

## 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 of all tried in courts of first instance (*tribunaux d'instance*<sup>1</sup> and *tribunaux de grande instance*<sup>2</sup>, commercial courts, employment tribunals [*conseils de prud'hommes*] ...). Depending on the monetary value of the dispute, decisions from these courts are either deemed to be rendered at last instance if they involve minor claims or, as in the majority of cases, at first instance. Thereafter they may be appealed before a court of appeal which re-examines all the factual and legal aspects of the case. Decisions rendered at last resort by first-level courts and decisions delivered by courts of appeal may themselves be appealed to the Court of Cassation. In addition to its position at the apex of the pyramid, the Court of Cassation is essentially characterised by two distinctive features which set it apart from other courts. First of all, it is unique: "There is one single Court of Cassation for the whole Republic". Its most important role by far is to uphold this fundamental principle which is laid down at the beginning of texts in the Code of Judicial Organisation that deal with the Court of Cassation: it cannot be dissociated from its foremost purpose which is to harmonize case law and ensure that texts are interpreted in the same way throughout the country. Such a harmonized interpretation is achieved thanks to the unique status of the Court which is consequently able to develop an authoritative case law. A harmonized interpretation and the unique status of this Court are thus mutually dependent. Secondly, it is not a third level of jurisdiction after the lower courts and the courts of appeal as it does not rule on the merits of a case. Indeed, when decisions are referred to the Court of Cassation the Court is required to decide whether the rules of law have been correctly applied by the lower courts based on the facts. This is why the Court of Cassation does not strictly speaking deliver a ruling on the disputes which are at the origin of the decisions but on the decisions themselves. In actual fact it judges the decisions of the lower courts: it is up to the Court to rule whether based on the facts of the case which the courts assessed at their sole discretion and on the questions which were put to them they have accurately applied the law. The purpose of each appeal is consequently to challenge a decision and the Court of Cassation is thus required to find whether the rules of law have been correctly or incorrectly applied.

It is at this precise point that the outcome of the dispute is decided. If the decision of the lower court is quashed it is quite naturally set aside and, save in exceptional circumstances where the decision is quashed without the right to appeal from the Court of Cassation's judgment, the case has consequently to be heard again.

<sup>1</sup> The Tribunal d'instance is competent in personal or movable civil actions not exceeding €10,000, subject to appeal.

<sup>2</sup> The Tribunal de grande instance (TGI) is competent in civil matters valued at over €10,000 as well as all cases (regardless of the amount of money involved) in family law (marriage, divorce, adoption, successions), seizure of immovables, patents, trademarks and dissolutions.

The origins of these distinctive features, which confer on the Court of Cassation its singularity and ensure that appeals which are lodged before it form part of “exceptional” review proceedings, can be dated back to the French Revolution. A “Tribunal of Cassation” was indeed established by an Act of November 27, 1790 which by virtue of a *senatus consultum* (a decree from the Senate) on the Floreal 28, Year 12 became the Court of Cassation. However, the history of the Court can in fact be traced back even further and originated from the way justice was rendered under the *Ancien Régime*: it was possible at that time to seek judicial review of decisions delivered by the *Parlements [Courts of Appeal]* before the King’s Council even though justice had been rendered in his name. The fundamental role played by the Revolution was to maintain this institution, despite the fact that it was losing its *raison d’être*, and transfer the powers that belonged to the Head of State to the courts. Further developments which took place during the 19<sup>th</sup> century have enabled the Court to establish its widely recognized powers.

Moreover, the legal and moral role played by this judicial body has led the legislator to entrust it with a variety of other tasks. One such example is the introduction of advisory proceedings which, under certain conditions, allow the Court to accomplish its vocation to harmonize the interpretation of the law. Here the Court intervenes in advance that is before and not after the lower courts have rendered their decision. In addition, the role of the Court has also been indirectly widened on the one hand by the creation of various judicial bodies which are comprised in full or in part by certain of its members and on the other by the fact that its members are requested to serve on a range of increasingly influential and major organisations which do not necessarily fall within the scope of their judicial powers.

## THE STRUCTURE OF THE COURT OF CASSATION

The structure of the Court of Cassation is naturally based on the fact that its role is to state the law. However, in order to function correctly it also requires an efficient administrative framework.

From a judicial point of view, the Court of Cassation is comprised of divisions to which appeals are referred in line with case-review criteria that are laid down by the Court of Cassation Bureau. The number of divisions has gradually increased from the original three (Civil Division, Criminal Division and *Chambre des requêtes* [a division which ruled on the admissibility of appeals before they were examined by the Civil Division and which was abolished in 1947] to six. A Commercial Division (*Chambre commerciale, économique et financière*), a Labour Division (*Chambre sociale*) and a Criminal Division (*Chambre criminelle*) have been added to the three strictly speaking civil divisions: the First, Second and Third Civil Divisions. Each division has its own presiding judge (*président*) and the President (*premier président*) assigns an unequal number of trial judges (*conseillers*) to each of these according to the number of appeals to be heard. However, due to the increasing caseload, each division has been divided into sections, each one having its own respective bench of judges. A case is heard by three judges if the appeal is inadmissible or if there are no serious grounds to overturn the ruling of the lower court. In such cases or if the outcome of the case “appears to be obvious”, the Court declares that the appeal is “not admitted” (this is called the non-admission procedure). Otherwise, the case is heard by a bench which is comprised of at least five judges, each one having a right to vote. The presiding judge may decide to sit in plenary session (Full Court) if the ruling to be given might overturn previous case law or because the Court is required to rule on a sensitive issue.

The Court of Cassation is also comprised of temporary benches which either include judges from each of the divisions (Full Court / plenary sessions) or judges from at least three divisions (Mixed Divisions). These benches are presided over by the President or by the most senior divisional presiding judge of the Court.

A total of nineteen judges sit in plenary sessions. These include all the divisional presiding judges and senior trial judges (*doyens*) together with a trial judge from each of the divisions. The decision to hear a case in Full Court is made by the President or by the division to which the appeal is referred. This is indeed the case when a matter of principle is involved. However it is mandatory if after an initial decision or judgment has been quashed by the Court of Cassation the decision of the second court to which the matter was referred is challenged again on the same grounds or if the request for a plenary session is made by the General Prosecutor (*procureur général*) before the appeal is heard. It is important to note that the points of law laid down in a ruling by the Full Court which quashes a lower court’s decision are binding on the court to which the case is then referred.

In addition to the President or Deputy President, mixed divisions include four judges from each of the divisions (the presiding judge, the senior trial judge and two trial judges). This would represent a total of thirteen judges if a mixed division were comprised of judges from the three divisions. If a given case normally falls within the scope of several divisions or if diverging rulings have been issued or are likely to be issued by the divisions, it must be heard by a mixed division. This is also the case if the division which heard the appeal initially reached a shared vote. Prior to the hearing, the General Prosecutor may also request for a given case to be heard by a mixed division. The foremost purpose of this type of bench is to settle inconsistencies in case law between the divisions.

One or several court clerks are assigned to each division.

Furthermore, a certain number of judicial commissions are closely linked with the Court of Cassation, as they use the judges, administrative framework and premises of the Court. Some examples of these are:

- the National Commission on Compensation for Wrongful Imprisonment which acts as a court of appeal against decisions by the presidents of the courts of appeal. Its role is to provide compensation for the detrimental consequences of a decision to remand a defendant in custody pending trial if and when the court proceedings in question have been terminated because the case was dismissed or the defendant was discharged or acquitted;
- the Criminal Conviction Revision Commission which examines applications for the revision of a judgment. The Commission refers those cases which it believes are likely to be admissible to the Criminal Division of the Court of Cassation;
- the Commission for the Review of Criminal Law Decisions following a decision by the European Court of Human Rights. This Commission, which was set up by an Act dated June 15, 2000, verifies that the application for review is both admissible and well-founded before referring the case to a court of equal jurisdiction and nature as the court which issued the decision in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the National Parole Board which was also created by the Act dated June 15, 2000. It hears appeals from regional court decisions concerning applications for parole lodged by prisoners.

The Court of Cassation also has a Legal Aid Board which is run conjointly by judges, lawyers, State officials and users of the court. The Chairman of the Board is appointed by the President. Its role is to examine requests for legal aid which are sought by appellants or respondents thereby ensuring free access to the Court for all citizens seeking justice irrespective of their financial situation.

As far as the administrative organisation of the Court is concerned, it will be seen later on that the President for the Bench and the General Prosecutor for the Public Prosecution's Office each have their own specific powers. Both have at their disposal a Secretariat-General which is comprised of judges. The immediate members of the President's staff act as advisors, human resources directors, managers and communications officers. The Secretariat-General of the President is responsible for the internal administration of the Court and the Information Technology Department. It is in charge, on the one hand of the operating and maintenance of the software and hardware and, on the other of providing technical assistance and training to the members of the Court.

A Bureau which is comprised of the President, the divisional presiding judges, the General Prosecutor and three Chief Deputy Prosecutors/[First Advocates General] (*premiers avocats generaux*) also has certain specific duties. It "deliberates on the areas which fall within its remit pursuant to laws and decrees". It decides in particular on the number and duration of hearings and draws up the National Register of Experts. It also advises the President on major issues concerning the organisation and administration of the Court.

Finally, like all courts, the Court of Cassation has a Court Clerk's Office which includes all the administrative departments. It is managed by the Chief Clerk who reports directly to the President. The Public Prosecutor's Office has its own secretarial offices which are managed by a chief clerk.

## THE MEMBERS OF THE COURT OF CASSATION

A cardinal distinction, which is indeed of fundamental significance in the French legal system, must be drawn between the members of the Court and the members of the Public Prosecutor's Office. The foremost role of the former is to judge cases whereas the latter present them before the court and in this respect ensure that the law is applied correctly.

### The Bench

The judges of the bench include the President, the divisional presiding judges, the trial judges and the deputy judges (*conseillers référendaires*).

The **President** enjoys both jurisdictional and administrative powers and presides over the Full Court and the Mixed Divisions. He also presides over one of the divisions when he deems fit, rules on emergency applications lodged by one of the parties in an appeal and may reduce the deadlines for the filing of written submissions. He decides on the relevance of an application for leave to enter a plea of forgery which is lodged by one of the parties against an exhibit produced before the Court of Cassation and states that an appeal is forfeited if the written submissions are not filed within the deadlines. He also rules on questions of admissibility and discontinuance of appeals and the withdrawals of appeals from the case-list. He hears decisions from the Legal Aid Board which are referred to him. He assigns the trial judges, deputy judges and divisional clerks to each of the six divisions of the Court. Finally he presides over the Bureau and superintends the Chief Clerk in respect of administrative matters.

However, in addition to his jurisdictional and administrative responsibilities within the Court, the President also holds a number of significant positions outside the Court. The President for example presides over the Higher Judicial Council in respect of disciplinary matters or the appointment of a judge of the bench since the reform of the Judicial Council which was laid down by the Act of July 23, 2008. He also chairs the Commission for the Promotion of Judges, the Board of Directors of the French National School for the Judiciary which plays a vital role in defining the initial training of future judges and the continuing education of all judges. As the highest judicial officer in the country, the President is a pivotal figure whose views are listened to by the various State bodies and frequently represents the judiciary during national and international events. His opinion is sought on the preliminary drafts of laws and decrees, which do not only concern proceedings before the Court of Cassation, but which also introduce major legal reforms. Furthermore, the legislature also requires the President to appoint the public figures who are to chair or to take part in various bodies, due to the independence of his position, and the authority it carries.

For a number of years now, the President has organised an annual meeting with all the presidents of the courts of appeal to exchange views on the new legal issues faced by lower courts and courts of appeal, in the presence of representatives from the various divisions of the Court and from the Chancellery. These meetings, which are further enhanced by written

quarterly correspondence between the courts of appeal and the Court of Cassation, are a valuable means of forging closer links at all levels of the judicial system and enable the Court to determine where its priorities lie in the execution of its duty to state the law, in view of the vast number of cases it is required to handle.

The six **divisional presiding judges** (the seventh is the director of the Documentation, Research and reporting department) preside over the hearings before their respective benches. In their absence, the most senior divisional trial judge, who is called a *doyen*, presides the hearing, or if he/she is absent, the hearing is presided by the most senior trial judge present.

There are one hundred and twenty **trial judges** who are the justices of the Court and another thirty-five positions held by the presidents of the courts of appeal and the president of the *tribunal de grande instance* of Paris. They are appointed by Presidential decree acting on a proposal from the Higher Judicial Council. Most of the judges selected belong to the judiciary, but some of them are law professors, or lawyers at the Council of State and Court of Cassation. There are also ten special assignment trial judges who are appointed for a period of five years due to their specific expertise and experience. They carry out the same role as the trial judges.

The trial judges are also appointed or proposed by the President to sit on various commissions and institutions.

The most senior divisional trial judge, who is called the *doyen*, supervises all cases.

The seventy **deputy judges** are chosen from the judges in office in the lower courts for a period which does not exceed ten years. They take part in proceedings in an advisory capacity except when they are Judge-Rapporteur in which case they are entitled to vote. They are entrusted with carrying out research and drafting summaries of decisions in conjunction with the Documentation, Research and Reporting Department.

### **The Public Prosecutor's Office**

The Public Prosecutor's Office is headed by the **General Prosecutor** who is assisted by seven **Chief Deputy Prosecutors**. In addition, it has a staff of thirty-three deputy prosecutors and five associate prosecutors. The General Prosecutor is personally entrusted with the role of public prosecution. The General Prosecutor assigns the members of the Public Prosecutor's Office to the divisions where he feels their work will be the most useful. The General Prosecutor may speak in hearings in the various divisions if and when he deems fit. In practice, the General Prosecutor and the deputy prosecutors are independent from the Minister of Justice. The deputy prosecutors do not report directly to the General Prosecutor who does not give them instructions.

The role, powers and authority of the Public Prosecutor's Office at the Court of Cassation are quite specific. The Public Prosecutor's Office is required to play a leading role in

the administration of justice and as such its foremost task is to ensure a harmonized interpretation of the law and compliance with the wishes of the legislature, public interest and public order. It also must make sure that the case law of the Court and all lower courts is consistent.

In order to achieve this objective, the General Prosecutor benefits from significant privileges. In civil cases, he may take the initiative of referring an irregular decision to the Court for it to be overturned “in the interests of the law”. He may also, when requested to do so by the Minister of Justice, lodge an appeal on the grounds of illegality. Here the General Prosecutor informs the Court of the actions of the lower courts which exceeded the powers which had been given to them. In criminal cases, appeals in the interests of the law may either be ordered by the Minister of Justice or at the initiative of the General Prosecutor. Moreover, the General Prosecutor also has the power to refer a case to a mixed division or to the Full Court.

The General Prosecutor also participates in various commissions which are closely associated with the Court of Cassation and takes part in the Commission which rules on appeals lodged by criminal investigation officers who have been suspended or whose authorisation has been withdrawn. He refers appeals to the Court of Cassation in the following circumstances: revision of a judgment; applications to refer a case from one court to another due to a claim from one of the parties, for risk of lack of impartiality, or risk to public safety; petitions for referral of a specific case by one court to another competent court; and requests for the designation of a court which shall be in charge of investigating or judging crimes and offences committed by judges and certain public servants.

The General Prosecutor also acts as the public prosecutor with the French Court of Justice where he/she is assisted by the Chief Deputy Prosecutor and two deputy prosecutors.

Furthermore, the General Prosecutor is also involved in the management and discipline of the judiciary. He consequently takes part in the Commission for the Promotion of Judges and sits on the Board of Directors of the French National School for the Judiciary. Since the reform of the Higher Judicial Council which was laid down by the Act of July 23, 2008, he presides over the composition of the Higher Judicial Council which hears disciplinary actions against public prosecutors.

## **THE BAR COUNCIL OF THE COUNCIL OF STATE AND COURT OF CASSATION**

The Court of Cassation has specialised lawyers who represent and defend litigants. They enjoy a monopoly over all cases submitted to the Court with the exception of electoral disputes (whether professional and political) which fall within the remit of the Court, as in this particular instance the parties are entitled to defend themselves. These lawyers, who are members of a specific Bar Council, descend from the lawyers at the King's Councils and are sometimes consequently referred to as lawyers of the Councils. The Bar Council Charter dates back to a royal decree of September 10, 1817 which is still in force, even though it has been amended as necessary over the years. These lawyers hold official positions and are thus limited to a total of sixty. A decree of March 15, 1978 however authorised a professional partnership or practice to hold the official position but each partnership may only have a maximum of three partners. There were a total of 97 lawyers (partners or other) on January 1, 2010. Membership of the Bar Council is governed by strict conditions of aptitude and future lawyers have either to pass an examination after three years of training or benefit from prior professional expertise which is defined in accordance with very specific objective criteria. An order of the Minister of Justice, appoints a lawyer after they have been presented by the transferor. In order to benefit from the transferor's right to act as a lawyer of the Court, the successor or partner is required to pay a financial contribution, for which financing facilities exist, and which is controlled by the Bar Council and the Chancellery. The creation of a specialised bar council attached in this way to a supreme court has been acknowledged by European bodies as necessary to ensure that the interest of justice is served.

Internal discipline within the Bar Council falls within the remit of a disciplinary council which is comprised of a chairman and eleven members who are all elected for three years. A third of the members of the council are re-elected each year. The main purpose of this Council is to lay down the professional ethics of the lawyers of the Councils and it issues an opinion on personal liability lawsuits which may be brought against them.

The lawyers, who are also public officers, are closely involved in the running of the Court of Cassation. Every legal office assists legal aid beneficiaries. Some lawyers are part of the Legal Aid Board while others examine criminal appeals to detect a possible ground for the lower court's decision to be quashed. Generally speaking, their role is to satisfy two concerns which are inextricably linked: the litigant's interests and the proper functioning of the Court.

## APPEAL TO THE COURT OF CASSATION

In civil cases, an appeal to the Court of Cassation shall be lodged with the Court Clerk's Office by a lawyer of the Council of State and Court of Cassation (except in the case of electoral disputes where the appeal may be lodged by the parties themselves or by any authorised representative provided with a special power of attorney<sup>1</sup>). The deadline for lodging the appeal is "two months unless otherwise stipulated", starting to run from the date the impugned decision is notified to the parties. In criminal cases, the appeal must be lodged with the clerk of the court which issued the decision no later than five days after it was delivered.

The appeal, which then complies with certain procedural rules that do not fall within the compass of this general presentation, necessarily challenges a decision. This raises the following twofold question: what type of decision may be appealed and on which grounds may a judgment be impugned.

In civil cases, appeals are only possible against decisions which have been rendered at last instance. However, under certain conditions, the impugned decision must also have been delivered on the merits of the case, in other words on at least "part of the main applicant's claims" which consequently excludes judgments ordering a measure of inquiry or interim relief. The latter may only be appealed at a later stage once the decision on the merits of the case is delivered.

In order for a decision to be quashed, the appellant must establish that the impugned decision does not comply with rules of law. This is the reason why any debate on the facts of the case are excluded from such a form of appeal as the Court of Cassation has no power to verify them. Indeed, the lower courts have sole discretion to assess these elements.

In criminal cases, "the decisions of an examining division of a court and the judgments rendered at last instance in respect of serious offences, misdemeanours and minor offences may be set aside if there is a breach of law..." Interlocutory court decisions follow specific rules. These allow for an application for leave to file an emergency appeal to be lodged with the presiding judge of a criminal division under certain conditions. A number of other cases of procedural irregularities has been added to the breach of law, by the Code of Criminal Procedure. Such texts have today been reinforced by the European Convention for the Protection of Human Rights.

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<sup>1</sup> *In the main and apart from criminal cases, the decree of 20 August 2004 does not require parties in electoral disputes to be represented by lawyers. In respect of employment disputes, parties must now be represented by a lawyer of the Councils.*

Generally speaking, in both civil and criminal cases, the control exercised by the Court of Cassation falls within two major categories: legislative control and disciplinary control.

By and large, the Court exercises legislative control through the replies it gives to grounds that there has been a violation of (civil or criminal) law or to grounds that the lower court's decision lacked a legal basis (in civil cases). A breach of law is not only a breach of law in the constitutional sense of the term but also breaches of regulatory texts, precedents and international treaties, which have superiority over domestic law pursuant to article 55 of the Constitution, and in particular Community law. With regard to grounds that the lower court's decision lacked a legal basis, this does not necessarily imply that the lower court misinterpreted the law but presupposes that the court did not provide sufficient grounds for its decision. In addition to the aforementioned cases, there is also the distortion of the terms of a document, the lack of legal grounds and the failure to reply to submissions. It is in this field par excellence that the Court of Cassation is able to show its capacity to harmonize – and often innovate – the interpretation to be given to a rule of law, whether it is substantive or procedural or part of old or more recent legislation, thereby developing its case law, which will be discussed later on in the article.

The notion of disciplinary control – which is a term that has been in use for a long time – involves first and foremost the court's obligations to deliver and draft their decisions in a particular way. The Court is required to ensure that the lower courts have correctly set forth the parties' claims and pleas, their replies to the submissions and the reasons for the judgments and decisions. The requirement to provide legal reasoning does not only cover the obligation to formulate reasons in support of the decision, but also the obligation not to contradict themselves, not to use hypothetical or dubious grounds and not to use inoperative grounds, in other words which do not constitute a reply to the plea raised. The distortion of the clear and precise meaning of a document also falls within the scope of disciplinary control in civil proceedings. A broader interpretation of disciplinary control also includes complaints alleging a failure to comply with the ethical obligations of the court and generally speaking with the components of the right to a fair trial: adversarial principle in particular when a plea is raised *ex officio*; the fairness doctrine; the principle of public hearing and the right to have a case heard within a reasonable period. Major developments in particular in the case law on the fairness doctrine in the light of article 6§1 of the European Convention on Human rights, has had significant repercussions on the *modus operandi* of courts or other similar bodies such as independent administrative authorities.

This broad interpretation of disciplinary control represents a heavy burden for the Court of Cassation as a very large number of appeals rely on one or more pleas pertaining to this control. It is however impossible to avoid it due on the one hand to the quantity, diversity and array of courts whose decisions are controlled by the Court of Cassation and on the other to the vital role played by the requirements to hold a fair trial in the principle of the rule of law.

## **REVIEW AND JUDGMENT OF THE APPEAL**

Once the appeal has been lodged with the Clerk's Office at the Court of Cassation a statement of claim or supplementary brief as it is called must then be filed with the Court within the deadlines. If the said statement of claim or supplementary brief is not filed within the deadlines the appeal is dismissed. The said document sets out the pleas in law which the appellant intends to rely on to have the impugned decision quashed and enlarges on the legal arguments in support of the said pleas. The respondent may in return file a statement of defence. Once the deadlines, which vary depending on the type of case (in civil matters, four months for the statement of claim and two months for the statement of defence from the date the statement of claim is served), have passed, the case is referred depending on its subject-matter to one of the six divisions of the Court, or even to a mixed division or to the Full Court where a Judge-Rapporteur is designated.

If the appeal is inadmissible or is not founded on serious grounds, the case may then be fast-tracked by a streamlined procedure which is called the non-admission procedure. This procedure, which was established by an Act of 25 June 2001, has restored the preliminary review of appeals, albeit in a different form, which existed in civil cases at least until 1947. However, there are two principal differences. To begin with, in the past a specialised division existed which was called the *Chambre des requêtes* [a division which ruled on the admissibility of appeals before they were examined by the Civil Division]. Now each division, which is comprised of a bench of three judges which vary from one appeal to the next, is required to rule on this type of appeal. Secondly, the examination of appeals by the *Chambre des requêtes* was compulsory for all appeals except those in criminal cases whereas now only those appeals that are likely to fall within the scope of the non-admission procedure are considered by these benches.

This screening process has a number of advantages. It is fast and simple and although it naturally presupposes that a Judge-Rapporteur has carefully examined the case and that the Public Prosecutor's Office has been consulted, the reasons behind decisions of non-admission need not be given. Moreover, by freeing the Court of Cassation of undeserving cases, it is able to focus on its foremost task which is to draw up case law based on the replies given to legitimate legal issues. A significant number of appeals are processed in this way: 30% in the civil divisions and 35% in the Criminal Division.

The Judge-Rapporteur, to whom every other case is assigned by the presiding judge of their division, is required to carry out an in-depth review of the file and submit their findings in writing. After having examined the case, the Judge-Rapporteur is required to prepare a report and a memorandum together with one or more draft judgments. The report includes a statement of the facts and proceedings, an analysis of the pleas, the specific aspects and significance of the point of law, the principal references from pertinent case law and legal theory, an indication as to whether one or more draft judgments have been prepared and a proposal on the composition of the appropriate bench to rule on the case. The memorandum merely contains the Judge-Rapporteur's opinion. The presence of one or more draft judgments is at the sole discretion of the Judge-Rapporteur who may decide that several solutions are possible or at least that they should be submitted for discussion.

The file, including the report (with the exception of the memorandum and draft judgments which are only intended for the trial judges who are to hear the case), is then transmitted to a deputy prosecutor who is required to issue an opinion. Approximately one week before the hearing the presiding judge and the senior trial judge of the Division meet to exchange views on the cases to be heard. The purpose of this meeting (*conference*) is to ascertain whether certain cases raise specific issues which require particular attention from the Judge-Rapporteur and the bench which has been assigned to hear them.

Pursuant to an Act of 23 April 1997, a bench comprised of three judges is necessary to rule on a case for which the outcome of the appeal is obvious notwithstanding the actual decision of the Court (dismissal, quashing of the lower court's decision, non-admissibility and non-admission). Otherwise, the bench must be comprised of at least five judges who are entitled to vote. The term "limited bench" is used for the former and "section bench" for the latter. The Public Prosecutor expresses his/her point of view in all cases. The case is then placed for deliberation. During this stage, the Judge-Rapporteur orally summarises the main points of his/her report and expresses his/her opinion. The senior trial judge then addresses the court and is followed in descending order of seniority by each trial judge. The Presiding Judge is the last person to speak. Then the court's decision, in other words not only the general thrust of the judgment but also its actual wording (which is as important as the decision itself) is put to a majority vote. The judgment does not however stipulate how the judges voted. There is no dissenting opinion.

If an appeal is dismissed, the impugned decision becomes irrevocable. A judgment may be quashed in full (the impugned decision is set aside and the parties find themselves in the position they were in before the decision was rendered) or partially (in this particular case, only certain parts of the ruling are overturned). In principle, such a decision only concerns the appellant and the respondent. However in criminal cases the Court of Cassation has the possibility of extending the consequences of the decision to overturn a lower court's decision to any party to the proceedings who have not appealed.

In the vast majority of cases, when a decision is quashed it is then referred back to another court of equal jurisdiction to the one which initially heard the case or back to the same court which is comprised of a different bench. Except in judgments which are rendered by the Full Court, the court to which the case is then referred is not bound to comply with the terms of the ruling of the Court of Cassation. However, the Court of Cassation may quash a judgment and refuse the right to appeal from its decision if such a judgment does not entail a new ruling on the merits of the case or if the facts, which have been ascertained and assessed at the sole discretion of the lower courts, enable the Court to apply the appropriate rule of law. The aim here is to expedite proceedings and ensure that one of the principal requirements of a fair trial, in other words the right of a party to be judged within reasonable time, is observed.

## CASE LAW OF THE COURT OF CASSATION

The Court of Cassation plays a fundamental role in harmonizing case law due to its position at the apex of the hierarchical structure of the courts, to the fact that it is unique and because it is its foremost task. This specialised court never rules on the facts of a case but is exclusively required to interpret a rule of law whether the said rule is substantive or procedural, or part of old or new legislation. This naturally enhances the importance of its decisions. The Court's interpretation of a rule of law is laid down in the replies given to the pleas submitted and in particular to pleas which allege a breach of law. The way in which the ensuing case law is established, developed and disseminated is explained in further detail below.

Due to the very nature of the quashing procedure which compels the Court to ensure that the law has been correctly applied for each impugned decision, the case law is established gradually, in line with the appeals and the pleas put forward. Regulatory judgments (*arrêts de règlement*) are prohibited at the Court of Cassation as in any other French court by article 5 of the Civil Code which stipulates that "courts are not entitled to deliver general regulatory judgments on the cases which are referred to them". Case law can only thus develop as and when problems come to light in respect of the pleas submitted. As the Court of Cassation is attentive to the French – and now to the European – society, it is able to state the law by adapting it to the evolutions of the society, be they political, social, economic, international, technical or technological. The range of questions submitted enables the Court to provide a balanced and consistent reply to the majority of potential questions raised concerning the interpretation of the law.

The resulting flexibility leaves ample scope for the Court to give another meaning to the law over time in line with changes in society and the way they are perceived. Furthermore, it allows the Court to fill a legal vacuum in substantive law. Indeed, article 4 of the Civil Code prohibits a court from declining to hear a case on the grounds that the act does not cover a specific aspect of the case, or is ambiguous or inadequate. The Court of Cassation consequently plays a vital role on this particular point. If the provisions of the act do not cover a specific aspect of a case, the Court of Cassation is able to use two techniques. The first approach is to apply the texts to situations that have not been foreseen by the legislators as in the case for example of the application of texts on misdemeanours, which stem by and large from the Civil Code of 1804, to driving offences. The second technique is to refer to general principles (such as for example the *fraus omnia corrumpit* [fraud negates everything] rule, the theory of unjust enrichment, that of abnormal neighbourhood disturbances or the principle of the rights of the defence) insofar as they do not conflict with a substantive law text. Nevertheless the technique is limited. Sometimes the interpretation of the wording of the act which has become questionable due to various developments cannot be modified. In such circumstances, the Court indicates the consequences which ensue from the wording of the texts in its annual report and suggests legislative amendments.

Developments in case law naturally undergo distinctions from earlier case law, but they may also result in a precedent being overturned. This is quite exceptional. The judges of the Court of Cassation are concerned with laying down a stable case law which serves as a yardstick for the lower courts, the litigants and their counsel. Establishing the law is an ongoing process. Moreover the authority of the court is at stake. However, this does not mean that case law should be cast in stone as judgments have repeatedly shown. Logical developments can also result in a complete change in judicial attitude on one point of law or another due to a long internal maturing process which is coupled with input from jurists or resistance from lower courts. It is only in all events after careful consideration that a precedent is overturned as the consequences not only affect the case in question but also have a chain reaction on all cases pending on the same issue. In other words it has a retroactive effect and thus calls into question the practices which it condemns. It is therefore quite understandable that there is constant concern to strike a subtle balance between the need to adapt the law to changes in society and to have lasting rules of law. The most significant reversals are often decided by the Full Court but they are by no means the only division to do so.

However, the practical impact of the case law of the Court of Cassation is only worth if it is brought not only to the attention of judicial and legal circles, but to companies and individuals. This is why particular attention is paid to the way in which the Documentation and Research Department disseminates the case law. A variety of publication tools is used to cover the diversity of the public involved. The most traditional tool, which dates back to the Revolution, is the publication of two monthly bulletins; one is for the civil divisions and the other for the criminal division. The bulletins contain the judgments which are put forward by the divisional presiding judge. Today there is also a quarterly “employment law” bulletin and a twice-monthly information bulletin. The latter, which is sent to all courts and courts of appeal, provides a summary of all the most important decisions or those which are of particular interest to the lower courts. It includes decisions that have not only been delivered by the Court of Cassation but by other courts too. It reproduces the opinions of the deputy prosecutors and the reports of the trial judges. A selection of writings by jurists or even the minutes of the meetings organised by the Court of Cassation such as for example the meeting of the presidents of the courts of appeal are also published in these bulletins.

Another tool which has been in use since the 19<sup>th</sup> century is the publication of judgments in legal journals. These are accompanied by comments from jurists and, in the case of important decisions, by the aforementioned opinions and reports.

However, thanks to information technology and the development of the Internet network the public now has free access to an online database on the *Legifrance* site (<http://www.legifrance.gouv.fr>) which contains all the judgments that have been published in the Civil Bulletin since 1960 and in the Criminal Bulletin since 1963, together with all the judgments, whether they have been published or not, since 1987. This database will be expanded even further to include new pages. The Internet site of the Court of Cassation ([www.courdecassation.fr](http://www.courdecassation.fr)) also

provides a selection of judgments and opinions and publishes all the periodical information bulletins.

Finally, special mention should be made of the Annual Report of the Court of Cassation. The Code of Judicial Organisation indeed stipulates that an annual report is submitted to the Minister of Justice on the progress of proceedings and the time required for appeals to be heard. A Reporting and Research Commission has been specially created to prepare the said report and is comprised of a presiding judge, a trial judge, representatives from each division and from the public prosecutor's office, and the manager of the Documentation and Research Department. The Commission reports to the chief judicial officers. The Annual Report in particular includes suggestions for legislative or regulatory amendments, comments on the most significant judgments which were delivered during the year and the legal research which was carried out by the members of the Court. The Report is also available online on the site of the Court of Cassation.

## **THE DOCUMENTATION, RESEARCH AND REPORTING DEPARTMENT AT THE COURT OF CASSATION**

Reporting directly to the President, the Documentation, Research and Reporting Department is headed by a senior judge who has the same ranking as a divisional presiding judge. The Department is comprised by and large of judges (*auditeurs* at the Court of Cassation) and civil servants (Chief Clerks and court clerks).

First of all, it streamlines the processing of cases and in this respect when appeals are referred to the various divisions it groups together cases which raise identical or similar issues. It also helps to reduce possible disparities in case law at the Court of Cassation or with the lower courts. When required, it also assists trial judges and deputy prosecutors with their research work. The Department now has its own European law monitoring unit allowing to answer the issues raised by domestic courts with regard to the application of European law.

Secondly, the Documentation and Research Department is instrumental in developing the case law policy of the Court through the electronic publication and dissemination of judgments of the Court of Cassation to lower courts.

## OPINIONS OF THE COURT OF CASSATION

The Court of Cassation was entrusted with the power to give opinions by an Act of 15 May 1991. This procedure allows the Court to signify its position on the interpretation of new texts relatively quickly. This enables the lower courts to anticipate the position the Court will take in respect of a specific rule which the courts are having difficulties applying. The procedure is strictly regulated and must comply with a certain number of conditions:

- The request must be made by a judicial court which, in relation to a question that has been referred to it within the scope of a pending case, decides to ask for the Court's opinion. Direct requests from parties are thus excluded.
- The question must be legal and moreover new.
- It must raise a serious difficulty and arise in a number of disputes.
- In addition to these conditions which are laid down by law, the Court of Cassation has added another requirement: the question raised must not already be the subject-matter of an appeal pending before it. The aim here is not to deprive the Division to which the appeal has been referred of its power to rule thereon.

In criminal cases, the Act of 25 June 2001 has laid down other restrictions relating to the nature of the disputes and the concern not to delay the adoption of a judgment when a defendant is being held in custody or is under judicial supervision.

The bench of the Court of Cassation varies depending on whether the request for an opinion concerns a civil or criminal case. The bench is presided over by the President and is obliged to deliver its opinion within three months from the date the request is filed. The court which requested the opinion is not bound to comply with it.

The Court of Cassation delivers approximately ten opinions per year.

