

# Supreme Courts and Courts of Cassation

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# VALORISATION

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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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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).<sup>7</sup> 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.<sup>8</sup> For that purpose, a court or set of courts that perform an error-monitoring function becomes necessary too.<sup>9</sup> 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

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<sup>2</sup> HABERMAS 2008, p. 12-20.

<sup>3</sup> DICEY 1979, p. 100.

<sup>4</sup> BRAVO-HURTADO 2014, p. 325-327.

<sup>5</sup> HART 1958/2012, p. 124-136; cfr., FULLER 1958, p. 630-672.

<sup>6</sup> RAZ 2009, p. 214.

<sup>7</sup> HAZARD & TARUFFO 1993, p. 183.

<sup>8</sup> SHAPIRO 1980, p. 629.

<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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

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<sup>10</sup> DANNEMANN 2006, p. 404-405.

<sup>11</sup> 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.<sup>12</sup> 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

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<sup>12</sup> DANNEMANN 2006, p. 403.

and England face a current case overload crisis.<sup>13</sup> 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*).<sup>14</sup> 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.’<sup>15</sup> 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

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<sup>13</sup> For the US, RICHMAN & REYNOLDS 2013; For England, DREWRY, BLOM-COOPER & BLAKE 2007, p. 124.

<sup>14</sup> BRAVO-HURTADO 2017, p. 149-174.

<sup>15</sup> ZWEIGERT & KÖTZ 1998, p. 34.

similar results, in order to solve the common problem of improving the functioning of our court systems.