

## THE ROLE OF THE COURT OF CASSATION

The Court of Cassation is the highest court in the French judiciary. Civil, commercial, social or criminal cases are first ruled upon by courts of first instance or lower courts (tribunaux d'instance and tribunaux de grande instance, commercial courts and industrial or labour courts (conseils de prud'hommes) etc). Depending on the importance of the dispute concerned, decisions by these courts are made at last instance in small cases or at first instance in the majority of cases. Decisions rendered at last instance may be challenged in a court of appeal, where all aspects of them are re-examined, as to both facts and law. Decisions at last instance by courts of first instance or decisions by courts of appeal may themselves form the object of an appeal before the Court of Cassation.

Apart from being at the apex of the pyramid, there are two other characteristics that single the Court of Cassation out from other courts.

It is unique: "There is one Court of Cassation for the whole Republic". The fact that this fundamental principle is set forth at the very beginning of the texts of the Judicature Act devoted to the Court of Cassation is because it is the most important; it is indissociable from the Court's essential purpose, which is to unify the case-law and ensure that the interpretation of texts is the same throughout the whole territory. It is the fact that the Court of Cassation is unique that makes it possible to achieve uniformity of interpretation, and hence to develop case-law that must be authoritative, uniqueness and uniformity being interdependent.

Secondly, the Court of Cassation is not a court of third instance after the appeal courts and other courts. Its purpose is essentially not to rule on the merits, but to state whether the law has been correctly applied on the basis of the facts already definitively assessed in the decisions referred to it. This is why the Court of Cassation does not, strictly speaking, rule on the disputes resulting in the decisions referred to it, but on those decisions themselves. In reality, it judges the decisions of other courts: its role is to state whether those courts have correctly applied the law in light of the facts, determined by them alone, of the case brought before them and of the questions put to them. The purpose of each appeal is thus to impugn a judicial decision, the task of the Court of Cassation being to state whether the law has been applied correctly, or indeed incorrectly.

It is at this stage that the ultimate fate of the case is decided, what is quashed being set aside and save in exceptional cases where the ruling to quash the judgment is without appeal, the case has to be heard again in light of the ruling by the Court of Cassation.

These characteristics, which form the basis of the originality of the Court of Cassation and make appeals on points of law an "extraordinary" remedy, are explained by its history. They originate in the events of the French Revolution. A law of 27 November 1790 instituted a "Tribunal of Cassation", which by virtue of the *senatus-consultum* of 28 Floreal Year XII, became the Court of Cassation. Yet the history of the Court goes back much further, being rooted in the way justice was practised under the Ancien Régime. Owing to the fact that, at that time, justice was a special preserve, stemming as it did from the King, the one possibility for an appeal to have a judgment of the Parlements overturned was for it to be considered by the King's Council. The essential contribution of the Revolution was to adapt this institution, just as it was losing its original *raison d'être*, transferring the power that belonged to the Head

of State to courts. Through its development during the nineteenth century this institution acquired its now widely recognized authority.

Moreover, as a result of this legal as well as moral authority, the legislator has entrusted the Court with various other tasks. An example is the introduction of an advisory procedure, which in certain conditions enables it to perform its unifying role by interpreting the law not a posteriori, but in advance, even before a ruling by the trial courts. The Court's role has also been indirectly enhanced, firstly through the creation of various judicial institutions consisting wholly or partly of members of the Court and secondly by the fact that members of the Court are increasingly called upon to serve on a range of bodies of growing influence and importance, even though this lies outside their judicial powers as such.

## **THE ORGANISATION OF THE COURT OF CASSATION**

The organisation of the Court of Cassation stems naturally from the fact that it is a court whose task is to state the law. Yet it can only operate efficiently if it has a sound administrative structure.

In judicial terms, the Court of Cassation is made up of chambers among which the appeals for consideration by the Court are distributed on the basis of varying criteria determined by the Bureau of the Court. The number of chambers has gradually increased from the original three (Civil Chamber, Criminal Chamber and *Chambre des Requêtes*, the latter having been disbanded in 1947) to the present six. A Commercial, Economic and Financial Chamber, a Social Chamber and a Criminal Chamber have been added to the three strictly civil chambers (i.e. the First, Second and Third Chambers). Each chamber has a president. The First President assigns justices (*conseillers*) to the chambers, their number varying according to the respective importance of the appeals the chambers have to deal with. Further, in each chamber, the volume of appeals for consideration has called for a division of labour. In fact, each of them has had to divide up into sections, within which the benches themselves vary. A case is heard by three judges when an appeal is inadmissible or not based on arguable grounds, which results in its being declared "not admitted" (*non admis*), or also when it seems necessary to settle the case. Otherwise, the case must be heard by a bench consisting of at least five voting members. When so decided by its president, the chamber may also sit as a full bench, for instance because the decision required in a case could result in a reversal of case law or because it has to rule on a sensitive issue.

The Court of Cassation also includes temporary benches consisting either of members of each chamber (full courts (*Assemblées plénières*)) or of members of at least three chambers (joint chambers), presided over by the First President or the senior president of a chamber of the Court.

The full courts consist of all the chamber presidents and senior chamber justices, together with a justice from each chamber, making a total of nineteen members. The decision to refer a case to such a bench is taken by the First President or the chamber to which the case has been assigned. This may happen when the case raises a matter of principle. It is mandatory when a first decision or judgment has been quashed and when, the case having been re-tried, the new decision is challenged on the same pleas. It is also mandatory when the

Procureur général requires it before the opening of deliberations. An important feature of a decision by the full Court to quash a ruling by a lower court is that the lower court must comply with the decision of the Court of Cassation on the points of law that Court has already ruled upon.

Besides the First President or his substitute, the joint chambers consist of four judges from each of the chambers constituting it (the presiding judge, the senior judge and two other judges), which, assuming a joint chamber consisting of judges from three chambers, makes a total of thirteen members. A case must be referred to a joint chamber when it raises a matter normally falling within the purview of several chambers, or if those chambers have arrived or are likely to arrive at different solutions. Such referral is mandatory in the event of an equal split in the votes in the chamber which first heard the appeal, as it is when the procureur général requires it before the opening of deliberations. The essential purpose of such a joint bench is to resolve differences between chambers over case-law.

Each chamber is assigned one or more registrars.

A number of committees of a judicial nature are closely associated with the Court of Cassation, in that it supplies them with judges and with the administrative infrastructure and premises necessary for their work. Some examples of this are:

the National Detention Compensation Committee (Commission nationale de réparation des détentions), which serves as a court of appeal against decisions by the first presidents of appeal courts in the area of compensation for the detrimental consequences of detention on remand ordered in proceedings now closed, the case having been dismissed for lack of evidence or because the detainee has been released or acquitted;

the Committee for the Revision of Criminal Convictions (Commission de révision des condamnations pénales) that considers applications for revision, referring those it believes may be admissible to the Criminal Chamber of the Court of Cassation;

the Committee for the Review of Criminal Law Decisions following a decision by the European Court of Human Rights (Commission de réexamen d'une décision pénale consécutif au prononcé d'un arrêt de la Cour européenne des droits de l'homme), instituted by a law of 15 June 2000. This Committee acts as a screening mechanism, ascertaining that applications for review are admissible and well-founded before referring cases to a court of the same hierarchy and level as the one having delivered the decision breaching the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Cassation also has a Legal Aid Office (Bureau d'aide juridictionnelle) involving judges, lawyers, State officials and persons using the Court, its director being appointed by the First President. This Office assesses applications for aid to cover lawyer's fees submitted by applicants or respondents in connection with appeals, thus ensuring free access to the Court for all, regardless of their financial situation.

Where administration is concerned, it will be seen below that, for the Bench, the First President of the Court of Cassation and, for the Ministère public, the Procureur général each has his own particular responsibilities. Each has an office staffed by judges, the immediate colleagues of the First President in his office being an adviser and the directors of international relations, human resources and management and communications. The First President's office is also responsible for the Court's department of administration and budgetary management, as well as the computing department, which looks after the running

and maintenance of software and hardware and provides members of the Court with technical assistance and training.

A "Bureau" consisting of the First President, the presidents of the chambers, the Procureur général and the Principal Advocate General has certain specific tasks. It "determines by deliberation over which areas it has jurisdiction under laws and decrees". Among other things, it determines the number and duration of hearings and compiles the National List of Experts. It also advises the First President on major issues relating to the organisation and functioning of the Court.

Lastly, like all courts, the Court of Cassation has a registry covering all its administrative departments. It is directed by the Senior Registrar under the authority of the First President. The Ministère public has its own independent general office, headed by a chief registrar.

## THE MEMBERS OF THE COURT OF CASSATION

An essential distinction, indeed one fundamental to the French judicial system, needs to be drawn between judges at the Court of Cassation and the Ministère public. The task of the former is essentially to judge, whereas the latter plead in the hearings and, in that capacity, are responsible for defending the law by ensuring its proper application.

### **Members of the Bench**

The judges of the Court of Cassation include the First President (premier président), first presidents of the chambers, justices (conseillers) and assistant judges (conseillers référendaires).

The First President has both jurisdictional and administrative responsibilities. He presides over meetings of the full Court (Assemblée plénière) and joint chambers of the Court. He also presides over one of the chambers when he sees fit, lays down the schedule for applications submitted by one of the parties to an appeal, and may therefore reduce the time-limits for the filing of memorials. He rules on whether to accept applications by the parties to have documents produced before the Court of Cassation registered as forgeries. He decides on the disqualification of appeals for failure to file memorials within the time-limits or on their inadmissibility and also on withdrawals. He rules on requests for removal from the list and hears such decisions of the Legal Aid Office as may be referred to him. He appoints the justices (conseillers), assistant judges (conseillers-référendaires) and chamber registrars (greffiers de chambre) to each of the six chambers of the Court. Lastly, he presides over the Bureau and has authority over the senior registrar with respect to the administration of the Court.

Besides his jurisdictional and administrative responsibilities at the Court, the First President is also involved in very important activities outside the Court. For example, he presides over the Conseil supérieur de la magistrature when it has to rule on a disciplinary matter concerning a member of the bench, the Commission d'avancement des magistrats, and the Conseil d'administration de l'Ecole nationale de la magistrature, which plays a key role in

determining the curricula for future judges as well as continuing training courses for sitting judges. As France's senior judge, the First President is a pivotal figure, whose views are listened to by the various authorities of State and who often represents the judiciary at national or international meetings. Among other things, he is consulted on preliminary draft laws and decrees relating not only to procedure before the Court of Cassation but also to major reforms affecting the judicial system. Owing to the independence of his position and the authority it carries with it, he is also asked by the legislative authorities to appoint prominent personalities to preside over or participate in various bodies.

For some years now, the First President has convened an annual meeting of all the first presidents of the appeal courts for an exchange of views, in the presence of representatives of the various chambers of the Court and of the Chancellerie (Ministry of Justice), on new legal issues facing lower courts. These meetings are a valuable way of forging closer links at all levels of the judiciary, while at the same time helping the Court of Cassation, faced with a vast influx of cases, to determine what its priorities should be as it states the law in the light of the issues brought to its attention.

The six chamber presidents preside over the hearings of the respective benches. In their absence, the senior justice (conseiller) of the chamber presides over the hearing, or, failing that, the senior justice present.

The conseillers or justices of the Court are one hundred and ten in number, added to which there are thirty-five posts intended for the appointment of the first presidents of the courts of appeal and of the president of the Paris Tribunal de grande instance. They are appointed by decree of the President of the French Republic following a proposal from the Conseil supérieur de la magistrature. Essentially, they are selected from among members of the judiciary, yet a number of professors of law or lawyers from the Conseil d'Etat and the Court of Cassation have also been appointed. To the extent that they perform the same tasks as the other conseillers, justices on special assignment (conseillers en service extraordinaire), of which there are ten, should also be included here. These justices are appointed for five years in view of their know-how and experience.

The conseillers must also serve on various committees and in various institutions, generally being nominated or proposed by the First President.

In each chamber, the senior judge or doyen performs a supervisory role in all cases.

The assistant judges (conseillers référendaires), of which there are seventy-two, are selected from among practising judges in the lower courts and appointed for a period not exceeding ten years. Except in cases in which they are conseillers-rapporteurs, they do not have voting rights during the deliberations, though may be consulted. They also have research duties and are responsible for drafting summaries of judgments in conjunction with the Legal Research Department.

## **The Parquet général**

The Procureur général is the head of the Parquet général at the Court of Cassation, which consists of six First Advocate General and thirty-three advocates general. The role of the advocates general is principally to deliver advisory opinions entailing an analysis of appeals on a point or points of law and, in certain cases, to provide an indication of the

economic or social issues at the heart of the problems raised or of the solutions envisaged. The Procureur général appoints every advocate general to one of the six chambers that make up the Court of Cassation. He may himself speak in hearings of the chambers when he sees fit. Practically speaking, the members of the Parquet général are independent of the Garde des Sceaux and the advocates general are not subordinate to the Procureur général who does not give them instructions.

The responsibilities, powers and authority of the Ministère public at the Court of Cassation are quite specific. Required as it is to play a central role in the administration of justice, the primary task of the Ministère public at the Court of Cassation is to ensure that the Court's interpretation of the law is uniform and complies with the wishes of the legislature, the general interest and with public policy. It is also its task to ensure the unity of case-law not only at the Court of Cassation but in all courts.

With a view to this, the Procureur général enjoys important prerogatives. In civil cases, he may take the initiative of referring an improper judicial decision to the Court for censure "in the interests of the law". He may also, when required to do so by the Garde des sceaux, lodge an appeal for abuse of powers with the Court of Cassation, informing it of the acts by which the courts have exceeded or abused their powers. In criminal cases, an appeal in the interests of the law may be either an appeal ordered by the Garde des sceaux, or an appeal instigated by the Procureur général, who also has the power to call for a case to be referred to a joint chamber or to the full court.

The Ministère public is also involved in the activities of the various committees associated with the Court of Cassation and in the Committee ruling on appeals by officers of the criminal police against their suspension or the withdrawal of their powers. It submits to the Court of Cassation applications for revision, applications for the referral of a case from one court to another where there is a suspicion of lack of impartiality or a risk to public order, applications for the designation of a court of competent jurisdiction (requêtes en règlement de juges), requests for the designation of a court to investigate or judge crimes and offences committed by judges and certain other public officials.

The Procureur général also represents the Ministère public at the Cour de justice de la République, in which capacity he is assisted by the First Advocate General and two other advocates general.

The Procureur général is also involved in the management and discipline of the judiciary; hence, he is a member of the Commission d'avancement des magistrats and of the Conseil d'administration de l'école nationale de la magistrature. He presides over the composition of the Conseil supérieur de la magistrature responsible for disciplinary action against public prosecutors.

<b>THE BAR OF THE COURT OF CASSATION AND CONSEIL D'ETAT</b>
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There are specialised lawyers for representing and defending litigants before the Court of Cassation, where such representation is indeed mandatory<sup>1</sup>, apart from disputes relating to elections (of trades and professions and also political ones) within the Court's jurisdiction, in which the parties are allowed to conduct their own defence. These lawyers, who form a single Bar, are the successors to the Barristers at the Royal Councils, from which heritage they derive their title of *avocats aux Conseils*. The Charter of this Bar dates back to a royal decree of 10 September 1817, still in force today notwithstanding certain necessary amendments down the years. These specialised lawyers hold official posts (offices), whence the limitation of their number to sixty. However, a decree of 15 March 1978 also permitted professional partnerships or practices to hold such posts, each partnership having no more than three members. On 1 November 2008, the total number of such lawyers, whether partners or otherwise, was 98. Membership of the Bar is governed by strict conditions of professional aptitude, demonstrated by success in an examination after a three-year training period or by an applicant's previous professional experience determined by very specific objective criteria. The appointment of such lawyers is pronounced by Order of the *Garde des sceaux*, after they have been presented by the transferer, who is thus exercising a right expressed in the payment by the successor or the partner presented of a sum whose amount is controlled by this Bar and the Ministry of Justice and for which funding possibilities are available. The institution of a specialized bar attached in this way to a supreme court has been recognised by the European bodies as a necessity justified by the public service of justice.

The internal discipline of the Bar is looked after by a disciplinary council, consisting of a president and eleven members, all elected for three years and one third re-elected each year. The essential task of the Council of the Bar (*Conseil de l'Ordre*) is to lay down the code of conduct of members of the Bar (*avocats aux conseils*). It also gives its opinion on personal liability actions against lawyers belonging to this Bar.

The members of this Bar, who as *officiers ministériels* hold official posts, are closely involved in the workings of the Court. Every practice (*cabinet*) at the Court of Cassation assists persons in receipt of legal aid. Some of these lawyers are attached to the Legal Aid Office, while others consider appeals on a point or points of law in criminal cases, looking for a possible plea of a breach of the law (*moyen de cassation*) potentially subject to censure. More generally, their task is to meet two related concerns that are inextricably linked, viz. the interests of the litigant and the smooth running of the Court.

## **APPEAL ON A POINT OR POINTS OF LAW (POURVOI EN CASSATION)**

In civil cases, an appeal on a point or points of law (*pourvoi en cassation*) is lodged by a declaration to the Registry of the Court of Cassation (except in electoral cases, where it may be lodged by the party himself or any authorised representative)<sup>1</sup>. The time-limit is "two months, except as otherwise provided" with effect from notification of the challenged decision. In criminal matters, the declaration of appeal must be made to the registrar of the court having delivered the decision challenged, no later than five days after its delivery.

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<sup>1</sup> The Decree of 20 August 2004 essentially limits cases where there is no mandatory representation to electoral disputes, in addition to criminal cases. Especially in all labour cases, representation by an *avocat aux Conseils* is now mandatory.

The appeal, which then follows certain procedural rules outside the compass of this general presentation, must by definition impugn a decision. This raises the twofold question of the type of decision that can be the subject of such an appeal and the grounds on which it may be impugned.

In civil cases, an appeal on a point of law is only possible against decisions rendered at last instance. However, with certain qualifications, the decision must also have been delivered on the merits of the case, that is to say at least on "some issue of substance", which excludes judgments calling for further investigation or a provisional measure, that can only be appealed at a later stage, at the same time as the subsequent decision on the merits.

For a decision to be quashed, the party lodging the appeal before the Court of Cassation must establish that the decision impugned does not comply with the law. This is why all discussion of the facts is excluded, which are not verified by the Court of Cassation, the task of appraising them falling exclusively to the lower courts.

In criminal cases, "judgments of the investigation chamber and rulings rendered at last instance in criminal and police matters may be set aside in the event of a breach of the law". Interlocutory decisions are here subject to a special procedure, which means that, under certain conditions, a request for the authorisation of an immediate appeal on a point of law may be submitted to the president of the Criminal Chamber. The Code of Criminal Procedure adds various other cases to the violation of the law that attach considerable importance to legal technicalities, these texts now being further reinforced by the European Convention on Human Rights.

In general, be it in civil or criminal cases, the control exercised by the Court of Cassation falls into two main categories: legislative control and disciplinary control.

Essentially, legislative control is exercised by means of the Court's reply to a plea or pleas alleging violation of the (civil and criminal) law or to a plea alleging lack of legal basis (civil cases). Violation of the law is not just violation of the law as such in the constitutional sense, but also of the regulatory texts, of custom and above all of international treaties, the principle of whose superiority over domestic law is laid down by Article 55 of the Constitution: in this connection, Community law deserves special mention. As regards the lack of legal basis, it does not necessarily entail an erroneous interpretation of the law by the trial court, but presupposes that the court has not provided sufficient grounds for its decision. Added to these cases are distortion, lack of legal grounds and failure to respond to submissions. It is in this field par excellence that the Court of Cassation is able to perform its unifying and often innovative action as regards the construction to be placed on a rule of law, whether substantive, procedural, or part of old or new legislation. It is essentially in this area that the case-law of the Court of Cassation is developed, to which matter we will revert later.

The notion of disciplinary control - as it has long been officially called - relates primarily to the obligations on courts regarding how they should render and set out their decisions. The aim here is to ensure that trial courts meet their obligations as regards setting out the claims and pleas of the parties, responding to the submissions and stating the reasons for judgments and decisions, since the requirement of legal reasoning covers not only the obligation to set out reasons in support of the operative paragraph or paragraphs, but also not to contradict oneself, not to use hypothetical or dubious grounds, not to use irrelevant



grounds, in other words, grounds which do not constitute a reply to the point raised. The distortion of the clear and precise meaning of a document also forms part of disciplinary control in civil cases. A broader interpretation of the concept of disciplinary control might also include complaints alleging failure to observe the ethical obligations of courts and, more generally, the components of a fair trial, i.e. the adversarial principle, such as when a ground is raised *ex officio*, and the principle of impartiality, the principle of public hearings and the right to be heard within a reasonable time. The principle of impartiality in particular, applied in the light of Article 6 § 1 of the European Convention on Human Rights, has seen major developments in case-law having substantial repercussions on the *modus operandi* of courts or other similar bodies, such as independent administrative authorities.

This disciplinary control, thus broadly understood, represents a heavy burden for the Court of Cassation, as a great many appeals entail one or more pleas in which it is involved. Yet there is no way this can be avoided, given the number, diversity and variety of the courts whose decisions are monitored by it, and also the major importance, in a State of law, of the requirements of a fair trial.

## **PROCESSING APPEALS ON A POINT OR POINTS OF LAW**

After an appeal has been registered in the Registry of the Court of Cassation, the next step, provided the case has not been disqualified, is the filing of a memorial of application (*mémoire en demande*), still called an amplificatory or supplementary memorial (*mémoire ampliatif*). This sets out the points of law relied on with a view to having the impugned decision quashed and also the arguments in support of those points of law; for his part, the respondent may reply by filing a memorial of response (*mémoire en defense*). At the end of the time-limits given to the parties for this purpose, which vary depending on the nature of the case (in civil cases, four months in principle for the memorial of application and two months for the memorial of response with effect from notification of the memorial of application), the case is referred, depending on the subject matter, to one of the six chambers of the Court, or to a joint chamber or the full Court, with a view to the appointment of a justice as rapporteur (*conseiller rapporteur*).

When the appeal is inadmissible or not founded on serious grounds the case may be fast-tracked by means of a streamlined non-admission procedure. This procedure, instituted by a law of 25 June 2001, has revived, in a different form, the procedure of the preliminary consideration of appeals that existed until 1947, in civil cases at least, yet with two essential differences. First, although there was formerly a specialised chamber for this purpose, the Chamber of Applications (*Chambre des requêtes*), now every chamber forms its own bench of three justices, who may vary, for the purpose of ruling on this type of appeal. Second, the consideration of appeals by the Chamber of Applications was a mandatory stage for appeals, except in criminal cases, whereas now only appeals appearing to warrant a decision of non-admission are considered by such benches.

This screening process has various advantages. It is fast and simple: although it naturally presupposes detailed consideration by a rapporteur, as well as the opinion of the *Ministère public*, decisions of non-admission, on the other hand, do not need to state the reasons. Further, by sparing the Court of Cassation from having to deal with undeserving cases, this process enables it to focus on its essential task, i.e. developing case-law based on

its response to appeals raising genuine legal problems. The percentage of appeals processed in this way is considerable, amounting to 30% for the civil chambers and 35% for the Criminal Chamber.

Every other case warranting detailed consideration forms the subject of written proceedings prepared by the justice serving as rapporteur, to whom the case has been assigned by the president of his chamber. Having considered the case, the conseiller rapporteur prepares a report, together with a Note and one or more draft judgments. The report consists of a statement of the facts and procedure, an analysis of the arguments, identification of the legal issue requiring a determination and its importance, the essential pertinent references from case-law and doctrine, an indication as to whether one or more draft judgments have been prepared and a proposal regarding the appropriate bench to deal with the case. The Note consists simply of the rapporteur's opinion. Whether there is one or more draft judgments is a decision for the rapporteur alone, depending on whether he considers that a number of solutions may be possible, or at least may need to be discussed.

The case file, including the report (but excluding the Note and draft judgments, which will be seen only by the justices who will have to consider the case), is then transmitted to an advocate general who examines it with a view to stating his opinion. About a week before the hearing, the president and senior justice of the chamber meet for an exchange of views on the cases thus fixed: this is the conférence, whose purpose is to determine whether certain cases appear to raise particular difficulties to which the rapporteur and the bench assigned to hear them will need to give special attention.

By virtue of a law of 23 April 1997, this type of bench consists of three justices when the appeal requires action, regardless of what kind it is (rejection, quashing, inadmissibility or non-admission). Otherwise, the bench must consist of at least five justices with voting rights. The term formation restreinte (limited bench) is often used for the former and formation de section (section bench) for the latter. On all such benches, the Ministère public states its views. The case is then deliberated upon, during which process the rapporteur summarises the essential points of his work and states his opinion. The floor is then given to the senior justice, followed, in declining order or seniority, by each justice (conseiller), the president of the chamber being last to speak. Then the action decided upon (solution), i.e. not only the general tenor of the judgment, but also its actual wording (at least as important as the action itself) are put to a majority vote, although the judgment will contain no mention of how justices voted. There can be no dissenting opinion.

Where a ruling to dismiss an appeal is delivered, the impugned decision becomes irrevocable. When a judgment is quashed it may be quashed without appeal (the impugned decision is set aside, the parties thus being exactly where they were before that judgment) or partly without appeal (in which case, only certain parts of the operative paragraph or paragraphs of that judgment are set aside). In principle, such a ruling only concerns the applicant and respondent in the appeal, although in criminal cases the Court of Cassation has the option of extending the effects of the setting aside to include parties to the proceedings who have not appealed.

In the great majority of cases, a judgment to set aside a decision refers the case back to a court of the same level as the one whose decision has been overturned, or to the same court with different judges. Except when a decision has been made by the full Court, the court to which it is referred back is not bound to comply with the action or solution in the Court of

Cassation's decision. However, the Court of Cassation may quash a judgment without appeal, either because the action of quashing the judgment does not imply any further ruling on the merits or because the facts, as definitively ascertained and assessed by the trial court, enable it to apply the appropriate rule of law. The aim here is to speed up the proceedings and ensure respect for one of the major requirements of a fair trial, in other words, a party's right to be tried within a reasonable time.

## **CASE-LAW OF THE COURT OF CASSATION**

As it is at the apex of the legal hierarchy, is unique and because this is its main purpose, the Court of Cassation plays an essential role in unifying case-law. This function explains the specialised nature of the Court, which never rules on the facts. Its task is thus exclusively to interpret the law, whether with respect to the merits or to procedure, old or new, all of which enhances the importance of its decisions accordingly. Its interpretation is based on the replies it gives in its judgments to the arguments set out before it, more specifically to the arguments alleging a breach of the law. How the ensuing case-law is formed, developed and disseminated calls for some comment.

Owing to the very nature of the technique of quashing (cassation), which consists in checking each case for the proper application of the law to the decision impugned, the case-law develops gradually, on the basis of the appeals and arguments arising. The practice known as *arrêts de règlement* ('regulatory judgments') is prohibited at the Court of Cassation, as it is in all other French courts, by Article 5 of the Civil Code, according to which "Courts are prohibited from making a ruling by way of general regulatory provisions on cases submitted to them". The case-law therefore develops little by little as problems are gradually raised by legal arguments. Hence it is by being attuned to French - and now European - society that the Court states the law, adapting it to developments in that society, be they political, social, economic, international, technical or technological. The very diversity of the issues put to the Court of Cassation means that it has to give a balanced, logical response to most of the potential problems raised by the interpretation of the law.

The resulting flexibility leaves ample scope for a new reading, over time and if required, of how to interpret the law, in light of the changes in society and the way they are perceived. In particular, it makes it possible to fill loopholes in positive law, Article 4 of the Civil Code prohibiting courts from declining to rule on the basis of the silence, obscurity or inadequacy of the law. The Court of Cassation thus has an essential role to play in this respect. Faced with the silence of the law, there are essentially two techniques it can use. One of these is the application of texts to situations not foreseen by the legislator, a possible example being the texts on criminal liability, essentially stemming from the Civil Code of 1804, to motor vehicles traffic. The other technique is the reference to general principles (such as, for example, the rule *fraus omnia corrumpit*, the theory of unjust enrichment, the rule of abnormal disturbance of neighbourhood or the principle of the rights of defence), naturally provided such a technique does not conflict with a positive law text. However, this technique has its limitations: sometimes the actual terms of the law, despite having become quite debatable as a result of various developments, do not permit any modification of its interpretation. In its annual report, the Court of Cassation then indicates the consequences arising from the present state of the texts and suggests legislative amendments.

The development of case-law undergoes gradual shifts in direction, but may also take the form of actual reversals of precedent, which by their very nature are exceptional. The justices of the Court of Cassation are at pains to lay down a case-law which is stable, and can thus serve as a yardstick for the trial courts, for litigants and their counsel. Building the law is necessarily a gradual, ongoing process. Moreover, the Court's authority is at stake. Yet this does not mean that case-law should be cast in stone, as judgments have repeatedly shown. And the logic of the development can therefore result, on one point or another, in a sudden reversal of precedent, usually the fruit of a long internal maturing process, other elements of which are the reactions of scholarly opinion or resistance from the trial courts. At any event, it is only after mature reflection that such a reversal of case law is decided upon, for it has repercussions not only on the particular case directly concerned, but also, through a chain reaction, on all pending cases on the same issue. In other words, it has retroactive effect, thus calling into question the practices it condemns. It is therefore understandable that there is a constant concern to strike a delicate balance between the need to adapt the law to changes in society and the need for laws that are lasting. The greatest reversals of precedent often originate in the full Court, though it has no monopoly over them.

However, it is only through the knowledge that the judicial and legal worlds, not to mention enterprises and individuals, have of the case-law of the Court of Cassation that it achieves practical significance. This is why such importance is attached to the task of publicising it, which is the responsibility of the Legal Research Department, and which it does in a variety of ways reflecting the varied sections of the public concerned. The traditional vehicle for this, dating back to the age of the Revolution, is the publication of two monthly bulletins, one for the civil chambers, the other for the Criminal Chamber, featuring judgments whose publication is proposed by the president of each chamber. There is now also a quarterly "labour law" bulletin and a fortnightly information bulletin. The latter, addressed to all courts and courts of appeal, provides summaries of the most important decisions or those which are of particular interest to the trial courts, and which have been delivered not only by the Court of Cassation, but by other courts too. It also reproduces opinions of advocates general and reports by justices (conseillers), together with a selection of scholarly writings and transcripts of meetings organised by the Court of Cassation, such as those of the presidents of the courts of appeal.

Another instrument which has been in use since the nineteenth century is the publication of judgments in legal journals, accompanied by commentaries by legal scholars and often, in the case of the most important decisions, of the opinions and reports referred to above.

Through computing and the development of the Internet, the public now has free access to the Legifrance website (<http://www.legifrance.gouv.fr>), an online database featuring all the decisions published in the Civil Bulletin since 1960 and decisions published in the Criminal Bulletin since 1963, as well as all decisions since 1987 (published as well as unpublished). This database is set to develop further with the inclusion of new headings. The Court of Cassation's website ([www.courdecassation.fr](http://www.courdecassation.fr)) also offers a selection of judgments and opinions and publishes all the periodic information bulletins.

Finally, special mention should be made of the Court of Cassation's Annual Report. Under the Judicature Act, the Garde des Sceaux (Minister of Justice) receives an annual report on the progress of proceedings and the time-limits laid down for them, for which purpose a Reports and Studies Committee was set up. This Committee, under the authority of the First

President and of the Procureur général of the Court, consists of one of the justices of the Court as chairman, and of representatives of each chamber of the Court, of the Parquet général and also of the director of the Legal Research Department. Among other things, the annual report contains suggestions for legislative or regulatory amendments, commentaries on the most significant judgments delivered during the year, as well as legal studies prepared by justices of the Court of Cassation. It can be found online on the Court's website.

## **THE COURT OF CASSATION'S LEGAL RESEARCH DEPARTMENT**

Placed under the authority of the First President, the Legal Research Department is directed by a justice (conseiller) at the Court of Cassation and consists essentially of judges (auditeurs) at the Court and of senior registrars.

First, it helps to streamline the processing of cases. When the appeals are referred to the various chambers, it groups together proceedings raising identical or related issues and helps to reduce any conflicts in the case-law of the Court of Cassation itself or between it and the trial courts. It also assists justices and advocates general in their research if they so require. The creation of a database of European law in the Department provides a useful tool for analysing the problems arising from the implementation of European law by national courts.

Secondly, the Legal Research Department is instrumental in developing the Court's case-law policy by publishing its judgments and also by publicising them in the courts, by electronic as well as other means.

## **ADVISORY OPINIONS OF THE COURT OF CASSATION**

A law of 15 May 1991 granted the Court of Cassation the power to deliver advisory opinions. The advisory opinion procedure has the advantage of very quickly making it known where the Court of Cassation stands on the interpretation of new texts, thus making it easier to predict what the Court's position will be regarding one particular rule or another, whose implementation is causing problems. This procedure, which is strictly regulated, is subject to a number of conditions:

- A request for an opinion must be made by a court in the national judiciary which, in connection with a question raised in proceedings pending, decides to ask the Court of Cassation's opinion. Direct requests from the parties are therefore excluded.
- The question must be legal and a new one.
- It must present a serious difficulty and arise in many disputes.
- Besides these conditions imposed by law, the Court of Cassation has added another: the question raised must not already be the subject of an appeal pending before it, the intention here being not to deprive the chamber dealing with the case of its power to rule on it.

In criminal cases, the law of 25 June 2001 imposed other restrictions relating to the nature of disputes and the concern not to delay the adoption of a decision when an accused is being held in custody on remand or is subject to judicial review.

The Court of Cassation, which rules as a specific, separate bench depending on whether an opinion has been requested in a civil or a criminal case, in principle with the First President presiding, must deliver its opinion within three months of the filing of the request. The court having requested the opinion is not formally bound to comply with it.

There are some ten advisory opinions per year.