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CASSATION AND ARTIFICIAL INTELLIGENCE: TOWARDS THE END OF A SYSTEM THAT HAS NEVER WORKED PROPERLY?

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ABSTRACT: The system of cassation, and more generally the system of appeal before supreme courts, has ultimately failed to adequately fulfill its nomophylactic function—that is, the protection of statute law—primarily because the creator of legal norms does not coincide with their supposed protector. This has produced paradoxical situations in the normative sphere, as illustrated by the concept of precedent. Generative artificial intelligence opens new possibilities in this regard, potentially enabling the legislative branch to recover its former role as guardian of its own laws, while also allowing cassation appeals to be resolved with unprecedented speed, thereby enhancing legal certainty.

KEYWORDS: Supreme Court; remand; separation of powers; nomophylactic function.

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1. INTRODUCTION

It may be time to acknowledge that cassation, despite the vast scholarship devoted to it and the remarkable exaggeration of its originality and supposed technical perfection[1] —both of which are highly debatable[2]— is, in reality, a system that has failed to solve any major legal problems that could not equally have been addressed through an ordinary appeal heard by a court situated at the apex of the judicial hierarchy[3], as has traditionally been the case in the United States. Moreover, the institution has generated unnecessary controversies[4], encouraged the usurpation of the legislator's role on numerous occasions, and produced an unacceptable degree of complexity in the appeals drafted by lawyers, often beyond what the law itself requires and frequently serving only the purpose of reducing judicial workloads[5].

The preceding observations are necessarily severe. Few institutions in procedural law have been subjected to such intense fetishization. Cassation has been elevated almost to the status of a legal deity, whereas no comparable reverence has ever been shown toward the appeals systems of the Common Law tradition, despite the fact that they constitute its historical antecedent. In the United Kingdom[6] and the United States[7], the supreme court is undoubtedly regarded as an institution of great significance within the legal order. Yet the appeal mechanism itself has never become the object of doctrinal fanaticism designed to magnify that significance. Such glorification is not merely unnecessary; it is actively misleading.

In several continental legal systems, praise for cassation may have become confused with praise for the judges who sit on supreme courts. The influence of Piero Calamandrei's work likely played a role in this development. As we shall see, he placed cassation at the centre of the legal order, even present-

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[1] See Calamandrei, P., *La cassazione civile*, Roma 1920, at the very first page quoting Napoleon. See also Serra Domínguez, M., *Del recurso de Casación*, en: "La reforma de los procesos civiles (Comentario a la Ley 10/92 de medidas urgentes de reforma procesal)", Madrid 1993, p. 215, Vázquez Sotelo, J.L., *La Casación Civil (Revisión crítica)*, Barcelona 1981, or myself: Nieva-Fenoll, J., *El recurso de casación ante el Tribunal de Justicia de las Comunidades Europeas*, Barcelona 1998, p. 13.

[2] Nieva-Fenoll, J., "The English Origin of French Cassation", *(2022) 41 Civil Justice Quarterly, Issue 1*, p. 31.

[3] See some of the following compilations, more ancient than cassation, Rubeo, P. *Sacrae Rotae Romanae Decisionum Recentiorum*, Roma 1640. O Xammar i De Sala, J.P., *Rerum iudicatarum in sacro regio senatu Cathaloniae*, Barcelona 1657. Popham, J., *Reports and cases*, London 1656.

[4] Iacoviello, F.M., *La motivazione della sentenza penale e il suo controllo in cassazione*, Milano 1997, p. 267.

[5] See Taboada Roca, M., *La casación civil española en alguna de sus complejidades*, Madrid 1977. Iacoviello, *La motivazione della sentenza penale e il suo controllo in cassazione*, p. 279. Morello, A.M., *La casación. Un modelo intermedio eficiente*, La Plata 2000, p. 191.

[6] Jones, D. L., "The Judicial Role of the House of Lords before 1870, in AAVV, The Judicial House of Lords: 1876-2009, Oxford 2009, p. 6.

[7] Irons, P., *A People's History of the Supreme Court*. New York 1999. Schwartz, B., *A History of the Supreme Court*, 1995. Rehnquist, W., *The Supreme Court*. New York 1987.

ing it as a guarantor of the separation of powers[8]. Such a role is clearly not performed by cassation today, and it is doubtful whether it ever truly performed it, even in France[9]. There is an important distinction between the decisions of supreme courts —which undoubtedly can have constitutional significance, whether positive or negative— and the notion that cassation itself is the guardian of the Law —*ius constitutionis*[10]—. The latter proposition is a considerable exaggeration and perhaps even a rather heartless lie.

Beyond these theoretical debates, courts of cassation have, in recent decades, increasingly standardized and parameterized their work. Where judges once engaged in careful analysis of individual cases in order to develop case law capable of guiding lower courts, one now often finds little creativity —or creativity directed in questionable ways— and a great deal of repetition. In some jurisdictions this tendency has become firmly established[11]. Courts increasingly appear motivated by convenience, abandoning their role as genuine adjudicative bodies and transforming themselves into institutions whose legal nature is quite peculiar: courts of precedent.

Whether this transformation is desirable or not, it is clear that such courts do not perform a nomophylactic function. Instead, they sometimes become "norm-producing" institutions, or alternatively ultra-conservative guardians of existing jurisprudence.

If supreme courts spend the overwhelming majority of their time merely repeating their own precedents, one may legitimately ask whether human beings are truly necessary for that task—especially given that those very judges already work with artificial intelligence and will increasingly do so in the future. Why should a small group of individuals repeatedly perform the same operation when a machine is capable of doing precisely that?

The pages that follow will address these questions with the aim of reaching conclusions that may help us imagine a future that is perhaps better, though certainly different.

2. WHAT PURPOSE HAS CASSATION REALLY COME TO SERVE?

If one sets aside everything that Calamandrei's influential work has generated, the truth is that it is now very difficult to confirm his main conclusion: the purpose of cassation was the defence of the *ius constitutionis*, that is, the preservation of the laws issued by the legislative assembly, taking advantage of litigants' willingness to defend their rights up to the highest court[12]. It is

[8] Calamandrei, *La cassazione civile*, vol. I., p. 399.

[9] Halperin, J.-L., *Le Tribunal de Cassation et ses pouvoirs*, Paris 1987, p. 64.

[10] Calamandrei, *La cassazione civile*, vol. II, p. 50.

[11] Mitidiero, D., *Precedentes: da persuasão à vinculação*, São Paulo 2022. Marinoni, L.G., *Precedentes obrigatórios*, São Paulo 2022.

[12] Calamandrei, *La Cassazione civile*, Vol II, p. 133-137.

not easy to discern a *nomophylactic* function that would be achieved through the maintenance of uniform case law. Nor does it perhaps make much sense to affirm that uniform case law, guiding lower courts, protects statute law, because especially those evolutionary interpretations that adapt to a constantly changing reality are the ones that are most useful to the legal system, and not fossilized ones.

What actually happens in practice is quite different. Supreme courts do not consist of a group of judges particularly attentive to the work of the legislator and striving to preserve it while channelling its democratic intentions. Rather, what happens is that those judges generate case law in which, although they usually comply —as they should— with statute law, they sometimes correct that legislative work, or even turn their backs on it, more or less explicitly, if they are not convinced by it, formulating solutions that may suit a particular appellant and which, if they are fortunate, are later repeated by the cassation court itself, thereby generating case law.

In other words, what is often observed is not respect for the *ius litigatoris* per se, but rather respect for the *ius* of some *litigator*, attempting to provide a solution to a fortunate litigant whose interest happens to resonate with the cassation court, and from that point, sometimes, case law of broader scope is generated. Only in this way can it be understood that lawyers, when searching for case law, rather than locating those major interpretative lines—when they exist—try to find a decision of the supreme court that may serve them in defending their client. Of course, sometimes one of those broad jurisprudential lines is found, but this is not the most frequent occurrence in an appeal, since those lines are usually already followed by lower courts and do not generate conflict. Ultimately, in most cases, we are not even dealing with case law lines, but rather with the *voluntas legislatoris*, that is, the mandates of the legislator repeated and explained by case law, which is logical, given that courts, including supreme courts, should lack *voluntas*, a term that should be reserved exclusively for the legislator.

In short, in most cases cassation courts are no longer bodies that overturn or annul decisions that defy the law, thereby generating uniform case law, but rather they mainly ensure that their own case law—whether correct or not—is being respected by lower courts, and that justice has been done to the litigant in the lower instances[13]. This often involves consideration of the "small history" of the case, that is, the facts, even though cassation courts are theoretically not supposed to deal with factual matters, nor certainly go beyond the facts declared proven by lower courts. All of this in the name of a—again fetishistic—respect for the principle that cassation courts do not

[13] See art. 487.1 of the Ley de Enjuiciamiento Civil after its reform By Real Decreto-ley 5/2023, 28th june: "*El recurso de casación se decidirá por sentencia, salvo que, habiendo ya doctrina jurisprudencial sobre la cuestión o cuestiones planteadas, la resolución impugnada se oponga a dicha doctrina, en cuyo caso el recurso podrá decidirse mediante auto que, casando la resolución recurrida, devolverá el asunto al tribunal de su procedencia para que dicte nueva resolución de acuerdo con la doctrina jurisprudencial.*"

deal with the point of fact. This requirement, heavily criticized by doctrine[14], originated in the first French *Cour de cassation*[15], which in turn had copied it from English law, probably under the influence of Merlin de Douai, Attorney General of the *Tribunal de cassation* from 1801 to 1814, who had already demonstrated in the Assembly in 1790 the parallelism between the English *appeal* before the *House of Lords* and cassation[16].

The fact is that in the English legal system this limitation made perfect sense because, in England at the time, cases were usually[17] decided at first instance by a jury that declared facts proven without providing reasoning. In fact, the restriction to the *point of law* applied not only to cassation, but to any appeal, as is logical[18]. However, when in France this restriction was copied only for a supreme court, within a system without juries, the exclusion of the *point of fact* ceased to be a logical measure—as it was in English law—and became merely a habit of cassation courts to rid themselves of cases.

It should therefore be understood that the landscape of cassation is much more discouraging than has been acknowledged: an appeal filled, in one way or another, with formalistic requirements that does not truly concern itself with preserving the *voluntas legislatoris*, but rather resolves concrete cases in a fragmented way, attempting to distance itself from the real facts of the dispute, perhaps accepting as proven a falsehood declared in lower instances,

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[14] See Chiarloni, S., "La cassazione e le norme", *Riv. di dir. proc. civ.* 1990, p. 992. Guasch Fernández, S., *El hecho y el derecho en la casación civil*, Barcelona 1997, p. 200. Iacoviello, F. M., *La motivazione della sentenza penale e il suo controllo in cassazione*, p. 265. Mazzarella, F., ""Fatto e diritto" in Cassazione", *RTDPCIt*, 1974. p. 82. Neumann, U., „Die Abgrenzung von Rechtsfrage und Tatfrage und das Problem des Revisionsgerichtlichen Augenscheinsbeweises", *GA*, 1988, p. 387. Satta, S., "Il formalismo nel proceso", *RTDPCIt*, 1958, p. 1154. Serra Domínguez, "Del recurso de casación", *Comentarios a la reforma de la Ley de Enjuiciamiento Civil*, Madrid 1985, p. 843. Vázquez Sotelo, *La Casación Civil (Revisión crítica)*, p. 198.

[15] Judgement of 8-1-1806: "*la discussion de ce point de fait, et l'examen des preuves y relatives ne sont pas du domaine de la Cour de cassation*". *Journal du Palais*, 1er sem., nº 373, 20-5-1806, p. 442.

[16] Archives Parlementaires de 1787 à 1860 - Première série (1789-1800) Tome XV - Du 21 avril au 30 mai 1790. Paris : Librairie Administrative P. Dupont, 1883, p. 666, 24 de mayo de 1790. *https://archive.org/details/archivesparlemen15pariuoft/page/666/mode/2up*: *Les Anglais j'ose le dire, Messieurs, les Anglais vous ont donn*é là-dessus une grande leçon. Ces hommes qu'on nous a cités si souvent comme des maîtres en fait d'ordre judiciaire; ces hommes qui ont admis l'ambulance des juges ordinaires, ont senti la *necessité de rendre sédentaires les juges de cassation. C'est à leur chambre-haute qu'ils ont attribué le pouvoir exclusif de casser les arrêts qui contreviennent aux lois du royaume et assurément, il serait difficile de leur persuader qu'ils eussent mieux fait, pour leur intérêt national, de confier ce pouvoir à un tribunal errant.*

[17] See Blackstone, W. *Commentaries on the Laws of England*, Lib. III, London 1794, p. 336: "This is the only method of trial known to the civil law; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined: but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance."

[18] Blackstone, *Commentaries on the Laws of England*, p. 455: "*…an appeal to the king in parliament was always unquestionable allowed. But no new evidence is admitted in the house of lords upon any account, for this a distinct jurisdiction: which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts) when a superior court is reviewing a sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. This is the general method of proceeding in the courts of equity.*"

and afterwards trying to create certain case law lines that, more than supporting legislative mandates, seek to complete them for a plurality of specific cases, as if the mission of the cassation court were to regulate rather than to assist in the effective enforcement of statute law. This task—if it may be called that—is completed by a systematic repetition of precedents whenever possible, sometimes even contradictory ones.

With such premises, it is simply impossible to formulate, as in the past, clear purposes for cassation within legal systems that continue to use this mechanism; or perhaps, rather than systems, those that simply continue to use this terminology—cassation. In the end, the only difference between appeal and cassation is the famous—and in Civil Law systems absurd—restriction to the point of law. In all other respects, the cassation court operates like any other court, sometimes resisting issuing a new judgment in systems that insist on remanding—another trace of its Common Law past[19], equally incomprehensible in Civil Law systems—and sometimes attempting to establish binding precedents in legal cultures traditionally accustomed to the persuasive (and therefore non-binding) force of case law.

Thus, this is the current image of cassation: an amorphous institution whose sole authority lies, in reality, in the fact that it is handled by a single court for an entire State. This gives its decisions a prominence and public visibility that, quite often, they likely do not even deserve.

3. THE PROBLEM OF "COPYPASTE CASE LAW"

A different issue is the obsessive repetition of precedents in the name of judges' convenience, making use of a technological advantage of recent times: the "copy and paste" tool.

For a couple of decades now, the study of case law has been greatly simplified, as has its production. It is easy to find judgments that copy each other using exactly the same wording as the first decision that established the criterion. In addition, judgments have become excessively convoluted, since judges are accustomed to copying and pasting—sometimes with quotation marks, sometimes without—entire sections of decisions that merely serve to increase the length of the current judgment, but are of no use whatsoever in producing more accurate criteria or in more easily presenting the reasoning of the current decision.

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[19] Elsynge, H., *The ancient and present manner of holding Parliaments in England with their priviledges*, London 1663, p. 224: "*it was to demand Judgment in a Case depending in the Common pleas, which was of such difficulty for point of Law, that the Judges did forbear to proceed, and so the Lords of Parliament directed them on which side to give judgment. Note that the Commons joined with the Lords to damn the recoignance of Elizabeth de Burgo, but the Commons did not join in the assent touching G. de Stantons petition, for there the Lords direct Justice to be done in another Court.*"

Quite the opposite. Although it has been praised, in good faith[20], that case law should always use the same wording when reiterating a precedent—thus reducing interpretative uncertainties that may arise from reformulations—the constant repetition of the same words carries the drawback that a given erroneous interpretation or formulation may become entrenched. Ultimately, judgments are not handbooks, but rather the product of resolving specific cases, in which it is always dangerous to formulate general statements with a quasi-legislative ambition.

This is so for several reasons. First, as noted, such texts resolve a specific case, and those words may fit well within that particular situation, but in order for them to apply to another, they sometimes need to be reshaped, with the risk of distorting the understanding of the original case by presenting as identical what is not. Moreover, case law does not have, nor can it have, a vocation of exhaustiveness, as its role is not to issue general mandates but, at most, to formulate guiding criteria—even in jurisdictions where *stare decisis* exists[21]. Finally, case law resembles an opinion more than a statute: it seeks to persuade rather than to command. Regardless of any binding effect it may have, the persistence of case law ultimately depends on its persuasive force, which requires argumentation rather than instruction—that is, rhetoric rather than command. Consequently, always repeating the same paragraphs from a given body of case law, however well-intentioned that practice may be, can prove counterproductive, and even dangerous if those words exceed the limits of the law, something that occurs on occasion in overly creative decisions[22].

"Copy and paste" serves only to increase the weight of decisions, or to perpetuate past errors without correcting them in the slightest. It is a crude fraud that creates the appearance of industriousness and, moreover, as has already been pointed out, generates errors. Dopico Gómez-Aller[23], following Soucek[24], has ironically coined the term "copypaste case law," which, beyond its playful tone, perfectly captures the phenomenon described.

Indeed, the author precisely identifies, under this label, very concrete consequences of the abusive use of the "copy & paste" tool: incoherent juxtaposition of unrelated or contradictory judicial citations[25]; reproduction of precedents that are no longer valid, even if they concern the same subject matter[26];

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[20] Dopico Gómez-Aller, J., "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", in Llabres, Gili, Tomás-Valiente e. a. (ed.), *Estudios Penales en homenaje al Profesor Juan Carlos Carbonell Mateu*, Valencia 2025, p. 441-442.

[21] Cross, R., *Precedent in English Law*, Oxford 1961, p. 130.

[22] See STS (Sala 2ª) 119/2019, 6-3-2019, FD 3.

[23] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 441.

[24] Soucek, B., "Copy-Paste Precedent", *The Journal of Appellate Practice and Process*, vol. 13 (2), 2012, p. 153.

[25] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 442.

[26] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 444.

standardized reasoning that, as noted, does not address the specific case[27]; incomprehensible accumulation of paragraphs from different judgments[28]; and loss of identification of the original source of a precedent when a later decision is cited instead[29]. In short, it is not surprising that the author calls, in line with what is argued here, for a return to the citation of statutes[30] instead of precedents—unless the latter are truly useful and necessary—as was commonly the case before the advent of "copy & paste."

Such a catalog of absurdities would be enough to cast doubt on the current relevance of the *nomophylactic* function in contemporary case law. However, that original *ius constitutionis* might have had some real significance when the initial *Tribunal de cassation* limited itself to literally—almost mechanically—breaking (*casser*) any judgment that contained an express violation of the text of the law. In other words, when the cassation body acted purely as a guardian of the legislative power[31], standing alongside it[32], as the French revolutionaries preferred to say, or even forming part of it, as was the case in the original English system, that first *Tribunal de cassation* seems to have confined itself to verifying the existence of an express violation of statute law[33], without producing case law—that is, without creating any legal construction that might rival the work of the legislator. Because that creative activity, despite its advantages, entails obvious risks. Ultimately, it is similar to the difference between a recording and a witness. The recording reproduces exactly what it captured. The witness uses memory and, even with the best intentions, will alter what was seen and heard[34]. Courts can never fully reproduce the *voluntas legislatoris*, especially if they do not even attempt to do so.

Even beyond "copypaste jurisprudence," it is interesting to briefly examine what has occurred within the *Common Law* tradition with respect to this judicial function. The well-known debate between Bentham and Austin on the maxim *non exemplis, sed legibus iudicandum est* ("judgment should be based on laws, not on precedents")[35] is illustrative. Bentham, one of the main intellectual influences of the French codification period[36], favoured legisla-

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[27] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 447.

[28] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 447.

[29] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 448.

[30] Dopico Gómez-Aller, "Copypasteprudencia (notas sobre una técnica defectuosa de redacción de resoluciones judiciales", p. 453.

[31] Merlin de Douai, *Opinion de M. Merlin sur la nécessité de rendre le Tribunal de Cassation sédentaire*, Paris 1790, p. 5.

[32] Art. 1 del Decret 27 november-1 december 1790.

[33] Merlin de Douai, *Recueil alphabétique de questions de droit*, t. III, Paris 1829, p. 240.

[34] Von Liszt, F. „Strafrecht und Psychologie", *Deutsche Juristen-Zeitung*, 1-1-1902, n. 1, p. 16-18. Manzanero, A. L., *Psicología del testimonio*, Madrid 2008, p. 38-39. Julià Pijoan, M. "Un análisis del fundamento de la declaración del testigo ocular como medio de prueba, a partir de la investigación empírica", *Ius et Praxis*, vol. 29, n. 2, 2023, p. 44.

[35] Codex 7, 45, 13

[36] Bentham, J., *Traités de Législation civile et pénale*, t. III, Paris 1820, p. 185.

tive commands over judicial ones[37], whereas Austin adopted a far more flexible view[38]. In reality, Bentham was simply seeking legal certainty, which is precisely what precedent-based systems often fail to provide. Except in those rare cases where a single precedent is repeatedly applied because the factual situation is clearly identifiable, case law tends to evolve constantly until it eventually disappears, sometimes without even explicitly acknowledging that fact—something that is truly striking.

Although there are many examples, this is precisely what has happened with regard to the exclusionary rule, which remains in force under the case law of the US Supreme Court, yet has all but consigned the original 1914 case of Weeks v. U.S.[39] to oblivion. Case law was able to adapt to the police misconduct of the time, establishing the exclusionary rule for evidence derived from unlawful searches in Silverthorne Lumber Co. v. U.S.[40], and reformulating it in Nardone v. U.S. in 1939[41] using different wording, but without altering its substance, and coining the term that has gone down in legal history as the "fruits of the poisonous tree" doctrine. This case law was upheld in the case of the unfortunate Mrs Mapp (Mapp v. Ohio)[42], who was deceived with a non-existent search warrant and subsequently convicted of possessing obscene material. Fortunately, the Court was still in the so-called Warren era.

But then came the case of Wong Sun v. US (1963)[43], in which the police illegally obtained a guilty plea from a Chinese citizen who did not speak English; despite this, the Supreme Court, invoking the attenuation doctrine, argued that the self-incrimination was all but spontaneous. This was followed by US v. Crews (1980)[44], in which the Supreme Court held that there was no causal link between the photograph taken following a suspect's arrest and the identification of the victims; rather, the complainants' recollection was an independent source of the photograph obtained as a result of that unlawful arrest. All it took was a case of the kind that inspires universal solidarity, such as Nix v. Williams (1984)[45], to establish the "inevitable discovery" doctrine. It was only a matter of time before Hudson v. Michigan (2006)[46] came along for

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[37] Bentham, J., *Introduction to the principles of morals and legislation*, London 1823. First edition 1780, p. 272.

[38] See Moreso Mateos, J.J., "Cinco diferencias entre Bentham y Austin", *Anuario de Filosofía del Derecho*, VI, 1989, p. 354, quoting Austin, J., *Lectures on Jurisprudence or the Philosophy of Positive Law*, Glashütten im Taunus 1972, 35, p. 525, 532-533.

[39] 232 U.S. 383 (1914).

[40] 251 U.S. 385 (1920).

[41] 308 U.S. 338 (1939).

[42] 367 U.S. 643 (1961).

[43] 371 U.S. 471 (1963).

[44] 445 U.S. 463 (1980).

[45] 467 U.S. 431 (1984).

[46] 547 U.S. 586 (2006). See *Tomkovicz, J. J.,* "Hudson v. Michigan and the Future of Fourth Amendment Exclusion", *Iowa Law Review, 93, 2008, p. 1819. Alschuler, A., "The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors", Iowa Law Review, 93, 2007-2008, p. 1741. Davies, S.L.; Scanlon, A.B., "Katz in the Age of Hudson v. Michigan: Some Thoughts on "Suppression as a Last Resort", University of California, Davis Law Review, vol. 41, 2008, p. 1035.*

the Supreme Court to endorse an illegal entry and search justified by the—allegedly—large quantity of drugs seized, a claim which was, moreover, false, since only twenty rocks of crack cocaine were seized from seven people[47]. The exclusionary rule had died whilst its survival was being proclaimed when Utah v. Strieff (2016)[48] came along and drove another nail into its coffin, with the Supreme Court justifying yet another unlawful arrest for the extremely serious offence of failing to pay a parking ticket. And all this, I insist, whilst the validity of the exclusionary rule continues to be affirmed[49].

Something should already have been foreshadowed by a review of the legal doctrine of another Common Law country, the United Kingdom[50], where it was found that the House of Lords had for decades been allowing lawyers to stretch the interpretative possibilities of precedents to the point of distorting them as they saw fit. It is not surprising that Passanante should have spoken, quite rightly, of the "impossible precedent"[51], when encountering quasi-legislative concepts such as the "prospective ruling"[52], or an application of precedents in the common law tradition which, although it may appear otherwise[53], are in fact treated as rules, taking into account the specific case in which they arose and comparing it with the present one. It may seem that, in this way, precedent is not treated as if it were statute law, but the opposite is actually true: precedent is treated as statute law for that specific case and its direct analogues. It is simply a matter of correctly determining its factual circumstances, a task that is more difficult in the continental legal tradition, as we are accustomed to the general provisions of statutes, which, whilst also addressing specific cases, do not reveal precisely which cases were in the legislator's mind—a task that can indeed be carried out by the judicial mind when dealing with a precedent.

4. THE SEEMINGLY UNSTOPPABLE TENDENCY OF SUPREME COURTS TO USURP LEGISLATIVE POWER

Be that as it may, it seems evident that only statutes truly provide a higher level of legal certainty, in the sense that they establish commands that can be clearer, since their drafters are precisely thinking in terms of issuing mandates, rather than resolving a specific case. Ultimately, when a judge interprets a precedent, he or she must act as a legislator of the concrete case, taking what a colleague previously did as a reference and attempting to com-

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[47] Moran, D.A., "The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment", *Cato Supreme Court Review*, 2005-2006, p. 297.

[48] 579 U.S. _, 136 S. Ct. 2056 (2016).

[49] See Miranda Estrampes, M., *Prueba ilícita y regla de exclusión en el sistema estadounidense. Crónica de una muerte anunciada*, Madrid 2019.

[50] Cross, R.; Harris, J.W., *El precedente en el Derecho inglés*, Madrid 2012, p. 153.

[51] Passanante, L., *Il precedente impossibile*, Torino 2018.

[52] Passanante, *Il precedente impossibile*, p. 273.

[53] See Passanante, *Il precedente impossibile*, p. 263.

pare the situation judged then with the one now under examination. By contrast, when interpreting a statute, the judge merely reproduces its command and ensures that the specific case falls within the set of factual situations imagined by the legislator.

However, the risks of maintaining what may now be considered an anomalous situation have already been set out. If we truly believe in the theory of the separation of powers and understand that it arose, above all, to guarantee the validity of legislative mandates and judicial independence from the political commands of monarchs[54], then, updating these ideas to our present time, it may be said with some confidence that what remains fundamental is, first, that judges do not arrogate to themselves a legislative power that does not belong to them, and second, that they remain independent from the fluctuations and influences of politics. In fact, upon closer observation, both ideas are complementary and can be summarized as follows: the judge should follow only one political directive—the one established by Parliament[55].

Nevertheless, there are more than enough examples, in too many countries, showing that some judges—particularly those of supreme courts—do not agree with legislative mandates, which they regard as originating from disoriented, corrupt, or ignorant politicians, while they themselves see themselves as the elite of legal knowledge. Under such conditions, they feel more qualified than legislators to make law, completely disregarding, and in a very serious manner, the democratic legitimacy of legislative power, which no court, of course, possesses.

In the original English model, the House of Commons emerged victorious from the Glorious Revolution of 1688, which expelled King James II, the last Stuart (with the exception of the later Queen Anne). At that moment, it became clear that kings would no longer appoint judges, and that judges would henceforth follow the mandates of Parliament when judging[56]; as Blackstone put it, there was no authority on Earth superior to Parliament[57].

However, there are clear hints[58] that this outcome did not please those who had previously been favoured by the monarch, namely those in the House of Lords, the upper chamber, which, coincidentally, was responsible for the *appeals* that had previously been decided by the king. It is evident that, in the turbulent years of the seventeenth century, the House of Lords, making use of

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[54] Bill of Rights, 1689: "*That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal; That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;*" See also the U.S. Declaration of independence 1776: "*He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers*", "*He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries*".

[55] Andrés Ibáñez, P., *El tercero en discordia*, Madrid 2015, p. 158.

[56] See again the quoted passage of the Bill of Rights.

[57] Blackstone, *Commentaries on the Laws of England*, Lib. I, p. 185.

[58] Jones, D. L., "The Judicial Role of the House of Lords before 1870", in The Judicial House of Lords: 1876-2009, Oxford 2009, p. 3.

its judicial functions—very limited in the sixteenth century—sought to assert itself against the House of Commons, as part of the well-known historical tensions between the two chambers[59]. What is particularly striking is that it was the House of Lords, feeling evidently threatened[60], that, towards the end of the nineteenth century[61], articulated the doctrine of precedent, probably as a means of reaffirming its own authority and strengthening itself after a century of disputes between the legislative chambers, combined with the doctrinal contributions of Bentham and Austin mentioned earlier[62]. In the end, although this was a judicial section of the House of Lords rather than strictly the legislative chamber itself, through the doctrine of precedent, binding law could, in one way or another, originate from that chamber, even without influence from the statutory law enacted by the House of Commons. The disputes between the two legislative chambers during the nineteenth century particularly reflected an increasingly strong rejection by the House of Commons of the judicial functions of the House of Lords[63], with several failed attempts at reform or abolition—*Appellate Jurisdiction Bill* (1870) y *Supreme Court of Judicature Act* (1873)—[64]. Nevertheless, the *Appellate Jurisdiction Act* of 1876 preserved the judicial role of the House of Lords[65], which later[66] strengthened the doctrine of binding precedent —even for itself— thereby considerably reinforcing the authority of its decisions, in evident rivalry with statutory law, even though only statute could overturn precedent. Indeed, the ruling in *London Street Tramways Co Ltd v London County Council* (1898)[67]

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[59] Jones, "The Judicial Role of the House of Lords before 1870", p. 3-7.

[60] Steele, "The Judicial House of Lords: Abolition and Restoration 1873-6", p. 14.

[61] Duxbury, N., *The Nature and Authority of Precedent*, Cambridge 2008, p. 42.

[62] Duxbury, *The Nature and Authority of Precedent*, p. 42.

[63] Jones, "The Judicial Role of the House of Lords before 1870", p. 10-11.

[64] Jones, "The Judicial Role of the House of Lords before 1870", p. 12. Steele, D., "The Judicial House of Lords: Abolition and Restoration 1873-6", in The Judicial House of Lords: 1876-2009, Oxford 2009, p. 13.

[65] Steele, "The Judicial House of Lords: Abolition and Restoration 1873-6", p. 13.

[66] London Tramways v. London County Council (1898), AC 375. *"a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was res integra and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries."* (Earl of Halsbury LC).

[67] "My Lords, I only wish to say one word in answer to a very ingenious argument which the learned counsel set before your Lordships. It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely, that that would be a case of a mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or that the Act had been repealed, to proceed upon the hypothesis that the Act existed. They would then have ascertained whether it existed or not as a matter of fact, and in a subsequent case they would act upon the law as they then found it to be, although before they had been under the impression, on the hypothesis I have put, either on the one hand that an Act of Parliament did not exist, or on the other hand that an Act had not been repealed (either case might be taken as an example) and acted accordingly. But what relation has that proposition to the question whether the same question of law can be reargued on the ground that it was not argued or not sufficiently argued, or that the decision of law upon the argument was wrong? It has no application at all." (Earl of Halsbury LC).

clearly states that the House of Lords had been accused of disregarding an Act of Parliament—an accusation it dismissed as nothing more than a "mistake of fact." There is little more to debate after such pronouncements.

Be that as it may, the result was that a legislative chamber functioned as a supreme court. When this model was adopted in the United States, it was decided that this role would not be exercised by a legislative body; instead, a Supreme Court was created at the apex of the judicial branch. That Court, incidentally, very quickly emphasized its political power by establishing judicial review in *Marbury v. Madison* (1803), less than thirty years after independence.

All of this suggests that supreme courts tend, in one way or another, to end up occupying the position of the legislator. If that is so, one may ask whether it would be possible to devise a mechanism to prevent this tendency. In this regard, it may be time to open a debate: could generative artificial intelligence help ensure that judges comply with legislative mandates?

5. LEGISLATIVE POWER AND ARTIFICIAL INTELLIGENCE

Generative artificial intelligence (GenAI) is based on a language model[68] that ensures fairly predictable responses even for those who have not configured the tool, provided that the data has been properly introduced during programming. This means that, for instance, when examining a cassation appeal of low or medium complexity—one that, aside from rhetoric, is drafted in a data-driven manner—the response produced by GenAI should always be the same. On this basis, one could begin to envisage, at the very least, a tool that assists judges of supreme courts, or perhaps even the legislative power itself, as will be discussed below.

In any event, the configuration of the tool must guarantee its democratic control[69], in the sense that the development of the algorithms it uses to function cannot be left in the hands of actors outside the State. As I have explained elsewhere[70], it is necessary to establish a procedure—that is, a phased course of action—ensuring both the selection of the individuals responsible for building the tool and the delimitation of the functionalities it is intended to have.

In this regard, the purpose of those constructing such a tool is straightforward. It should be a system that, in light of the facts of a specific case and the defects alleged as grounds for cassation, determines the existing case law and

[68] See Lee, R., "Large Language Models (LLMs) and Generative Artificial Intelligence (Gen AI)", en *Natural Language Processing*, Springer 2025, p. 241. Mehta, S.D., Paul, S., Awiti, E. e.a., "Evaluation of large language models within GenAI in qualitative research", *Scientific Reports*, n. 15, 2025, 34993.

[69] See Reid, M., "Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots." *West Virginia Law Review*, 2017, 119 (3), p. 873.

[70] Nieva-Fenoll, J., "Perder el control digital: ¿hacia una distopía judicial?", *Actualidad Civil*, n. 4, abril 2023, p. 1.

proposes the application only of that which is consistent with the law. This requires prior work of data selection, which must, naturally, be carried out by human beings, literally combing through the entirety of case law to ensure that only that which complies with the law is incorporated into the system, discarding erroneous, outdated, or abandoned case law, and also identifying creative precedents so that they may be classified as mere alternative solutions, at least in situations where the factual circumstances do not allow the direct application of the law and require resolution by analogy.

This entire process of constructing the tool should be monitored by the legislative power, as the author of the norms subsequently applied by case law, or upon which analogies are based. Certainly, taking into account the variability of parliamentary compositions and, at times, the much-criticized—though democratically inevitable—lack of legal expertise of some members of Parliament, there might be a temptation to entrust all such control to the Supreme Court. However, despite the unquestionable merits such a body might possess, it may not be appropriate to entrust a small group of distinguished legal professionals—who perform judicial functions—with the interpretation, for purposes of parametrization—that is, with a generalizing intent—, of norms that they themselves did not create. To do so would be tantamount to reducing the legislature to the mere role of producing norms, which could then be altered through various means by the judiciary. As has already been seen, such excesses may be frequent, unless judges exercise a level of restraint and responsibility that, unfortunately, has not always been observed in the past in virtually any supreme court.

Accordingly, the idea would be for legislative chambers to appoint a substantial group of highly qualified jurists to carry out this work, organized in commissions that do not depend on legislative terms, but rather maintain continuity over time, regardless of political changes. This would constitute, in effect, a kind of artificial intelligence section within Parliament. In reality, legislators already rely on a considerable number of advisors, but the proposal is that this group be more plural and stable, so that, by virtue of its legal prestige, it may earn the confidence of both parliamentary chambers and the public at large, regardless of the political origin of its composition.

Their function would be limited to the development and continuous updating of the tool, the use of which should be validated by Parliament, which would also require its modification when errors are detected. In essence, this would be nothing more than a complement to the current legislative work of Parliament, ensuring that such work has greater reach, coherence, and effectiveness in the technological world of the twenty-first century and beyond.

In this way, it would also become easier to propose small reforms—so often subject to political delay—whenever gaps in the legal system are detected, or simply when laws have become outdated. This would avoid the current situation in which the task of adaptation is left to the fragmented possibilities available to judges when resolving individual cases. Thus, the legislative

power would be equipped with a tool, configured by Parliament itself, to perform a genuine, indeed pure, *nomophylactic* function, with the creator of the law acting as its guardian—a solution that, moreover, seems to be the only logical one from the perspective of the separation of powers and, as already explained, represents a return to the original model.

Furthermore, this approach would be technically refined, given that it would be undertaken by genuinely top-level jurists—this must be emphasized—who would configure the tool independently of the resolution of specific cases, that is, without being driven by the incentives associated with litigation. This would help ensure a greater degree of independence and, ultimately, what matters most: the neutrality and excellence of their criteria.

It should be clearly understood that the tool is not intended to judge, but rather to perform the original function of cassation: the detection of judicial errors in the application of the law. In this way, those errors could be identified far more quickly, without the need to wait for the lengthy timeframes characteristic of cassation courts. These timeframes would instead correspond to the ongoing maintenance of the tool by the parliamentary commission, ensuring that it remains constantly ready to respond, with very high speed, to concrete cases of judicial infringements of the law. The response time would be unprecedented, effectively reduced to the time required for the tool to analyse cassation appeals drafted in a structured manner—measured in seconds. The only exceptions would arise in cases where such automation is not possible, either due to errors or gaps in the tool or in the laws themselves, or because the case is unusually complex. The former, everyday cases of low or medium difficulty, should be resolved by the parliamentary AI commission, while the latter should, as a matter of course, be addressed by the legislative power itself through a much more agile procedure than that of current legislative initiatives, in order to clarify the interpretative uncertainties that gave rise to the complexity of the appeal. Ultimately, this would involve filling a gap or resolving an ambiguity, rather than enacting a new law.

Incidentally, under such a system, it might actually make sense to reintroduce remand to the court, so that once the tool has identified the error, the court may correct it and proceed accordingly—necessarily in a direction opposite to its previous ruling—in order to prevent the resistance that has historically been observed in such situations[71].

6. THE END OF *APPELLATIO*. A RETURN OF CASSATION TO ITS LEGISLATIVE ORIGIN?

It is more than likely that all of the above will generate mistrust, reservations, and even a certain nostalgia, which is entirely understandable. We have lived for a very long time with supreme courts embedded in our collective

[71] Calamandrei, *Cassazione civile*, p. 433-434.

imagination, and one might fear that without this final guarantor, nothing could work.

On the contrary, we already have the legislative power, in the unprecedented technological conditions described, to carry out the task of supervising the work of judges in complying with the law, with the assistance of appellants. Moreover, we would have a supreme interpreter of the law who would also be the one who logically and exclusively should always have been entrusted with this role: the legislator itself, now equipped with a tool that would have been unimaginable just a few years ago, allowing it to work with extraordinary speed and efficiency, thereby also reducing the time citizens must wait for the resolution of disputes.

When such technological assistance did not exist, it may have been reasonable to entrust this task to a group of the most distinguished jurists in the country acting as judges, because perhaps there was no alternative, beyond the historical reasons already explained, so specific in England —where the entire system originated[72]— and so novel, in their time, in the United States. But it must be made immediately clear that those historical reasons are precisely what have produced the system we have today. By identifying them, it becomes evident that the model has exhausted its potential and must therefore be overcome, since none of our institutions should persist independently of the scientific reality of the time, and, more specifically in this case, its technological reality.

It is interesting to reflect on how everything began with that *appellatio* or *provocatio* to Caesar in the year 30 B.C.[73] It was an exceptional remedy, perhaps inspired by Egyptian sources[74], which allowed the one who held all powers to review a case and issue a new judgment. That person was also the one who legislated, and for this reason it is not surprising that, over time, this capacity was assumed by a royal council, which in turn was responsible for drafting the laws later signed by the king. From those royal councils or *curia regis* emerged the upper chamber of the English Parliament[75] and, indeed, all the supreme courts of the *ancien régime*, whether called councils[76] or royal audiences[77], among other denominations. The emergence of cassation courts is simply a consequence of the overcoming of that *ancien régime*, stripping the king, in most places, of that original *curia*, following the French model which itself had drawn inspiration from the English system.

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[72] Nieva-Fenoll, J., "The English Origin of French Cassation", *(2022) 41 Civil Justice Quarterly, Issue 1*, *passim*.

[73] See Kaser; Hackl, *Das römische Zivilprozessrecht*, München 1996, p. 446, 501.

[74] See Gaballa, G.A., *The Memphite Tomb-Chapel of Mose*, Warminster 1977, p. 30. In Mesopotamia, Sasson, J.M., "Treatment of Criminals at Mari: A Survey", *Journal of the Economic and Social History of the Orient*, vol. XX, part. I, 1977, p. 100-101.

[75] Blackstone, W., *Commentaries on the Laws of England*, Lib. III, London 1768, p. 454.

[76] Nueva Recopilación, Book II, tit. IV.

[77] Constitucions y Altres Drets de Catalunya, I, 27 (p. 77).

However, it is important to note that cassation courts may represent the final remnants of that ancient *appellatio*. What justification remains today for a supreme instance of appeal before a body that, unlike the ancient emperor, does not enact laws?

In reality, this justification has been gradually constructed by appellants themselves, who, in search of a favourable outcome for their case, repeatedly turn to these courts seeking, not so much justice, but an interpretation of the law that benefits them, or even a supra-legal or extra-legal criterion that might also satisfy their interests—just as, in the past, litigants appealed to Caesar in the hope that he would overturn the decisions of judges by declaring what the law should be.

But that model has been surpassed. The democratic legitimacy of the legislator cannot end with the mere promulgation of laws; it must recover the function of protecting those norms, a function it undoubtedly possessed in the past. Technology may greatly assist in achieving this restoration. In any case, such a transformation would finally bring an end to the role of bodies that have at times been excessively elitist, and that even take the liberty—particularly, but not exclusively, in Common Law countries—of arbitrarily selecting the cases they hear[78], and that, on many occasions, compete with the legislator.

By contrast, we are now presented with the possibility of creating a tool capable of extending democratic legitimacy to the *nomophylactic* function itself. It would not be a bad idea, with a certain degree of progressivism and by abandoning the comfort of traditionalism, to set to work on this endeavour.

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[78] See *Judiciary Act* 1891 (*Evarts Act*), *Judiciary Act* 1925 and *Supreme Court Case Selections Act* 1988.

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