts.

B. Target groups

(a) *Jurists*. Legal scholars are the first target group that benefits from this research. Since comparative law research should be conducted between legal institutions that perform similar functions, the Diagonal Symmetry Thesis helps to identify the comparable courts (which could be located at different hierarchical levels) between which to conduct further comparative law research properly.

(b) *Academics*. Scholars from disciplines different than Law will benefit too. Academics from Economics and Political Science, for instance, also have an interest in researching the behaviour of the courts of last resort. When these academics apply their methodologies to conduct comparative research, however, they may face the problem that two given courts are not comparable (despite the same hierarchical level or similar denomination) since the equivalent judicial function could be performed by another court. The Diagonal Symmetry Thesis, therefore, will help academics from other disciplines to avoid these problems of comparability.

(c) *Judges*. The judiciary of all hierarchical levels, and particularly the members of the courts of last resort, will find useful insights from this research. Judges may better understand and improve their practices by comparison with other jurisdictions. Accordingly, the Diagonal Symmetry Thesis could help judges to identify the foreign courts against which to compare their practices.

(d) *Lawyers*. Legal practitioners, especially if they are involved in litigation in several jurisdictions, will find useful guidance, as well. As this research demonstrated, courts of different jurisdictions look considerably different at first sight (horizontal asymmetry). From a diagonal perspective, instead, a lawyer may navigate better inside the court system of other jurisdictions by knowing that the comparable courts could be located at different hierarchical levels.

(e) *International corporations*. Corporations that face the option of litigating in more than one jurisdiction will benefit from the findings of this research, too. Since jurisdictions such as the US, England, France and Italy differ as to the level of the court hierarchy at which judicial functions are performed, corporations can make a more informed decision about the jurisdiction in which it is more convenient for them to conduct litigation according to their interests and expectations.

(f) *Policymakers*. Finally, judicial reforms will also benefit from the findings of this research. Comparative experiences are an essential tool to design reforms. Therefore, policymakers may use the Diagonal Symmetry Thesis to design reforms

based on the comparable courts from other jurisdictions, regardless of the level of the court hierarchy or local denomination.

C. Innovative activities

This research opens the opportunity to conduct comparative studies in an innovative way. In general, comparative studies have several applications beyond the purely academic sphere. For instance, individuals and corporations, as one target group previously mentioned, engaged in businesses in more than one country need to be informed about the legal advantages and disadvantages of conducting their businesses in one country or the other. Comparative studies provide that information about the legal differences between jurisdictions.¹⁰ Traditionally, however, comparative studies of courts have been conducted by comparing courts at the same hierarchical level (horizontal perspective) or the courts with a similar denomination.¹¹ According to the Diagonal Symmetry Thesis, however, comparative studies should expand the analysis to the comparison of courts that are located at different hierarchical levels too. This change from a horizontal to a diagonal perspective led to new findings in this research and would reveal innovative applications in other fields, both in the substantive and in the procedural law.

As regards the substantive law, a reliable comparative study cannot be limited to the comparison of the black letter of the national legislation. Additionally, it is equally important to compare how the courts interpret and apply that legislation in practice (case law). The Diagonal Symmetry Thesis creates awareness of the complexities when conducting comparative case law studies between courts of different jurisdictions. The reason for this is that the functions of the judgments delivered by judicial lawmaking or error-monitoring courts are different in several aspects. For instance, judgments of judicial lawmaking courts are meant to resolve a few hard cases with complex interpretation problems. The judgments of error-monitoring courts, on the other hand, are meant to deal with relatively numerous easier cases in which a well-settled interpretation needs to be reaffirmed. Therefore, the conclusions of a comparative case law analysis in a given legal field – e.g., property law, contracts or torts – could be misleading if the comparison is made between hard cases (judicial lawmaking court) vis-à-vis easy cases (error-monitoring court). To solve the problem, an adequate case law comparison should be conducted between courts at different hierarchical levels. As a result of the new diagonal perspective, therefore, further comparative studies of the substantive law

¹⁰ DANNEMANN 2006, p. 404-405.

¹¹ Horizontal studies on courts of last resort, for example, SILVESTRI 1986; JOLOWICZ 1998; TARUFFO 1998; FERRARIS 2015; VAN RHEE & FU 2017; on intermediate appellate courts, for example, JOLOWICZ 1999, p. 8-9; UZELAC & VAN RHEE 2014, p. 3-10; MARCUS 2014A, p. 108-110.

will be more reliable, since the case law comparison will be made between the previous judgments delivered by courts that perform equivalent judicial functions.

As regards the procedural law, comparative studies can also be applied to make decisions on the forum for litigation. For corporations engaged in international activities, the differences between the local court systems are an important factor in the context of possible litigation, especially when arbitration alternatives are not available. For such international corporations, therefore, the findings of this research will be useful in making better decisions on the forum of litigation, since they will realise that the court systems differ as to the hierarchical level at which the judicial functions are performed. Based on the Diagonal Symmetry Thesis, for instance, one may anticipate that, according to actual court practice, litigation can be prolonged to higher hierarchical levels in France and Italy than in the US and England.

Another application of comparative studies is the formulation of policy recommendations. Policymakers make extensive use of comparative studies in order to formulate reforms.¹² Currently, however, when policymakers design reforms that change the function of the court of last resort, they face the problem of resistance to the 'transplant' of foreign legal institutions. For instance, restricting access filters or increasing the binding force of the judgments delivered by the court of last resort in a civil law jurisdiction may be seen as the (problematic) transplantation of judicial functions that are better suited for common law jurisdictions instead. But based on the findings of this research, such judicial reforms can be designed in an innovative manner, solving that problem. The Diagonal Symmetry Thesis demonstrates, quite the contrary, that these jurisdictions have equivalent judicial functions but performed at different hierarchical levels. Therefore, from now on judicial reforms that change the function of the court of last resort can be designed, not based on foreign experiences, but by observing local experiences on how certain judicial functions are performed at higher or lower hierarchical levels and 'relocating' these functions within the court system. An example of how the comparative findings of this research can be applied to formulate policy recommendations will be detailed in the next section as regards Chile.

D. Diffusion

The findings of this research are useful, first, for the jurisdictions under study. Accordingly, the diffusion of experiences may cover the US, England, France and Italy. On the one hand, the intermediate appellate courts of the US federal system

¹² DANNEMANN 2006, p. 403.

and England face a current case overload crisis.¹³ According to the Diagonal Symmetry Thesis, the diffusion in the US and England of the French and Italian experiences when dealing with case overload at the cassation ordinary chambers can be useful in solving, or at least in better understanding, the crisis that US and English intermediate appellate courts face since they share the error-monitoring function. On the other hand, the diffusion in France and Italy of the experiences of the US and UK supreme courts can be useful in improving the performance of the French and Italian cassation plenary sessions since they share, more or less explicitly, a judicial lawmaking function.

The findings of this research, however, can be useful not just for the particular jurisdictions under study. Other common law jurisdictions that follow the US and English examples, on the one hand, and cassation jurisdictions that follow the French and Italian examples, on the other, may benefit from the Diagonal Symmetry Thesis, as well. Therefore, diffusion may include other jurisdictions too. Accordingly, the results of this research were presented at forums in the Netherlands (Maastricht), Norway (Bergen), China (Beijing), Croatia (Dubrovnik), Russia (Kazan) and in several cities of Chile (Santiago, Valparaíso, Valdivia).

Chile is an interesting example of how the findings of this research have been ‘exported’ beyond the jurisdictions under study. Currently, Chile is undergoing an entire reform of its civil procedure, which includes the modification of the recourse in civil matters (*casación en el fondo*) before the court of last resort (*Corte Suprema*).¹⁴ The design of the new recourse of last resort for Chile, therefore, may benefit from the Diagonal Symmetry Thesis too. Consequently, during 2014 the PhD candidate Mr Bravo-Hurtado participated in a round table of national experts on the Supreme Court, convened by the Chilean Ministry of Justice. On that occasion, Mr Bravo-Hurtado contributed with his comparative findings of this research to the collective design of the Bill project for a new recourse of last resort in civil matters for Chile.

In sum, revealing the hidden similarities between jurisdictions, as this research accomplished, helps to build bridges. If the court systems of two or more jurisdictions are now seen as sharing more similarities than differences, everyone – from lawyers and legal scholars to policymakers – will be open to learning from each other’s judicial experiences. As ZWEIGERT & KÖTZ once wrote: ‘[T]he legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.’¹⁵ According to the findings of this research, that statement is now particularly true as regards the courts of last resort as well. The Diagonal Symmetry Thesis will promote the circulation across nations of the different approaches, which may have

¹³ For the US, RICHMAN & REYNOLDS 2013; For England, DREWRY, BLOM-COOPER & BLAKE 2007, p. 124.

¹⁴ BRAVO-HURTADO 2017, p. 149-174.

¹⁵ ZWEIGERT & KÖTZ 1998, p. 34.

similar results, in order to solve the common problem of improving the functioning of our court systems.

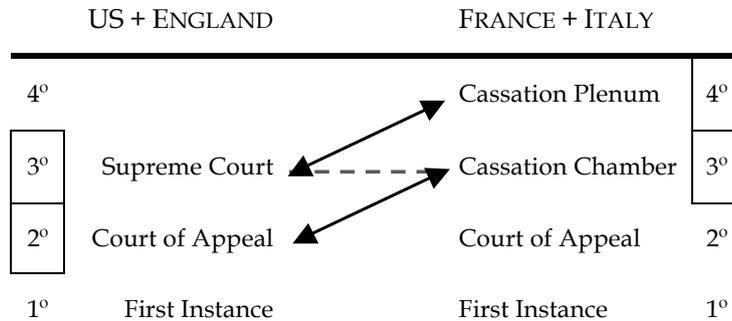
SUMMARIES

SUMMARIES	443
A. English	443
B. French.....	445
C. Italian	447
D. Spanish.....	449
E. Russian.....	452

A. English

This dissertation, titled *'Supreme Courts and Courts of Cassation: A Diagonal Symmetry'*, is a comparative study of the judicial functions of the courts of last resort in civil matters of two pairs of jurisdictions that belong to the common law (US and England) and the civil law (France and Italy). The methodology consists of the comparison of eight functional attributes of these courts – *i.e.*, scope of review, effects of the judgment, decision exposure or publication, opinion style, caseload, panel composition, total size and preliminary screening (access filters) – but for the purposes of this Summary, let us concentrate on two of these attributes: the effects of the judgments and the opinion style. The main findings challenge the orthodox view about the divide between the common law and the civil law as regards their (apparently) different judicial functions. The research demonstrates that, in reality, both pairs of jurisdictions have courts with similar judicial functions, but located at different levels of the court hierarchy, as follows.

Figure I : Summary – A Diagonal Symmetry



According to the orthodox view of comparative law, common law jurisdictions such as the US and England are characterised by, among other aspects, decisions that have a strong force to change the decision criteria of future cases (binding precedents) and judgments that include dissenting opinions. Civil law jurisdictions such as France and Italy – the orthodox view continues – are characterised, quite the contrary, by judicial decisions of a weaker force, because only a trend of several judgments in the same direction may change the criteria of future cases (*jurisprudence constante*) and expressing dissenting opinions among judges is not allowed.

That orthodox divide between the common law and the civil law certainly holds true from a ‘horizontal’ perspective – that is to say, when comparing courts located at the same 3rd level of each pair of jurisdictions: the supreme courts of the US and UK *vis-à-vis* the ‘chambers’ of the courts of cassation of France and Italy. Indeed, the judgments of the US and UK supreme courts have a strong binding force and dissenting opinions are rather common. On the other hand, the decisions delivered by the ordinary chambers of the French and Italian cassation courts do not enjoy an equivalent binding force and their judgments omit any kind of dissenting opinion.

The same orthodox divide, however, does not hold true if we change our perspective from a horizontal one to a ‘diagonal’ one, comparing courts at different hierarchical levels. As this dissertation demonstrates through the comparison of the eight attributes relevant to the courts’ functioning, France and Italy also exhibit judicial organs that perform similar functions as the US and UK supreme courts, but at a hidden higher level. The strong force of decisions in guiding future cases and (rudimentary forms of) dissenting opinions can be found not in the ordinary chambers but in the ‘plenary sessions’ of the French and Italian cassation courts. Therefore, the ‘common law’ judicial function found at the 3rd level of the US and UK supreme courts is also present – however, phrased in a different manner and not always explicitly admitted – at the hidden 4th level of the cassation *plenum* in France and Italy.

Additionally, this dissertation demonstrates that the judicial functions of the ordinary chambers in the French and Italian cassation courts can also be found in the common law jurisdictions of the US and England, but at a lower court level. As a reaction to the case overload crisis, the US and English intermediate appellate courts now deliver judgments that have a much weaker precedential force (comparable to the *jurisprudence constante*

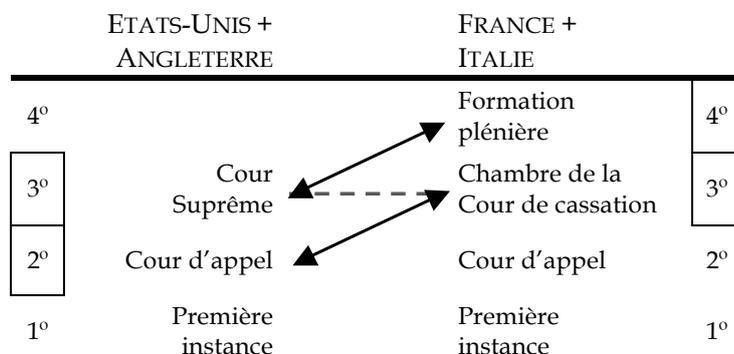
system), judgments in which dissenting opinions are becoming impractical and exceptional. Therefore, the judicial function that according to the orthodox view is proper of the civil law is becoming more and more apparent at the 2nd court level in the US and England as well.

These findings – called the ‘Diagonal Symmetry’ thesis – are relevant for several reasons. First, the diagonal symmetry invites us to reformulate the divide between the common law and the civil law. From now on, the real divide is not in the distinctive judicial functions of each legal tradition, but at the court level in which the equivalent judicial functions are present. Second, the diagonal symmetry changes the relevant question that further comparative law studies should answer. From now on, the relevant question is not why the common law and the civil law have different judicial functions, but why civil law jurisdictions (such as France and Italy) perform at higher court levels the functions that common law jurisdictions (such as the US and England) perform at lower court levels. Third, the diagonal symmetry is important for policy-makers because it demonstrates that the relevant point when designing a judicial reform is *not about which functions* they want the courts to perform, but *at which level* of the court system they want those functions to be performed. Finally, the diagonal symmetry may facilitate the international circulation of judicial models – such as the introduction of binding precedents in civil law jurisdictions – because it demonstrates that judicial functions that are thought to be proper of foreign legal traditions are, in reality, also present in domestic jurisdictions. Therefore, the so-called ‘transplants’ of these kinds of judicial functions should not be seen as the introduction of foreign institutions but as the relocation of domestic judicial functions that were previously performed at different court levels. In that sense, the findings of this dissertation will be of invaluable help in promoting these improvements in legal education, comparative research and judicial reforms that follow from the diagonal symmetry thesis.

B. French

Cette thèse de doctorat intitulée ‘Cour suprême et cour de cassation : une symétrie diagonale’ [*Supreme Courts and Courts of Cassation: A Diagonal Symmetry*], est une étude comparative des fonctions judiciaires des tribunaux de dernière instance en matières civiles dans deux paires de juridictions relevant de la common law (les Etats-Unis et l’Angleterre) et du civil law ou de la tradition romano-canonique (la France et l’Italie). La méthodologie utilisée consiste à comparer huit attributions fonctionnelles des cours – *i.e.*, le champ de révision, les effets des décisions, la publicité des décisions, le nombre d’affaires, évaluation préalable (ou filtre d’accès), la composition des formations de jugement, l’étendue totale et le style des décisions. Cependant, aux fins du présent résumé, nous allons nous concentrer sur deux des attributions fonctionnelles, à savoir, les effets et le style des décisions de justice. La principale conclusion de cette étude remet en question la vision orthodoxe de la division entre la common law et la civil law à propos des (supposées) différences dans leurs fonctions judiciaires. Cette recherche montre, qu’en réalité, les deux paires de juridictions ont des cours avec des fonctions judiciaires semblables, mais qui sont situées à des niveaux hiérarchiques différents, comme il en suit :

Schéma I : *Résumé* – Une symétrie diagonale



Selon la vision orthodoxe du droit comparé, les juridictions de common law, tels que les Etats-Unis et l'Angleterre, se caractérisent notamment par des décisions judiciaires à grande force obligatoire qui permettent de changer les critères de décision des affaires futures (précédent obligatoire) et leurs décisions comprennent les opinions dissidentes des juges. Les juridictions de civil law comme la France et l'Italie – toujours sous la vision orthodoxe – se caractérisent, en revanche, par des décisions judiciaires à faible force obligatoire, seul un mouvement de plusieurs décisions réunies vers une même fin peut changer les critères de décision des affaires futures (jurisprudence constante) et les décisions ne contiennent pas les opinions dissidentes des juges.

Cette division orthodoxe entre la common law et la civil law est certainement correcte d'un point de vue 'horizontal', c'est-à-dire en comparant des tribunaux situés au 3^{ème} niveau de chaque paire de juridictions : les cours suprêmes des États-Unis et du Royaume-Uni *vis-à-vis* les chambres en formation ordinaire des cours de cassation en France et en Italie. En effet, les décisions judiciaires des cours suprêmes des États-Unis et du Royaume-Uni ont une grande force obligatoire et les opinions dissidentes sont assez fréquentes. En revanche, les décisions rendues par les chambres en formation ordinaire des cours de cassation en France et en Italie ne profitent pas d'une telle force contraignante et les décisions judiciaires ne contiennent en aucun cas les opinions dissidentes.

Cette division orthodoxe n'est, toutefois, plus valable si l'on passe d'une perspective horizontale à 'diagonale', comparant à présent des tribunaux situés à différents niveaux hiérarchiques. Comme le montre cette thèse à partir d'une comparaison de huit attributions du fonctionnement de ces cours, la France et l'Italie ont également des organes judiciaires avec des fonctions similaires à celles des cours suprêmes des États-Unis et du Royaume-Uni, mais ces organes judiciaires sont, en quelque sorte, 'cachés' à un niveau supérieur. La grande force de pouvoir guider les affaires futures et (de façon rudimentaire) les opinions dissidentes peuvent se trouver non pas dans les chambres en formation ordinaire, mais dans les formations solennelles ou 'formations plénières' des cours de cassation françaises et italiennes. Par conséquent, la fonction judiciaire que l'on trouve dans la common law au 3^{ème} niveau des cours suprêmes des Etats Unis et du Royaume-Uni, est également présente – bien que formulée d'une manière différente et non pas toujours explicitement admise – au 4^{ème} niveau, cachée dans les formations plénières des cours de cassation de France et d'Italie.

De plus, cette thèse montre que la fonction judiciaire des chambres en formation ordinaire des cours de cassation françaises et italiennes, peut également se retrouver dans les juridictions de common law des Etats Unis et de l'Angleterre, mais à un niveau hiérarchique inférieur dans l'ordre judiciaire. Face à la crise provoquée par une surcharge d'affaires judiciaires, les cours d'appels des Etats-Unis et de l'Angleterre dictent à présent des décisions à force contraignante beaucoup plus faible (comparable au système de jurisprudence constante) et où les opinions dissidentes deviennent une exception peu pratique. Par conséquent, la fonction judiciaire qui est propre à la civil law d'après la vision orthodoxe, devient de plus en plus présente au 2^{ème} niveau judiciaire aux Etats-Unis ainsi qu'en Angleterre.

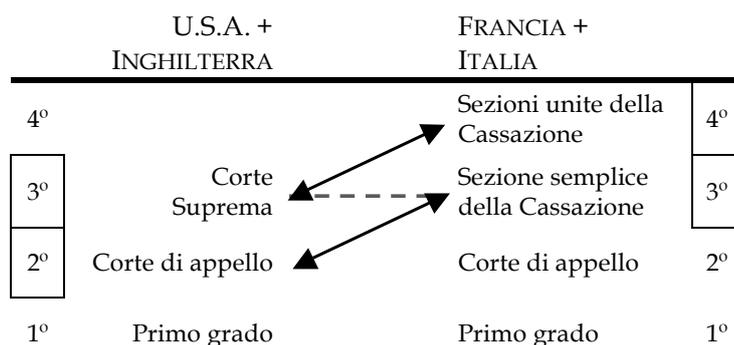
Ces résultats - appelés thèse de la 'symétrie diagonale' - sont importants pour plusieurs raisons. Premièrement, la symétrie diagonale nous invite à reformuler la division entre la common law et la civil law. Désormais, la véritable différence ne se trouve pas dans les diverses fonctions judiciaires propres à chaque tradition juridique, mais dans l'ordre hiérarchique judiciaire dans lequel se présente une fonction judiciaire équivalente. Deuxièmement, la symétrie diagonale change la question clé qui devra être répondue à l'avenir par les études de droit comparé. A présent, la question qui se pose n'est pas pourquoi la common law et la civil law ont des fonctions judiciaires différentes, mais pourquoi les juridictions de civil law (comme la France et l'Italie) exercent à un niveau supérieur dans l'ordre judiciaire leurs fonctions, alors que dans les juridictions de common law (tels que les États-Unis et l'Angleterre) elles s'accomplissent par des tribunaux à un niveau inférieur. Troisièmement, la symétrie diagonale a de l'importance pour les acteurs politiques puisqu'elle montre que le point en question lors de l'élaboration d'une réforme judiciaire n'est pas de savoir *quelles fonctions* devront accomplir les tribunaux, mais à *quel niveau* du système judiciaire devront-elles être remplies. Enfin, la symétrie diagonale permet la circulation internationale des modèles judiciaires - tels que l'introduction du précédant obligatoire dans les juridictions de civil law - en montrant que les fonctions judiciaires que nous pensions propres à des traditions juridiques étrangères sont, en fait, également présentes dans les juridictions nationales. Ainsi, les soi-disant 'transplantations' de ce type de fonctions judiciaires ne peuvent être vues comme l'introduction d'institutions étrangères, mais comme une relocalisation des fonctions nationales qui étaient auparavant assurées à différents niveaux judiciaires. En ce sens, les résultats de cette thèse seront d'une aide inestimable afin de promouvoir ces avancés dans l'éducation juridique, la recherche comparée et les réformes judiciaires qui se suivent à la thèse de la symétrie diagonale.

C. Italian

La presente tesi di dottorato, intitolata "Corti supreme e corti di cassazione: una simmetria diagonale" [*Supreme Courts and Courts of Cassation: A Diagonal Symmetry*], è uno studio comparatistico delle funzioni giudiziali delle corti di ultima istanza, in campo civile, in due coppie di giurisdizioni che appartengono rispettivamente alla *common law* (U.S.A. e Inghilterra) e alla *civil law* (Francia e Italia). La metodologia impiegata è consistita nella comparazione di otto attributi funzionali di tali corti - ovverosia ampiezza del giudizio impugnatorio, effetti delle sentenze, esposizione pubblica, numero dei casi, esame preliminare (o filtri di accesso), composizione del collegio, dimensione totale e stile delle

sentenze. Ai fini di questa sintesi non possiamo che concentrarci su due di questi attributi funzionali, cioè gli effetti e lo stile delle sentenze. La conclusione principale di questo studio mette in discussione la visione tradizionale sulla distinzione tra *civil law* e *common law* per quanto riguarda le (presunte) differenze tra le funzioni giudiziali. Questa ricerca dimostra che, in realtà, entrambi i tipi di giurisdizioni sono dotati di corti con funzioni giudiziali simili, ma situate in posizione differente nella piramide giudiziaria, in questo modo:

Schema I : *Sintesi* – Una simmetria diagonale



Secondo la concezione tradizionale del diritto comparato, le giurisdizioni di *common law* come gli Stati Uniti o l’Inghilterra si caratterizzano, tra l’altro, perché ciascuna sentenza è dotata di grande forza di cambiamento dei criteri di decisione dei casi successivi (precedente vincolante) e le sentenze contengono le opinioni dissenzienti. Le giurisdizioni di *civil law* come la Francia e l’Italia – sempre secondo la visione tradizionale – sono, al contrario, caratterizzate da decisioni giudiziali dotate di una forza molto ridotta, poiché solo un indirizzo con molte sentenze convergenti in un’unica direzione potrebbe mutare i criteri per i casi futuri (giurisprudenza costante) e non è consentito che i giudici esprimano opinioni dissenzienti nelle sentenze.

Questa divisione tradizionale tra *common law* e *civil law* risulta certamente corretta secondo una prospettiva “orizzontale”, cioè se si comparano corti collocate allo stesso (terzo) livello di ciascuna coppia di giurisdizioni: le corti supreme di Stati Uniti e Regno Unito comparate con le sezioni semplici delle corti di cassazione francese e italiana. Le sentenze delle corti supreme di Stati Uniti e Regno Unito, infatti, hanno una notevole forza vincolante e le opinioni dissenzienti sono piuttosto frequenti. Al contrario, le sentenze emesse dalle sezioni semplici delle corti di cassazione francese e italiana non godono di tale forza vincolante e nelle loro sentenze è omissivo qualsiasi tipo di opinione dissenziente.

Questa stessa suddivisione tradizionale, però, non risulta corretta se mutiamo la nostra prospettiva da orizzontale a “diagonale”, comparando tribunali collocati a diversi livelli gerarchici. Come dimostra questa tesi di dottorato, attraverso la comparazione di otto attributi del funzionamento di queste corti, anche la Francia e l’Italia hanno organi giurisdizionali che espletano una funzione simile a quella delle corti supreme degli Stati Uniti e del Regno Unito, ma questi organi giurisdizionali sono, per così dire, “nascosti” a un livello più alto. La grande autorità per guidare la soluzione di casi futuri e (forme rudimentali di) opinioni dissenzienti si possono trovare non nelle sezioni semplici ma

nelle “adunanze plenarie” delle corti di cassazione francese e italiana. Pertanto, la funzione giudiziale nei contesti di *common law*, che si trova al terzo livello delle corti supreme degli Stati Uniti e del Regno Unito, è presente anche – per quanto espresso in maniera diversa e non sempre ammesso esplicitamente – nel quarto livello nascosto delle “adunanze plenarie” delle corti di cassazione in Francia e in Italia.

Inoltre, questa tesi di dottorato dimostra che la funzione giudiziale delle sezioni semplici delle corti di cassazione francese e italiana si può ritrovare anche nelle giurisdizioni di *common law* degli Stati Uniti e dell’Inghilterra, ma a un livello più basso nella piramide giudiziaria. Come reazione alla crisi derivante dal sovraccarico di processi, le corti intermedie di appello negli Stati Uniti e in Inghilterra ora emettono sentenze dotate di una forza vincolante molto più debole (paragonabile al sistema della *giurisprudenza costante*), in cui le opinioni dissenzianti stanno diventando un’eccezione poco pratica. Pertanto, la funzione giudiziale che, secondo la visione tradizionale, sono proprie della *civil law*, si stanno rivelando sempre più attuali nel secondo livello delle corti negli Stati Uniti e anche in Inghilterra.

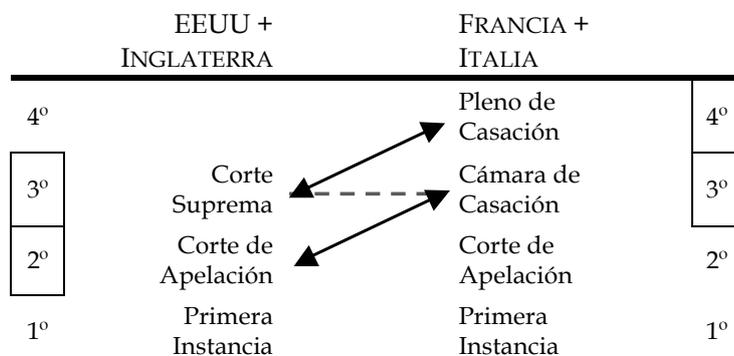
Questi risultati – chiamati la tesi della “simmetria diagonale” – sono rilevanti per diverse ragioni. In primo luogo, la simmetria diagonale ci invita a riformulare la divisione tra *common law* e *civil law*. A partire da ora, la vera differenza non è nel diverse funzioni giudiziali in ciascuna tradizione giuridica, ma nel livello gerarchico delle corti in cui una stessa funzione giudiziale è esercitata. In secondo luogo, la simmetria diagonale muta la domanda a cui gli studi di diritto comparato dovranno rispondere in futuro. Da ora, la domanda rilevante non è perché le corti di *common law* e di *civil law* hanno funzioni diverse, ma perché le giurisdizioni di *civil law* (come Francia e Italia) espletano a un livello più alto delle loro corti le funzioni giudiziali che nelle giurisdizioni di *common law* (come gli Stati Uniti e l’Inghilterra) si compiono a livelli più bassi del sistema giudiziario. In terzo luogo, la simmetria diagonale è importante per gli attori politici perché dimostra che il punto rilevante per disegnare una riforma giudiziale non è *quali funzioni* si vogliono assegnare alle corti, ma *a quale livello* del sistema delle corti vogliamo che tali funzioni siano espletate. Infine, la simmetria diagonale potrebbe facilitare la circolazione internazionale dei modelli giudiziali – come l’introduzione del precedente vincolante nelle giurisdizioni di *civil law* – perché dimostra che le funzioni giudiziali che ritenevamo proprie di tradizioni giuridiche straniere sono, in realtà, presenti anche nelle giurisdizioni nazionali. Pertanto, i cosiddetti “trapianti” di questo tipo di funzioni giudiziali non debbono esser visti come introduzione di istituti stranieri, ma come redistribuzione delle funzioni nazionali che prima erano espletate a diversi livelli del sistema delle corti. In questo senso, i risultati di questa tesi di dottorato saranno di valore inestimabile per promuovere queste migliorie nell’istruzione giuridica, nella ricerca comparatistica e nelle riforme giudiziali che prenderanno le mosse dalla tesi della simmetria diagonale.

D. Spanish

Esta tesis doctoral, titulada ‘Cortes Supremas y Cortes de Casación: una Simetría Diagonal’ [*Supreme Courts and Courts of Cassation: A Diagonal Symmetry*], es un estudio comparado de las funciones judiciales de las cortes de última instancia en materias civiles en dos pares de jurisdicciones que pertenecen al common law (EEUU e Inglaterra) y al

civil law o tradición romano-canónica (Francia e Italia). La metodología consistió en la comparación de ocho atributos funcionales de estas cortes – *i.e.*, ámbito de revisión, efectos de las sentencias, exposición pública, número de casos, evaluación preliminar (o filtros de acceso), composición del panel, tamaño total y estilo de las sentencias. Para efectos de este resumen, sin embargo, nos concentraremos en dos de estos atributos, a saber, los efectos y estilo de las sentencias. La conclusión principal de este estudio cuestiona la visión ortodoxa acerca de la división entre el common law y el civil law respecto de las (supuestas) diferencias en sus funciones judiciales. Esta investigación demuestra que, en realidad, ambos pares de jurisdicciones poseen cortes con funciones judiciales similares, pero ubicadas a niveles diferentes en la jerarquía de sus tribunales, del siguiente modo:

Esquema I : Resumen - Una simetría diagonal



Según la visión ortodoxa en el derecho comparado, las jurisdicciones de common law como EEUU e Inglaterra se caracterizan, entre otros aspectos, porque cada sentencia posee una gran fuerza para cambiar los criterios de decisión de los casos futuros (precedente vinculante) y las sentencias incluyen votos disidentes de los jueces. Las jurisdicciones de civil law como Francia e Italia – continúa la visión ortodoxa – se caracteriza, por el contrario, por decisiones judiciales que poseen una fuerza más débil porque sólo una tendencia de muchas sentencias reunidas en la misma dirección podría cambiar los criterios de los casos futuros (jurisprudencia constante) y que los jueces expresen votos disidentes en las sentencias no está permitido.

Esta división ortodoxa entre common law y civil law ciertamente resulta correcta desde una perspectiva ‘horizontal’, esto es, cuando se comparan tribunales ubicados en el mismo 3^{er} nivel de cada par de jurisdicciones: las cortes suprema de EEUU y del Reino Unido *vis-à-vis* las cámaras ordinarias de las cortes de casación de Francia e Italia. De hecho, las sentencias de las cortes supremas de EEUU y el Reino Unido tienen una gran fuerza vinculante y los votos disidentes son bastante frecuentes. En cambio, las decisiones dictadas por las cámaras ordinarias de las cortes de casación de Francia e Italia no gozan de tal fuerza vinculante y sus sentencias omiten cualquier tipo de voto disidente.

Esa misma división ortodoxa, sin embargo, no resulta correcta si cambiamos nuestra perspectiva de horizontal a ‘diagonal’, comparando ahora tribunales ubicados en diferentes niveles jerárquicos. Tal como esta tesis doctoral demuestra a través de la comparación de ocho atributos del funcionamiento de estas cortes, Francia e Italia también

poseen órganos judiciales que realizan una función similar a las cortes supremas de EEUU y el Reino Unido, pero éstos órganos judiciales están, por así decirlo, ‘escondidos’ en un nivel más alto. La gran fuerza para guiar casos futuros y (formas rudimentarias de) votos disidentes se pueden encontrar no en las cámaras ordinarias sino en las ‘sesiones plenarias’ de las cortes de casación francesas e italianas. Por lo tanto, la función judicial que en el common law se encuentra en el 3^{er} nivel de las cortes supremas de EEUU y del Reino Unido también está presente — aunque formulado de una manera distinta y no siempre admitido explícitamente — en el 4^{to} nivel escondido de las sesiones plenarias de las cortes de casación en Francia e Italia.

Adicionalmente, esta tesis doctoral demuestra que la función judicial de las cámaras ordinarias de las cortes de casación francesas e italianas también se puede encontrar en las jurisdicciones de common law de EEUU e Inglaterra pero en un nivel más bajo de su jerarquía de los tribunales. Como reacción a la crisis de sobrecarga de casos, las cortes intermedias de apelación en los EEUU e Inglaterra ahora dictan sentencias que tienen una fuerza vinculante mucho más débil (comparable con el sistema de jurisprudencia constante), en las cuales los votos disidentes se están volviendo una excepción poco práctica. Por lo tanto, la función judicial que según la visión ortodoxa es propia del civil law se está volviendo cada vez más presente en el 2^{do} nivel de tribunales en los EEUU e Inglaterra también.

Estos resultados — denominados la tesis de la ‘simetría diagonal’ — son relevantes por varias razones. Primero, la simetría diagonal nos invita a reformular la división entre el common law y el civil law. A partir de ahora, la verdadera diferencia no está en las distintas funciones judiciales de cada tradición legal, sino en el nivel jerárquico de los tribunales en el cual está presente una función judicial equivalente. Segundo, la simetría diagonal cambia la pregunta relevante que los estudios de derecho comparado deberían contestar a futuro. Desde ahora, la pregunta relevante no es por qué el common law y el civil law poseen funciones judiciales diferentes, sino por qué las jurisdicciones de civil law (como Francia e Italia) cumplen a niveles más altos de sus tribunales las funciones que en las jurisdicciones de common law (como las de EEUU e Inglaterra) se cumplen a niveles más bajos de los tribunales. Tercero, la simetría diagonal es importante para los actores políticos porque demuestra que el punto relevante para diseñar una reforma judicial no es acerca de *qué funciones* queremos que los tribunales cumplan, sino *a qué nivel* del sistema de tribunales queremos que esas mismas funciones sean cumplidas. Finalmente, la simetría diagonal facilita la circulación internacional de modelos judiciales — tales como la introducción de precedente vinculante en las jurisdicciones de civil law — porque demuestra que las funciones judiciales que creíamos eran propias de tradiciones jurídicas extranjeras están, en realidad, presentes en las jurisdicciones nacionales también. Por lo tanto, los así llamados ‘trasplantes’ de este tipo de funciones judiciales no deben ser vistos como la introducción de instituciones extranjeras sino como la reubicación de funciones nacionales que anteriormente eran cumplidas a distintos niveles de los tribunales. En este sentido, los resultados de esta tesis doctoral serán de una ayuda invaluable para promover estas mejoras en la educación jurídica, la investigación comparada y las reformas judiciales que se siguen de la tesis de la simetría diagonal.

E. Russian

Данная диссертация «*Верховные суды и кассационные суды: диагональная симметрия*» - это сравнительное исследование функций судов, являющихся последней инстанцией рассмотрения гражданских дел, в ключе двух парных юрисдикций, принадлежащих общему праву (США и Англия) и системе гражданского права (Франция и Италия). Методологией исследования стало проведение сравнения восьми функциональных признаков этих судов, а именно: объем пересмотра, эффект судебных решений, публичное освещение, количество дел, предварительное разбирательство (критерии доступа), состав коллегии, общее число и способы выражения мнений - но в целях настоящего обзора предлагается сконцентрироваться на эффектах судебных решений и способах выражения мнений. Основные выводы бросают вызов общепринятому взгляду о существующем разделении между гражданским правом и общим правом в отношении (вероятных) различий судебных функций. Данное исследование демонстрирует, что в действительности обе пары юрисдикций имеют суды со схожими функциями, но расположенными на разных уровнях судебной иерархии следующим образом.

Схема 1: Резюме – диагональная симметрия



Согласно общепринятому в сравнительном правоведении мнению, юрисдикции общего права, такие как США и Англия, кроме прочих признаков характеризуются наличием решений, имеющих влияние на изменение критериев рассмотрения будущих дел (обязательные прецеденты), и судебных решений, включающих особые мнения. Юрисдикции гражданского права, такие как Франция и Италия - в продолжение общепринятой точки зрения, - наоборот характеризуются судебными решениями «слабой силы», поскольку только наличие тенденции - нескольких судебных решений одного направления - может изменить критерии будущих разбирательств (*jurisprudence constante* [принцип единообразия судебной практики]), и выражение расхожих мнений среди судей не допускается.

Данное традиционное различие между гражданским правом и общим правом, безусловно, справедливо с «горизонтальной» точки зрения - то есть при сравнении

судов, расположенных на одном третьем уровне каждой пары юрисдикций: Верховные суды США и Великобритании в отношении «кассационных палат» судов Франции и Италии. Действительно, решения верховных судов США и Великобритании имеют строго обязательную силу, и особое мнение встречается довольно часто. С другой стороны, решения, вынесенные обычными палатами французских и итальянских кассационных судов, не имеют эквивалентной обязательной силы и исключают возможность выражения особых мнений.

Однако это различие не имеет места, если изменить перспективу от горизонтального взгляда к «диагонали», сравнивая суды на разных иерархических уровнях. Как показано в диссертации посредством сопоставления восьми признаков работы судов, во Франции и Италии также имеются судебные органы, выполняющие аналогичные функциям верховных судов США и Великобритании действия, но на скрытом, более высоком уровне. Оказание сильного влияния на руководство рассмотрения будущих дел и особые мнения (рудиментарные формы) можно найти не в обычных палатах, а на «пленарных заседаниях» французских и итальянских кассационных судов. Таким образом, функции судов «общего права» найдены на третьем уровне верховных судов США и Великобритании и также присутствуют - однако это сформулировано порозному и не всегда явно признано - в скрытом четвертом уровне кассационного *плenums* Франции и Италии.

Кроме того, диссертация демонстрирует, что судебные функции обычных палат кассационных судов Франции и Италии также могут быть найдены в юрисдикциях общего права США и Англии, но на более низком судебном уровне. В качестве реакции на кризис, связанный с перегрузкой судов делами, американские и английские промежуточные апелляционные суды теперь выносят решения, где прецедентная сила значительно слабее (в сравнении с системой *jurisprudence constante*), и в которых особые мнения становятся нецелесообразными и выносятся в исключительных случаях. Таким образом, функции судов, которые согласно общепринятому взгляду присущи системе гражданского права, очевидно, становятся все более применимы на втором уровне судов США и Англии.

Данные выводы — названные тезисом «диагональная симметрия» — актуальны по нескольким причинам. Во-первых, диагональная симметрия предлагает переформулировать разрыв между гражданским и общим правом. Отныне реальный разрыв состоит не в отличиях судебных функций каждой правовой традиции, а в уровне суда, в котором присутствуют эквивалентные функции судебных решений. Во-вторых, диагональная симметрия изменяет вопрос, на который должны ответить дальнейшие сравнительно-правовые исследования. Теперь соответствующий вопрос заключается не в том, почему гражданское право и общее право имеют разные функции судов, а почему юрисдикции гражданского права (такие как во Франции и Италии) на высших судебных уровнях осуществляют те функции, которые в юрисдикции общего права (например, США и Англии) представлены в судах более низких уровней. В-третьих, диагональная симметрия важна для политиков, т.к. она демонстрирует соответствующую точку для разработки судебной реформы, касающейся *не функций*, которые выполнялись бы судами, а *уровня* судебной системы, на котором требуется выполнение этих функций. В заключение,

диагональная симметрия может способствовать взаимодействию судебных моделей, например, введению обязательных прецедентов в юрисдикциях гражданского права – поскольку это демонстрирует, что судебные функции, которые считаются собственно иностранными юридическими традициями, в действительности также присутствуют и в национальных юрисдикциях. Таким образом, так называемую трансплантацию этих видов судебных функций следует рассматривать не как введение новых иностранных институтов, а как перемещение национальных функций, которые ранее выполнялись на других уровнях суда. В этом смысле результаты данной диссертации станут ценным вкладом в содействии введению этих улучшений в области юридического образования, сравнительных исследований и судебных реформ, которые вытекают из тезиса о диагональной симметрии.
