DOI: 10.15691/0719-9112Vol11n1a4

General Interest as a Differentiating Criterion Between the Chilean and Spanish Appeal for Cassation on the Merits

El interés general como criterio diferenciador entre el recurso de casación en el fondo chileno y español

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Abstract

This paper is a microcomparative study of the appeal for cassation on the merits based on Spanish and Chilean regulations. First, a genealogical analysis of the institution referred to is made in order to find a common root. Next, the main points regulated by Spanish and Chilean legislation in relation to the figure under study are mentioned. On the basis of the above, it is examined whether it is pertinent to transplant the appeal in cassation interest in our legal system. It is concluded that it is not advisable to incorporate this figure, since neither the uniformity of the jurisprudence nor the nomofilaxis ensures a fair result, since this depends on the fairness of the rule. On the other hand, it affects the right of the litigant, since it prioritizes the creation of doctrine over the resolution of conflicts, which is the main function of the jurisdiction.

Keywords: *Cassation appeal, procedural remedies, procedural law, microcomparative study, legal transplant.*

Resumen

El presente trabajo es un estudio microcomparativo del recurso de casación en el fondo a partir de la regulación española y chilena. En primer término, se realiza un análisis genealógico de la institución referida con el objetivo de encontrar una raíz común. A continuación, se mencionan los principales puntos regulados por las legislaciones española y chilena en relación a la figura en estudio. En base a lo expuesto, se examina si resulta pertinente trasplantar el interés casacional en nuestro ordenamiento jurídico. Se concluye que no es recomendable incorporar esta figura, puesto que ni la uniformidad de la jurisprudencia ni la nomofilaxis aseguran un resultado justo, dado que esto depende de la justicia de la norma. Por otro lado, afecta el derecho del litigante, por cuanto se prioriza la creación de doctrina por sobre la resolución de conflictos, función principal de la jurisdicción.

Palabras clave: *Casación, recursos procesales, derecho procesal, estudio microcomparativo, trasplante de normas.*

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How to cite this article:
LEÓN MONTERO, Constanza (2023). "General Interest as a Differentiating Criterion Between the Chilean and Spanish Appeal for Cassation on the Merit", *Latin American Legal Studies*, Vol. 11 Nº 1, pp. 107-148.

I. INTRODUCTION

The project of Civil Procedural Code from 2012 (in what follows, PCPC) intends to introduce a series or reforms aimed at adjusting civil procedures to current times. In the words of the legislator, with "this project begins shaping the design and implementation of the legal instruments needed for an effective legal protection of rights and legitimate interests, concerning the solution of civil and commercial conflicts civil procedures".[1]

Well then, one of the novelties introduced by this proposal, in order to provide effective protection to rights, is the introduction of the extraordinary remedy, to the detriment of our known appeal for cassation on the merits. Concretely, art. 405 PCPC contemplates the possibility of resorting to the Supreme Court in case that a "general interest" is affected by the contested decision. Since the proposed concept is foreign to our legal tradition, the legislator specified its content. One of its possible meanings is that this interest is given if a fundamental guarantee has been infringed in an essential manner either by the contested decision or during the proceedings. Conversely, it is considered that a general interest arouses if the petitioner deems necessary to uniform, clarify, or modify a jurisprudential doctrine.

Precisely, it is the last meaning the one that has caused commotion in the national doctrine. On one side, it is argued that prioritizing the equal application of a normative precept and therefore creating precedents, is detrimental to the rights of the parties, since by limiting the number of cases reviewed by the Court, one of the main objectives of courts of justice is disregarded: to resolve the existing conflict between the parties and to protect their rights.[2] Additionally, binding jurisprudential doctrine would entail the need to review our system of sources, since these decisions would be accorded the power to create law, which is contrary to the relative effect of judgements established by art. 3 of the Civil Code (in what follows, CC).[3]

On the other hand, a sector dismisses this objection, in the understanding that, for a long time, the private interest of the litigating parties has being preferred, since under certain circumstances cassation has acted as a *de facto* third instance.[4] Thus, we would go from an extensive system of procedural remedies, since the defeated party may lodge a cassation whenever she deems that the law has been erroneously applied, to one in which the possibility of resorting to our highest tribunal is restricted to the existence of contradictory jurisprudence.[5] As for the possible impacts upon our theory of the sources of law, these occur only if said theory is regarded in a binary way, which leaves no room for nuances or disregards the existence of sources that are applicable by greater of lesser degrees. Concerning jurisprudence, the "all or nothing" approach would explain why it is excluded as source of

[1] "este proyecto se comienza a estructurar, en lo que corresponde a la solución de los conflictos civiles y comerciales, el diseño e implementación de los instrumentos legales necesarios para una tutela efectiva de los derechos e intereses legítimos", Boletín 8197-07.

[2] DELGADO (2017), p. 115.

[3] DELGADO (2017), p. 222.

[4] MARÍN (2017), p. 194.

[5] BRAVO-HURTADO (2013), pp. 555-556.

law, since the message to be delivered was not to detract from its importance, but to establish that this was not to create law.[6] As can be seen, adopting one or the other view leads to different consequences.

In sum, the problem raised is due to the (momentary) acknowledgement of general interest as a core aspect of the extraordinary remedy, which entails transplanting a legal institution that is part even of continental legal systems.[7] Thus, under the word transplant we understand the transfer of a norm or a legal system from one country to another or from one people to another.[8] In the words of Watson, this phenomenon takes places when people move to a different territory in which there is no comparable civilization and adopt its law with it; and, lastly, if people voluntarily accept a great part of a system belonging to another person or persons.[9] In view of the foregoing, the Chilean project corresponds to the third option.

Therefore, in order to study whether the transplant of this institution is pertinent, the present work compares the current Chilean legislation with other reformed systems -in this case, Spain- that expressly contemplates a similar institution to the one introduced by the reform (as it will be discussed in the third section). In order to fulfill the set purpose, we will carry out an historical overview of the remedy and an examination of the current norms thereafter. Concretely, this is a microcomparative analysis, i.e. a study concerning a specific norm or institution in different systems.[10] Additionally, this is a synchronic analysis, i.e of "comparison between norms that are present in different but contemporary systems".[11] Lastly, it is a genealogical investigation, since it endeavours to "establish a filial relationship between the objects that are being compared",[12] taking into account the historical context of the norms and the function they fulfil in the relevant countries.

II. Overview of the History of the Cassation Appeal

According to most of the doctrine, the classical notion of cassation originates in France. Furthermore, this legal remedy dates back to the times of Louis IX, originally being conceived as an annulment remedy to be lodged before the king aimed against judgements pronounced by courts.[13] This remedy could have originated due to at least two factors: first, an historical one, since this legal remedy establishes itself during the French Revolution, time in which the *conseils des parties* allowed the intervention of the king in judicial matters. Additionally, the king enjoyed a high level of confidence on the part of the people. For this reason, the French established the statute law as the highest source of law, so that the judge

[6] Bravo-Hurtado (2013), p. 554.

[7] By way of example, see arts. 477 ff of Act 1/2000 from 2000.

[8] Watson (1993), p. 21.

[9] Watson (1993), p. 30.

[10] Zweigert y Kotz (2002), p. 5.

[11] Ajani *et al.* (2010), p. 21.

[12] Samuel (2013), p. 106.

[13] Casarino (2007), p. 196.

was to confine his activity to its application and, in case of doubt concerning its interpretation, refer to the legally established criteria.[14]

Due to the excessive lack of confidence towards the judiciary, the French system created a series of mechanisms to neutralize the power of judges. The first of them is the theory of sources, whose purpose consisted in establishing a hierarchy and limiting the sentencing criteria applied by the judge.[15] In second term, the separation of powers was established, so that the judge was not allowed either to create or execute law.[16] In third term, and as a corollary of the first mechanism, the codification process needs to be highlighted, since judges were to apply codified law and not laws belonging to the ancient regime.[17] Lastly, the cassation appeal is officially established with the aim of annulling judgements passed in infraction of the law, thus guaranteeing its equal application.[18]

In order to fulfil this mission, the Court of Cassation was instituted. At first, this organism "had a single function, in what matters: annul, without providing reasoning, the judgements containing an express infraction to the letter of the law and (…) once cassation took place, within a scrupulous respect for the division of powers, the court was to send the matter back to the jurisdictional organs, so that they give a new judgement".[19]

Unlike the French case, in which the appeal of cassation had a political origin, the Spanish cassation was conceived as a jurisdictional remedy from its inception.[20] The first signs of this legal remedy go back to the Constitution from 1812,[21] since art. 261 entrusts the Supreme Tribunal with the power to hear this legal remedy —at that time called "remedy of annulment ("recurso de nulidad")—, but only for deciding the cassation of the judegment. Nevertheless, following the opinion of Pacheco we cannot regard this legal remedy as a remedy by way of annulment, since it was conceived as a remedy of supplication, purpose that is totally opposed to the annulment of a judgement[22]

According to other authors, it is necessary to go forward in time in order to understand the current Spanish cassation model. Concretely, the Royal Decree from the 4th of November of 1838 ascribes a nomofilactic function to the Supreme Tribunal, i.e., of purifying jurisprudence from infractions of substantive law. Due to the former "(…) its violation shall be cause for annulment, in principle under the understanding that the legal doctrine is the one established by courts in general and, subsequently the one set by the Supreme Tribunal".[23] In this vein, the indicated tribunal is in charge of pronouncing both the decision

[14] MONTERO (2012), pp. 302-306.

[15] BRAVO- HURTADO (2013), p. 553.

[16] BRAVO- HURTADO (2013), p. 553.

[17] BRAVO- HURTADO (2013), p. 553.

[18] CASARINO (2007), p. 196.

[19] NIEVA (2002), p. 26.

[20] DELGADO CASTRO (2009), p. 350.

[21] PACHECO (1847), p. 8.

[22] PACHECO (1847), p. 7.

[23] BUENDÍA CASANOVAS (2006), p. 58.

of cassation and the judgement of replacement, since the requirement of sending the proceedings back to the respective Court of Appeals as introduced later.[24]

Subsequently, the first Act of Civil Procedure was enacted in 1855 (*Ley de Enjuiciamiento Civil*, in what follows: LEC), enshrining the appeal in cassation, which is defined as an extraordinary remedy against definitive judgements passed in second instance. This remedy can be filed in case of infraction of law as well as due to the infringement of essential procedural requirements (reasons *in iudicando* and *in procedendo*). Additionally, errors *in procedendo* were reviewed by a different Chamber than the one bound to study errors *in iudicando* and, in the latter case, he requirement of sending the proceedings back to the respective Court of Appeals was suppressed.

Nevertheless, this regulation experienced modifications: firstly, the enactment of the LEC from 1881, and later of the LEC from 2000, which contemplated a series of novelties. In the aforementioned body or norms, the Spanish legislator breaks with the existing tradition and splits the appeal in cassation in two. On one hand, it establishes a remedy that may be brought in case of infractions to procedural norms, which is called extraordinary remedy against procedural infraction (*recurso extraordinario por infracción procesal*, in what follows: REIP); on the other hand, a remedy aimed at correcting the erroneous application of substantive law, known as appeal for cassation. We shall analyse the latter in the following section.

III. Regulation of the Appeal of Cassation in Spain

The LEC took charge of regulating what was traditionally understood as cassation by two ways: the REIP and the appeal in cassation proper. The former is not defined by the LEC, but the reasons for its lodging are explicitly contemplated. Therewith we could understand it as a remedy of extraordinary character, whose objective consists in annulling judgments or rulings passed by Provincial High Courts, thus finishing the second instance in whose resolution an infringement of procedural norms has taken place.

The latter, which is the one that interest us for the purposes of this work, is regulated in arts. 477 and following of the LEC.[25] From this we can ascertain that the appeal for cassation is an extraordinary remedy whose object is to annul a judgement when infringements to substantive norms applicable to the object of the proceedings have taken place.

3.1 Object

[24] Nieva (2002), p.32.

[25] Act 1/2000 from 2000.

From the concept extracted from art. 477 of the LEC,[26] we infer that the appeal for cassation aims at annulling judgements in which substantive norms have been infringed —reasons *in iudicando*—.

Concretely, the substantive norms whose infraction give way to annulment are those of civil or commercial character; norms of other nature as long as they are linked to those belonging to the previously stated category; foreign law and the custom, notwithstanding the proof related difficulties involved with them and even norms of constitutional rank, despite the unfortunate wording of art. 477 subsection 2 of the LEC.[27] In this sense, only the guarantees contemplated in article 24 of the Spanish Constitution are excluded from the reasons for filling a cassation appeal (these elements belonging to due process).

3.2 Decisions Subject to Cassation Appeal

According to art. 477 second paragraph of the LEC,[28] only second instance judgements passed by Provincial High Courts are susceptible to cassation. As it can be ascertained, it is a very restrictive scope of application, since other decisions both relevant and worthy of review are set aside.

3.3 Legal Reasons FOR Cassation Appeal

Art. 477 of the LEC clearly states that the decisions subject to the appeal in cassation can be contested through the aforementioned remedy in the following cases: a) when they were adopted for the civil judicial protection of fundamental rights, except for those contemplated in art. 24 of the Constitution; b) when the value of the proceedings exceeds 600,000 euro;[29] and c) when the value of the proceedings does not exceed 600,000 euro or this has been carried out *ratione materias*, as long as, in both cases, the decision of the appeal is of cassation interest.[30]

This last issue is perhaps the most relevant and novel in the light of the Chilean experience. This numeral comprises those cases that, if the second norm were to be applied, could not be reviewed via cassation, but that may be reviewed via this remedy if they present cassation interest. As for the origin of this notion, "this concept comes from German law,

[26] Act 1/2000 from 2000.

[27] Act 1/2000 from 2000.

[28] Act 1/2000 from 2000.

[29] By amount of the proceedings we do not refer to what is concretely claimed in the proceedings or the amount fixed by the first instance judge, but to the money at stake in the appeal, what is known as *summa gravaminis*, that is, the difference between what was requested by the party and what was granted by the tribunal.

In order to illustrate the situation, Nieva proposes us the following example: if a matter conducted via ordinary proceedings has an starting amount of over 1.000.000 euro, but the Provincial High Court granted 800,000 already, the creditor of that amount would no longer be able to appeal in cassation, since only the *summa gravaminis*, meaning the sume of the detriment, could be claimed through said remedy. Namely, only 200,000 euros, which is far below the requested 600.000 euro. NIEVA (2015), p. 326.

[30] Act 1/2000 from 2000.

where is known with the name of character or fundamental meaning, and in turn from the Law of the United States and from the jurisprudence concerning to the writ of *certiorari*, summarized in Rule 10 of the Rules of the Supreme Court of the United States from 2013, which allows the Supreme Tribunal to discretionarily declare the inadmissibility of a writ inadmissible in a series of cases".[31]

In effect, the American model is secret and leads to arbitrariness, since the Supreme Tribunal is not required to provide its reasoning for the selection criteria. In contrast, in the Spanish system the selecting criteria are publicly known and the judges shall found their choice in the decision, indicating their reasons for asserting the existence of a general interest in the matter.

Turning to the legal regulation, the LEC considers the following hypothesis as those in which the appeal has cassation interest, namely: a) when the appealed judgement goes against the jurisprudential doctrine of the Supreme Tribunal;[32] b) when the judgement rules upon a matter on which there are contradictory jurisprudence among the Provincial High Courts;[33] and c) when the judgement applies norms that have been in effect for less than 5 years, as long as, in this last case, there is no jurisprudential doctrine of the Supreme Tribunal concerning previous norms of equal or similar content.[34]

[31]"este concepto proviene del derecho alemán, donde es conocido con el nombre de carácter o significado fundamental, y a su vez del derecho estadounidense y de la jurisprudencia del writ of certiorari resumida en la Regla 10 de las Rules of the Supreme Court of the United States de 2013, que permite al Tribunal Supremo inadmitir discrecionalmente un recurso en una serie de casos" NIEVA (2015), p. 333.

[32] Under the terms of the Agreement on the "Admission Criteria Concerning the Appeal in Cassation and the Extraordinary Remedy for Breach of Procedure" (Acuerdo sobre criterios de admisión de los recursos de casación y extraordinario por infracción procesal) from the 30th of December 2011, it is necessary to quote "two or more judgements from the First Chamber of the Supreme Tribunal in the appeal, reasoning as to how, when and in what sense the contested judgement has infringed or disregarded the jurisprudence established therein" ("en el escrito de interposición se citen dos o más sentencias de la sala primera del TS, y que se razone cómo, cuándo y en qué sentido la sentencia recurrida ha vulnerado o desconocido la jurisprudencia que se establece en ellas"). Agreement Of The Supreme Tribunal (Acuerdo del Tribunal Supremo) (from the 30th of January, 2011), p.14.

[33] In this case there is a more or less uniform opinion about a certain mater on part of the Provincial High Courts which is contradicted by a new judgement. Concretely, the agreement states the following:

"With regard to a relevant legal problem concerning the decision on the contested judgement, this element requires invoking two final judgements from the same section of a Provincial High Court deciding in a sense contrary to another two final judgements from the same section. The latter must be different, whether or not it belongs to the same High Court. The judgements must have been given in a collegial manner. One of the invoked judgements must be the contested one". Agreement of the Supreme Tribunal (Acuerdo del Tribunal Supremo) (from the 30th of January, 2011, p. 15).

[34] For these purposes, the computation of the five years of since the applicable norm came into effect "must be made taking as *dies a quo* the date on which it came into effect and as *dies ad quem* the date on which the contested judgement was given. If the appellant clearly justifies that it was previous, the *dies ad quem* will be the date on which the norm was first invoked in the proceedings" ("debe efectuarse tomando como dies a quo la fecha de su entrada en vigor y como dies ad quem aquella en que se dictó la sentencia recurrida. Si la parte recurrente justifica con claridad que fue anterior, se tomará como dies ad quem la fecha en que la norma fue invocada por primera vez en el procedimiento") Agreement of the Supreme Tribunal (Acuerdo del Tribunal Supremo) (from the 30th of January, 2011, p. 17).

3.4 Competent Tribunal

According to the criteria of objective jurisdiction, the tribunal previously established by law empowered to hear the appeal for cassation is the Supreme Tribunal. This follows from art. 478 of the LEC,[35] which restricts the power to hear the appeal in cassation in civil matters to the First Chamber of the Supreme Tribunal. This is a case of privative or exclusive jurisdiction, since only said tribunal may hear the aforementioned remedy and pass judgement on it.

Nevertheless, according to art. 478 of the LEC,[36] the Civil and Criminal Chambers of the Higher Justice Tribunals have the power to hear the appeals in cassation against decisions rendered by civil tribunals based in the Autonomic Community, as long as the appeal is based, either exclusively or in conjunction with other reasons, on an infringement of norms of civil law, foral law, or special law of the Community, and when the corresponding Autonomy Statute contemplates this faculty.

3.5 The Decision Of The Tribunal

Finally, the chamber shall give judgment on the cassation appeal within twenty days after the conclusion of the hearing, or during the term established for voting and sentencing according to art. 487 of the LEC.[37] Regarding the attitude of the tribunal we must differentiate whether we are in the first and second hypothesis contemplated in the second paragraph of art. 477 or in the third hypothesis of the aforementioned precept.

In the first case, the decision shall confirm or anull the contested judgement in full or in part. The legal provision leads to the assertion that the Supreme Tribunal should also pass a judgement of replacement, but "jurisprudence has finally opted to send the matter back to the second instance in these cases, without the existance of either a procedure for it or an actual realization of when the proceedings are to be send back to the second instance, since the Supreme Tribunal considers that it takes place so the petitioner does not lose an instance".[38] In the second case the contested judgement is annuled and the Supreme Tribunal itself pass judgement on the matter as long as the remedy is regarded as founded.

IV. REGULATION OF THE CASSATION APPEAL IN CHILE

The Chilean Code of Civil Procedure (in what follows, CPC), adopted in 1902, had the aforementioned LEC from 1855 as its main influence.[39] According to ALCALÁ Y ZAMORA, this influence is due to the language unit and the community of legal culture

[35] Act 1/2000 from 2000.

[36] Act 1/2000 from 2000.

[37] Act 1/2000 from 2000.

[38] "la jurisprudencia finalmente ha optado por reenviar el asunto a la segunda instancia en estos casos, sin que exista un procedimiento para ello ni una concreción real de cuándo sucede este reenvío, que el Tribunal Supremo considera que se produce para que el recurrente no pierda una instancia" NIEVA (2015), p. 338.

[39] NUÑEZ (2005), p. 176; and TAVOLARI (1992), p.145.

between Spain and its former colonies, which facilitated not only transplanting the norms, but their literal copy.[40]

As for the remedy under consideration, from the joint examination of arts 764, 765 and 767 of the CPC,[41] appears that cassation is an extraordinary remedy which may be filled against certain judicial decisions in order to invalidate them if there has been a breach of law that has substantially influenced the operative part of the judgement. However, MARÍN questions the assertion that the remedy is extraordinary, since the second subparagraph of art. 785 empowers our highest tribunal to *ex officio* annul judgements containing a breach of law that has substantially influenced the operative part of the judgement, if the appeal for cassation has being rejected due to formal defects.[42] In the words of the jurist, this provision "is an open invitation for our highest tribunal to deliver justice in the concrete case, every time it cannot do so due to an error in lodging the remedy".[43]

Secondly, the remedy aims at annulling the contested judgement. Thirdly, it is a matter that falls within the exclusive and excluding jurisdiction of the Supreme Court (art. 98 n°1 COT).[44] In this respect, by empowering only the highest tribunal to hear this remedy, it was intended that, through its decisions, the Supreme Court could persuade subordinated tribunals of the correct application of the law. This "would be achieved through three measures: the said exclusive jurisdiction of the full Court to hear and resolve the remedy; eliminating the need to send the proceedings back to the second instance by requiring the Supreme Court to give judgements of replacement; and the publication of judgements".[45]

However, a series of reforms prevented the complete fulfilment of this purpose, since nowadays the remedy is heard by a chamber of the Court and may be heard by the full Court only extraordinarily, when the party requires it and there is conflicting jurisprudence (art. 780 CPC).[46]

Lastly, it does not constitute an instance, since it is restricted to analyse the applicable law leaving out the factual aspects. Nevertheless, MARÍN does not agree with this last point. In effect, the aforementioned author argues that in many cases it could be asserted that the appeal for cassation could be considered as a third instance, as some legal reforms allowed, at least regarding the formal cassation, the judge not only to annul the judgement but to modify the facts, reviewing the merits of the case (as it is the case regarding the defects of *ultrapetita* and *res judicata*) and therefore delivering the judgement of replacement.[47]

As for the judgements subjected to the remedy, art. 767 of the CPC clearly states that the challengeable decisions are definitive judgements and interlocutory decisions that

[40] ALCALÁ Y ZAMORA (1956), p. 40.

[41] Act 1552 from 1902.

[42] MARÍN (2017), p. 194.

[43] MARÍN (2017), p. 194.

[44] Act 7421 from 1943.

[45] BORDALÍ *et al.* (2019), p. 197.

[46] Act 1552 from 1902.

[47] MARÍN (2017), p. 201.

terminate the trial or make it impossible for it to continue, that are not subject to appeal, given by a Court of Appeals or by second instance arbitration courts integrated by arbitrators *de jure* reviewing matters within the sphere of jurisdiction of the formerly stated courts.[48]

4.1 Reason for an Appeal for Cassation

As explained in the previous section, the Chilean law contemplates a reason for bringing an appeal in cassation, namely, that the judgement contains a breach of law that has substantially influenced the operative part of the judgement. For this to be the case, it is necessary to explain what are the legal errors affecting the contested judgement, what were the breached norms and in what way they substantially influenced the operative part of the judgement -arts. 767 and 772 of the CPC.[49] In other words, the appellant is required to prove that by mentally and hypothetically suppressing the erroneously applied norm, the tribunal would have given a different judgement. Therefore, the breach must be relevant enough to influence in all or in part the operative part of the judgement.

Once the reason for bringing an appeal for cassation has been explained, we must precise what constitutes a breached law or norm. The most obvious is to turn to the natural meaning of the concept, regulated by art. 1 of the CC.[50] Nevertheless, part of the doctrine has understood this term in a broader sense, that is, including not only formal statute laws —that is, those emanating from a body constitutionally empowered to create norms—,[51] but also international treaties, customary law and foreign law, among others. Therefore, executive regulations, supreme decrees and general ordinances, on the understanding that they do not constitute statute laws in a formal sense.[52] On the contrary, decree laws and decrees with the force of law are subsumed under the term, since although these are not statute laws in a formal sense, they are legally equated to them.[53]

The question as to whether an appeal for cassation may be founded on the breach of a constitutional precept deserves special mention. In principle, the Supreme Court has held the view that these norms are excluded from the sphere of jurisdiction of this remedy, thus asserting that "it is not possible to found a remedy of annulment solely on precepts of said order, since the Political Charter restricts itself to establish principles that are subsequently

[48] Act 1552 from 1902.

[49] *Grimberg con Fisco de Chile* (2014).

[50] For instance, the Supreme Court understood it so in Serviu Metropolitano v. Medina (2012), since the invoked precept does not conform with the concept of law in a formal sense.

[51] CASARINO (2006), p. 199.

[52] Nevertheless DEL RÍO argues that rather than look at the origin of the norm, it is the mandate emanating from it that should be analysed. This way, "the cassation relevance of infra-legal norms derived from rulemaking powers should not be arguable in the Chilean law, as long as these contain universalizable legal mandates, able to function as decisive normative criteria for the respective matter" ("no debiera ser discutible en el Derecho chileno la relevancia casacional de las normas infralegales provenientes de la potestad reglamentaria, en cuanto las mismas contengan mandatos jurídicos universalizables capaces de funcionar como criterios normativos decisorios de la cuestión de fondo planteada") DEL RÍO (2015), p. 173-174.

[53] CASARINO (2006), p. 201.

developed through norms of inferior hierarchy, such as statute laws, these being the ones susceptible to be analysed through cassation on the merits, in accordance with article 767 of the Code of Civil Procedure".[54]

Without prejudice to the former, we deem possible to bring this remedy on these grounds, since the concept of law should be understood in a broader sense, within which the Constitution should be included, since it is the highest norm upon which our legal system is built.[55]

Once the meaning of the term law is "clarified", it is necessary to precise what sorts of norms can lead to cassation. To this effect we shall discriminate between laws *ordenatoria litis* and *decisoria litis*, since only the latter give way to cassation.[56] In this regard:

[54] "it is not possible to substantiate an appeal for cassation solely on precepts of said order, since the Political Charter limits itself to establishing principles that are therefore developed by norms of inferior hierarchy, such as statute laws, these being susceptible to be analysed via cassation on the merits, according to article 767 of the Code of Civil Procedure" ("no es posible sustentar un recurso de nulidad únicamente en preceptos de dicho orden, por cuanto la Carta Política se limita a establecer principios que luego son desarrollados en normas de inferior jerarquía como son las leyes, siendo éstas las susceptibles de ser analizadas por medio de la casación en el fondo, según lo dispone el artículo 767 del Código de Procedimiento Civil") *Pedrazzini con Fisco de Chile* (2013).

[55] "Minister Muñoz has understood it so, considering that the infraction of constitutional norms can also be controlled via cassation, since the decisions refereed to by article 796 of the Code of Civil Procedure can be subject to cassation, including those of the sort of the decision that has been contested in these proceedings, as long as they contain a breach of law that has substantially influenced the operative part of the judgement, being the Political Constitution of the Republic the fundamental law of the State, which is to be applied directly, displaying repealing effect regarding the norms that predated the Constitution and are against it, as well as giving preference to interpreting norms of inferior hierarchy in accordance to the Political Charter". ("Así lo ha entendido el Ministro Sr. Muñoz al estimar que la infracción de normas constitucionales también puede ser materia de un recurso de casación, toda vez que éste procede respecto de las sentencias a que se refiere el artículo 767 del Código de Procedimiento Civil, entre las que se encuentra la impugnada en estos autos, siempre que se hayan pronunciado con infracción de ley y ésta haya influido sustancialmente en lo dispositivo del fallo, siendo la Constitución Política de la República la Ley Fundamental del Estado, la cual corresponde aplicar directamente, con efecto derogatorio de las normas preconstitucionales que se opongan a ella y prefiriendo la interpretación de las normas de inferior jerarquía en la forma que se respete la Carta Política"). *Pedrazzini con Fisco de Chile*, 2013.

[56] In Judgement "Ronald Jonson Servicios médicos con Jas Forwarding Chile Limitada" (2012), the following is asserted: "Therefore, it is argued by both the doctrine -on the basis of the previously cited articles from the Code of Civil Procedure- that the appeal for cassation on the merits requires the contested decision to have effectively breached a law that is 'decisive for the matter', that is, the legal provisions that -regardless of their substantive or procedural nature- are necessary in the concrete case for solving the controverted matter.

In contrast, the appeal for cassation on the merits is not appropriate concerning the breach of laws 'ordenatoria litis', denomination that is given to norms or exclusively procedural character, aimed at regulating the procedural formalities of the trial".

("Por eso, se afirma tanto por la jurisprudencia como por la doctrina -sobre la base de lo señalado en los artículos antes citados del Código de Procedimiento Civil- que la procedencia del recurso de casación en el fondo queda supeditada a la efectiva transgresión en la sentencia impugnada de leyes 'decisorias de la litis', esto es, de aquellas disposiciones legales -indistintamente sean ellas de naturaleza sustantiva o procesal- que sirvan en el caso concreto para resolver la cuestión en controversia.

En cambio, cabe descartar la impugnación, por la referida vía procesal, de las infracciones a las leyes 'ordenatoria litis', designación que se da a aquellas normas de índole netamente procesal, que se encargan de regular las formalidades procedimentales en juicio")

> The first ones are merely procedural, determining the form in which the tribunal examines the merits and give judgement, for example, those regulating the opportunity to invoke *res iudicata*, and; the second ones are aimed at resolving the disputed matters, that is to say, those according to which the dispute is to be resolved, as it is the case of those that establish the triple identity of the *res iudicata*.[57]

Deserving special mention are the norms governing evidence. To this effect, Palomo asserts that the appeal in cassation may be brought when the burden of proof is altered (art. 1698.1 CC), a means of evidence not authorized for the specific case is admitted or one precisely admitted by law for the concrete case is denied (art. 341 CPC and 1698.2 CC) and, lastly, when the legally assigned evidentiary value to the means of evidence is altered.[58]

Lastly, as for the decision on the remedy, two possibilities exist: the first one is its rejection, thus upholding the decision given by the lower tribunal. The second one is that the appeal in cassation is granted, in which case two judgements must be given: one granting the appeal —judgement of cassation— and another one emending what was previously decided by correctly applying the law —judgement of replacement—.

4.2 The Enshrinement of General Interest in the Project of Civil Procedural Code

The project of Civil Procedural Code entails a radical change in civil litigation. Among the main novelties offered by the project from 2012 we find the extraordinary remedy, conceived as a means to strengthen the role of the Supreme Court as the highest tribunal of the Republic, by entrusting it with the protection of fundamental rights as well as with providing coherence and unity to the decision criteria of the country's tribunals.

Thus, art. 409 of said project empowers our highest tribunal to review a matter when, according to the majority of its members, a general interest is infringed. The text takes charge of clarifying doubts regarding this concept, indicating that such an interest arises a) when a fundamental right contemplated in the Political Constitution of the Republic or in international treaties subscribed by Chile and currently in force has been infringed in an essential way; and b) In case it considers necessary to establish, unify, clarify of modify, a jurisprudential doctrine.

In the same vein, arts. 408 and 410 PCPC indicate that the expression of general interest is a requisite for the admissibility of the remedy. Notwithstanding the foregoing, it is possible that the remedy is not considered admissible, as long as the counterparty argues why a hearing of the remedy by the Supreme Court is not justified. Lastly, the Supreme Court must present the grounds that were considered for declaring the inadmissibility of the remedy when giving judgement and, if the remedy is granted, the manner in which a certain norm

[57] BORDALÍ *et al.* (2019), p. 210.

[58] BORDALÍ *et al.* (2019), p. 211.

or legal principle is to be interpreted or applied. Regardless, if it were proven that the delivered judgement contradicts other one given by the same specialized chamber, without placing on record in the text of the judgement that the previous doctrine has been modified, the appellant may within fifteen days request the full court to annul the judgement, so a new hearing is held before a non-disqualified chamber (art. 414 PCPC).

V. RESULT OF THE COMPARATIVE ANALYSIS

In order to carry out a comparison we must ponder the common and distinctive elements of the subject of study. As mentioned in the second section, the appeal for cassation has a common core, namely the French model, which inspired diverse legal systems such as those that we have examined in this study. However, even though some similarities were determined, such as the exclusive and excluding jurisdiction of the highest tribunal for hearing the remedy and that it is a remedy by way of annulment, we observed that the Spanish appeal in cassation considerably restricts the sort of decisions that can be subject to cassation by the Supreme Tribunal.

In effect, only second instance judgements may be subject to cassation. In contrast, in Chile not only definitive judgements can be contested via cassation, these being those of greater importance in our system, but also interlocutory decisions, whether these terminate the trial or make it impossible for it to continue, such as a decision accepting the withdrawal of the lawsuit or declaring the abandonment of the proceeding.

Furthermore, the Chilean case widens the scope concerning the tribunal that dictates the contested judgement, since it includes not only ordinary tribunals, but also subject to cassation judgements given by arbitration tribunals. This is possible if these tribunals are integrated by arbitrators *de jure* expressly entrusted with jurisdiction to hear matters that ordinarily would fall within the sphere of jurisdiction of Courts of Appeals, which are the second highest tribunals after the Supreme Court.

At this point, it is necessary to evaluate whether it is prudent to transplant the Spanish institution to the Chilean system or, on the contrary, preserving the current model. We consider that the analysis of the function that the appeal for cassation performs in our system provides lights for building an argument against the adoption of general interest. In this regard, there are different views. Firstly, the role originally given to cassation is nomofilactic, meaning, it aims at preserving the norm or the legal system. In other words, "judges must look after the supreme goal of a legal system, by manifestly preventing contraventions of public order, which permits preserving the integrity of the legal system as well as avoiding legal uncertainty or transgressions against the teleological end in the respective cases".[59]

Secondly, the aforementioned remedy has the function of unifying jurisprudence, with the understanding that the higher tribunals, through the reasoning of their judgements, are able to convince the lower courts of adopting a certain stance. This idea is reinforced by the

[59] AGNELLI *et al.* (2019), p. 596.

Supreme Tribunal, which in one of its judgements stated that "it is to be considered that jurisprudence does not have as its object the mere reproduction of legal precepts, but rather aims at fixing standards regarding their interpretation which are intended to complement the legal system through establishing the proper meaning of the norm, the integration of its loopholes and the unification of the diverse criteria that tribunals may follow in its application".[60]

The previously stated assertions could be constructed as an argument in favour of transplantation, since in both the Chilean and Spanish cases, the law grants the parties a tool aimed at obtaining a uniform opinion from the highest tribunal. In fact, art. 780 of the CPC provides that once the cassation appeal has been lodged, any of the parties may request, within the time frame for becoming a party before de tribunal *ad quem*, that the remedy is heard and decided by the full Court. Furthermore, the parties are given the opportunity that the matter be heard by the full Court and not by a chamber, as it would ordinarily be appropriate, as long as the party requests it and there had been different interpretations by this tribunal. In turn, art. 409 PCPC allows the lodging of the extraordinary remedy in order to uniform jurisprudence.

Nevertheless, it is necessary to specify certain points in order to fully understand the purpose that the appeal for cassation intends to achieve. In this vein, the work by Nieva is very clear to mention that we should discriminate between the apparent aims of cassation and its main purposes, since the means and the end are confused. Firstly, among the apparent aims we find the purpose of annulling the sentence. The annulment cannot be regarded as and end it itself, since "for legal practitioners any judgement by the Supreme Tribunal is useful, not only those that annul the contested decision, but also those that uphold it. Even the decisions by the first chamber barring the appeal for cassation proceedings can be useful".[61]

A second apparent aim is the already stated uniformity of jurisprudence, since it does not seem acceptable that concerning similar cases there are as many interpretations as tribunals. If a sole criterium were to be established for the same matter, much more legal certainty would be achieved, that is, "certainty as to 1) the content of the legal norms in force; and 2) the fact that they are applied according to their content".[62]

Some could consider that this aim is reflected in the LEC due to the inclusion of cassation interest on one side and through the request that the cassation appeal is heard by the full court. This way, the appeal in cassation would ensure respect for the legal system and one of the means of accomplishing said purpose is by achieving the uniformity of judgements.

For this purpose, it is necessary to respect formal justice, that is, the consistent and regular application of the norms in force. In the case at hand, this happens when a norm is

[60] ESCRIBANO (2019), p. 132.

[61] NIEVA (2002), p. 77.

[62] GARCÍA MANRIQUE (2012), p. 195.

applied the same way than in previous cases that are similar.[63] Thus, if uniformity demands applying the same solution to equal cases, and equality before the law requires treating similar cases equally and judging differently those that are different, it follows that cassation would ensure equality before the law. This way, these factors would allow the parties to predict the decision of the judge if they find themselves in a similar case.

Nevertheless, García Manrique warns that it is questionable that the regular application of a criterium necessarily leads to a just outcome. For example, this would not happen if the norm is substantially unjust. Furthermore, even if a just outcome requires the regular application of a precept or criterium, we cannot conclude that the morality of the just act would be transmitted to the adjudication act, since it can serve both justice and injustice.[64] Even though is true that the constant and uniform application of a criterium generates an expectation in the parties and its frustration entails a detriment, since the criteria of a system are to fulfil certain requirements such as publicity and generality, this could lead to substantial injustice. From this follows that the justice of the regular application of a criterium has no value in and on itself, but it will depend on the content of the breached norm.[65] Therefore, it follows that cassation will not always lead to equality before the law, since applying norms and doing justice are different things.

Another argument against is the one put forward by Buendía. The aforementioned author underscores uniformity as a goal of this remedy, since this would be a means to an end. This is because "the jurisprudence leading to uniformity is the unavoidable outcome, or the practical justification, by which the Supreme Tribunal, via the appeal for cassation, fulfils its main purpose, namely the protection of law, of the norm".[66]

Once the two previously stated "ends" are excluded, it is necessary to analyse what should be understood as the main end of cassation. For many authors the main objective of this remedy is the protection of the legal order. This is what we currently understand as *ius constitutionis*, in contrast with *ius litigationis*, that would be the other end of cassation in which the protection of the party's right is prioritized. Well then, both the regulation proposed by Chile and the Spanish one affect the party's right to access the highest tribunal. In the first case, the current access configuration to cassation is broader, since, although it is possible to have jurisprudence detrimental to the case, the reasoning provided by the respective party allows for a change in the interpretation. In contrast, according to the project, contradictory jurisprudential doctrines would be necessary for accessing the Supreme court, regardless of the merits of the appellant's case.[67]

A similar situation can be ascertained in the Spanish case, since the legally established criteria represent an obstacle for accessing the Supreme Tribunal, that is, a high value of the

[63] GARCÍA MANRIQUE (2012), pp.289-290.

[64] GARCÍA MANRIQUE (2012), pp.307-308.

[65] GARCÍA MANRIQUE (2012), p.313.

[66] BUENDÍA CASANOVAS (2006), p. 115.

[67] BRAVO-HURTADO (2013), p. 567.

detriment and an hypothesis in which the decision contradicts the opinions of higher tribunals. Additionally, Delgado argues against the adoption of this view, since the main function of judges is to hear and resolve legally relevant conflicts, not turning into a school of legal scholars. Opting for this model would entail relinquishing the protection of the party's rights.[68]

On the basis of the above, we consider that the justification of cassation interest lies in criteria of system efficiency aimed at reducing the volume of cases reviewed by higher tribunals rather than the protection of the legal order. This is due to the setting of a demanding first access filter for those cases that are "really important" (the value element in the Spanish case) and favourable jurisprudence in the Chilean case. Nonetheless, it is convenient to remember that the State having the monopoly on justice administration does not mean that all claims of the parties need to be uphold, but only that the judicial process or an alternative mechanism of conflict resolution has to be employed when settling a dispute.[69] For this reason, we fear that, in the event that cassation interest is transplanted, whether the version proposed by the reform or the Spanish one, the interest of the parties would be limited.

VI. FINAL REMARKS

At the beginning of this work we intended to compare the Spanish and Chilean systems in order to determine whether it is advisable to transplant the general interest criterium for lodging the appeal for cassation in the PCPC. Firstly, we carried out a genealogical study of the institution, concluding that both the Chilean and the Spanish cassation share their origin: the French cassation. Nevertheless, the Chilean legislator adopted the Spanish idea, which, unlike the French case, was conceived from the very start as a jurisdictional remedy. According to this doctrine, culture was the main system determining the adoption of this regime.

Thereupon we contrasted the Spanish and Chilean norms. Although similarities do exist, such as the privative jurisdiction of the highest tribunal of each country, and that it is an annulment remedy, the great differentiating factor is the inclusion of general interest as a reason for bringing an appeal for cassation. One of the meanings of this concept indicate the contradiction between the contested judgement and the jurisprudence established by the Supreme Tribunal. In this vein, one of the purposes of cassation is achieving the uniformity of judgements, in similar terms as the regulation contemplated in the PCPC. Therefore, even though they are systems belonging to the same legal tradition, there is no equality concerning the treatment of the studied remedy.

Having all these elements in view, we examined whether it is advisable (from a doctrinal point of view) to transplant general interest as a reason for bringing an appeal in cassation in the way contemplated in the Spanish system and in the PCPC. We concluded

[68] DELGADO CASTRO (2017), p. 122.

[69] DELGADO CASTRO (2017), p. 115.

that it would be inconvenient to establish this regulation based on the ends pursued by cassation. One of the arguments in favour of the inclusion of the studied regulation is the unification of jurisprudence, since it would allow to solve similar cases in the same way. However, we indicated that the constant and uniform application of a criterium does not necessarily lead to formal equality, since everything depends on the justice of the respective normative formulation. On the other hand, the *ius litigationis* would be affected, in the event that the creation of doctrine by the Supreme Court receives priority over the main function of jurisdiction: to hear and to solve the cases brought before the tribunals.

Nevertheless, we wish to clarify that the proposed solution is based solely on doctrinal grounds. Therefore, in order to achieve a full understanding and study of the arguments in favour and against general interest, it would be useful to rely on statistics that justify or reject limiting the access to our country's highest tribunal based on purely economic criteria. This way, the debate would go beyond reducing the volume of cases ending up in the Supreme Court or avoiding appeals in cassation aimed solely at prolonging the proceedings, focusing instead on what is truly important: the effective protection of the rights and legitimate interests of the parties.

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