APPEAL, CASSATION, AMPARO AND ALL THAT: WHAT AND WHY?

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SUMMARY: I. *The "Impurity" of Cassation.* 1. *Control of decisions of fact.* 2. *Control of court of remand.* 3. *Power of decision.* II. *The "Impurity" of Appeals.* 1. *Civil law.* 2. *Common law: England.* III. *"Public" and "Private" Purposes.* IV. *Concluding observations.* 1. *The Variables.* 2. *The "Right" to decide.* 3. *The Nature of the Questions.* V. *Endpiece.*

The law governing possible recourse against judicial and other adjudicatory decisions has, in all developed legal systems, become exceedingly complex. Nevertheless, broadly speaking, two principal categories of recourse are recognised and are distinguished one from another, as is reflected in legal terminology by regular use of two different words: *appel, cassation; appello, cassazione; apelación, casación* (or *amparo-casación*); *Berufung, Revision.*[1]

A notable exception to this list is the English language —the language of the common law— which makes no technical use of the word "cassation".[2] This does not mean, however, that procedures that a comparative lawyer would classify as "cassation" rather than "appeal" did not and do not exist. On the contrary, until the major reforms of the 19th Century,[3] an "appeal" properly so-called existed in England only in the courts of Equity; in the courts of "common law" the only forms of recourse available had far more in common with the "cassation" than with the "appeal" of other countries.[4] What

[1] It must be stressed at the outset that no attempt is made in this paper to enter into the detail of any given legal system The topic is treated very broadly and refers almost exclusively to recourse against final judgments given at the end of civil (including "administrative") litigation.

[2] The word "quash", meaning, essentially, to annul, and having the same derivation as cassation, is, however, firmly entrenched in English legal terminology.

[3] Supreme Court of Judicature Acts 1873-1875. Now the Supreme Court Act 1981.

[4] For a brief explanation of the division between "common law" and "equity", see Jolowicz, "El procedimiento civil en el *common law*. Aspectos de su evolución histórica en Inglaterra y en los Estados Unidos durante el Siglo XX" (Trans. Lucio Cabrera Acevedo) in III *LXXV años de evolución jurídica en el mundo* (Mexico, 1978) 99, 101-104.

is more, while England itself substituted for those forms of recourse a procedure of "appeal" in the nineteenth Century, reserving a procedure analogous to cassation for limited classes of case including, most importantly, recourse against the decisions of administrative authorities or "tribunals", in the United States of America the older English forms of recourse including what is actually now called an "appeal" to a "Court of Appeals"— have been developed rather than replaced: for the purposes of this paper, therefore, the American "appeal" is treated as a form of "cassation" rather than of "appeal".

In principle, and as established in practice in the legislation of post-Revolutionary France which provided the model for so many of the legal systems whose language contain both "appeal" and "cassation", the distinction of kind between the two is clear.[5] On "appeal" the litigation as a whole —or so much of it as is the subject of the appeal (*tantum devolutum, quantum appellatum*)— "devolves" upon the appellate jurisdiction whose function it is to consider afresh the questions at issue on their facts as well as at law. Unless it finds the proceedings at first instance to be null and void, its business is to *decide*, at second instance, the substantive questions brought before it and its decision, in so far as it does not merely affirm the decision at first instance, replaces that decision for all purposes. While an appellate jurisdiction should not deal with questions not dealt with at first instance, for otherwise it would not be an *appeal* but itself a procedure at first instance (*tantum devolutum, quantum judicatum*),[6] it is not bound to have regard only to the legal arguments and to the evidence or proofs that were available at first instance: though "new" demands are excluded on appeal, new proofs are not.

From the "appeal" as thus defined, "cassation" is usually held to differ sharply. There is no "devolutive" effect and the role of a jurisdiction of cassation is said to be exclusively to examine the legality of the decision under attack —and "attack" is here an appropriate word which it is not in relation to appeal. No proofs are admissible on cassation— the facts must be taken as already found —and the

[5] For the appeal, see Book III of the Code de procédure civile of 1806. The Court (originally Tribunal) of cassation was created by the law of 27 November to 1 December 1790, but its procedures were governed partly by a pre-Revolutionary decree of 1738 and partly by a number of uncodified laws and decrees of the post-Revolutionary period. See, e.g., Faye, *La Cour de Cassation* (1903).

[6] Adherence to this rule is in principle essential to the preservation of the right to a double degree of adjudication, normally taken as the principal justification for the appeal. See however *post*, n. 43.

court has only two options: it must either affirm or annul. In the latter event the parties are restored to the position in which they were before the defective decision was made, and so if, as a result, questions are left outstanding between them, these must be resolved in another court: they cannot be resolved on cassation. What is more, that other court must reach its own decision unfettered by anything that may have been said on cassation even with regard to the correct interpretation of the law. The French procedure as it remained until 1837[7] provides an example of cassation in this sense, and so too does the old English "writ of error". Under that procedure the formal "record" of the proceedings at first instance —the "trial" of the action before a jury— was brought before a "court of error". If error was found on the record, a mainly formal document consideration of which gave no opportunity to the court of error to reconsider decisions of fact, the decision must be quashed and a "new trial" ordered. The powers of a court of error went no further; it could not even disregard an error which in its view could not have affected the outcome of the trial.[8]

It is often said, and even more often assumed, that the purposes which these two distinct procedures exist to serve are themselves quite different. It must not be overlooked, however, that neither can be invoked until after a decision which affects a person's legal rights has actually been made or that, subject to limited and rarely used exceptions,[9] neither is open save to persons directly affected by the decision. This being so, it is in the nature of things unlikely that either will actually be invoked in any case unless a person actually affected by the decision in question considers that it would be to his own advantage to do so. Calamandrei has observed, in relation to cassation, that the state makes use of the private, self-interested initiative of the disappointed party by putting it to the service of the wider interests of society.[10] This can, however, often be said also of the appeal, but even if it is right that in its "pure" form cassation is pri-

[7] Loi du 1er avril 1837.

[8] Holdsworth, *History of English Law* I (ed. 7, London, 1956) 222-224. For a late example, see *Househill Coal & Iron Co.* v. *Neilson* (1843) 9 Cl. and Fin. 788.

[9] In particular, the recourse "in the interest of the law". This was introduced in Mexico in 1951 but, as Dr. Fix Zamudio observes, is little used: *El juicio de amparo*, Mexico, 1964, p. 301.

[10] Calamandrei, *La Cassazione Civile*, II, cap. 6 nº 64, in Piero Calamandrei, *Opere Giuridiche*, a cura di Mauro Cappelletti, VII (Naples, 1976) 133. See also Jolowicz, "Appellate Proceedings", in *Towards a Justice with a Human Face*, Storme and Casman, ed. Antwerp, 1978, pp. 127 and 154.

marily concerned with those wider interests while the appeal is concerned primarily with the private interests of the parties, it is increasingly difficult in modern conditions to find either institution in pristine condition. "Pure" cassation, in particular, is today something of a rarity, but there are many appeals which provide less than a true *novum judicium* and some which even trespass upon the province of courts of first instance by deciding questions not previously decided in the court below. Even where there are "courts of appeal" and "courts of cassation" it is no longer possible to distinguish sharply between their respective functions: the differences between them are blurred. Some of the changes which have led to this blurring stem from the universal need to reduce the cost and the delays of litigation. Others, perhaps, have had broader objectives. But be this as it may, it is suggested that the time has come for lawyers to take stock of what has occurred in their particular legal systems and to give fresh consideration to the purposes which their various forms of recourse actually serve.

It is not, of course, the intention of this paper to enter into detail, nor yet to provide answers to questions to which, in any case, different solutions are appropriate in different countries. Its intention is only to show, in general terms, and through examples, how the institutions of "appeal" and "cassation", both once internally consistent in principle, have tended to lose their individual character, and to offer some general and somewhat speculative observations at the end. In Mexico, of course, the complex institution of amparo has a special place and some unique characteristics, and it would be ridiculous as well as impertinent for an English lawyer to attempt to discuss it at length in a volume in honour of one of its greatest exponents, Dr. Hector Fix-Zamudio. Nevertheless, two things should be said about it at this stage and before passing to other matters.

1. The debate which has taken place in Mexico concerning the relationship between cassation and the amparo against judicial decisions, and the notable contribution to that debate of Dr. Fix-Zamudio himself, are important to the subject matter of this paper from at least two points of view. First, in answer to those who lay great stress upon the differences between the amparo and cassation as practised in Mexico before 1919, Dr. Fix-Zamudio points out that they confuse cassation, as such, with one particular model —the Spanish— which had

been adopted in many Mexican codes of civil procedure.[11] This, if it may be said with respect, is plainly correct: to mention but one aspect of the matter —a vital one— the French model of cassation did not until very recently allow the court of cassation to do more than quash a defective decision whereas under the Spanish model, if a decision is quashed for *error in judicando,* the court may proceed to give its own decision disposing of the litigation. Indeed, the Spanish cassation has been described by at least one distinguished Spanish writer as "impure",[12] and in this respect, at least, it seems that the Mexican "*amparo-casación*" as it exists today is closer to "pure" cassation than was its predecessor.

2. The second reason for referring to the Mexican debate in this paper is to draw attention to its discussion of the respective purposes of cassation and amparo: according to one line of argument the two must be distinguished because cassation has as its purpose the protection of the legal order, while amparo exists for the protection of individual rights. To this Dr. Fix-Zamudio replies, in part, that no such clear distinction of purpose can be drawn between the two institutions,[13] and he refers specifically, of course, to the amparo itself. His reply is, however, capable of more general application. Such is the nature of the judicial process and its impact on society that however clearly a legislator may envisage the purposes he intends his legislation to achieve, the purposes actually achieved by it can be ascertained only from its operation. Of course, appreciation by the legislator that his legislation has failed to achieve the purpose he had in mind may lead to its modification, and indications by the legislator of his purpose may sometimes control the interpretation and application of the legislation by the judges. There is, nevertheless, no necessary identity between the original "purpose" of a legal institution and the probably numerous "purposes" that institution actually serves. Appreciation of this elementary fact of legal life is of particular importance when procedural institutions and their development are under consideration, and even if the initial "purposes" of "appeal" and "cassa-

[11] Fix Zamudio, "Presente y futuro de la casación civil a través del juicio de amparo mexicano" (1978) 9 *Memoria de El Colegio Nacional,* 91, núm. 49.

[12] Fairén Guillén, "Los procesos europeos desde Finlandia hasta Grecia (1900-1975)" in *op. cit. supra,* note 4, pp. 13, 53. See also the same author's national report to the International Congress on the Law of Civil Procedure, Ghent, 1977, on Appellate Proceedings: "La 'casación' española tiene bastante poco que ver con la francesa."

[13] *Loc. cit,* n. 11, nos. 50, 51.

tion" are distinct, as each institution has developed they have come much closer together. Indeed, as has been indicated above, "pure" cassation has become something of a rarity,[14] and many "appeals" are more "impure" than "pure". It may even be true today that the differences between them are more of degree than of kind. The attempt will now be made to justify this statement.

I. The "Impurity" of Cassation

Three main aspects of "pure" cassation fall to be briefly considered, first in relation to countries of the civil law tradition and then to those of the common law.

1. *Control of decisions of fact*

A. Civil law

Without openly transgressing the rule that it is concerned only with questions of law, thanks to the notorious imprecision and fluidity of the distinction between questions of fact and questions of law a court of cassation can, if it so desires, review many decisions that are essentially of fact. At least three different techniques are available. First, it is widely held that the qualification of the facts is a question of law.[15] Secondly, the traditional idea that the interpretation of private documents such as a contract or a will is a question of intention and thus of fact is overcome by the concept of "distortion".[16] Thirdly, as

[14] The *amparo-casación* itself is, perhaps, an example even since the amendments of 6 January 1984 to articles 76 and 79 of the Ley de Amparo. The amendment to article 78 does, however, seem to import an element of "impurity". Another example of "pure" cassation, though never so described, is the English Application for Judicial Review against administrative decisions. See *post*, pp. 2065-2066. For this procedure see Gordon, *Judicial Review: Law and Procedure*, London, 1985.

[15] *E.g.*, France, Vincent et Guinchard, *Procédure Civile*, ed. 20, Paris, 1981, nº 37; Italy, Liebman, *Manuale di diritto processuale civile*, ed. 4, Milan, 1981, p. 329; Spain, Fairén Guillén, *loc. cit.* at. p. 55 and authorities cited, n. 207. For Germany, see generally Schlosser. "Le contrôle des constations de fait par le juge de cassation dans le procès civil en droit allemand", 1980, *Rev. int. dr. comp.*, 93. The position in the French Conseil d'Etat when acting as a court of cassation is not as it is before the French court of cassation itself: Debbasch, *Contentieux administratif* (ed. 3, Paris, 1981) nº 652. In England, by contrast, it is specifically denied that the qualification of facts is a question of law: *(Wolverhampton) Ltd.*, v. *Haynes* [1959] A.C. 743, but there neither the Court of Appeal nor the House of Lords is formally restricted to questions of law.

[16] "Distortion" ("dénaturation") appears in France as early as 1868: Civ. 20 jan.

a jurisprudential development[17] or by actual legislation,[18] a decision may be quashed on cassation if its findings of fact are inadequately motivated: based upon the idea that acourt of cassation cannot perform its function, especially that of considering the qualification of the facts, if the facts are not adequately stated, the door is open for it to consider almost any point of fact.[19] It has, indeed, been said for France that of the elements of the dossier produced in the lower courts the court of cassation can do with them what it likes,[20] and, for Germany, that, contrary to the intention of the legislature, *Revision* before the *Bundesgerichtshof* has become a *"Tatsacheninstanz"*.[21]

B. Common law

In England, as already mentioned, the principal analogue of "cassation", the writ of error, was replaced by an "appeal" more than a century ago. Most other common law jurisdictions have followed suit. In the United States, however, although the word "appeal" is used, the procedure is not a retrial of the case. The procedure is a development of the old writ of error; it is usually stressed that it is "a review concerning whether prejudicial error occurred in the original determination",[22] and the court is limited to errors on the "record". It remains true that the decision of disputed questions of fact is held to be the province of the jury —and there is no jury in a Court of Appeals— so that attention is directed in principle to alleged errors of law, but instead of the original mainly formal document, the "record" has become a written account of the entire proceedings and may include a

1868. D.P. 1868. 1. 12. See Boré, "Le contrôle de la dénaturation des actes", 1972, *Rev. trim. dr. civ.*, 249.

[17] As it still is in France. See Motulsky, "Le 'manque de base légale', pierre de touche de la technique juridique", *J.C.P.* 1949. I, 775, reprinted, *Ecrits* (Paris, 1973) 31.

[18] *E.g.*, Italy, C.p.c., art. 360 5), Liebman, *op. cit.*, n. 15, p. 332.

[19] Striking examples from France include Civ. 2e, 24 nov. 1955, D. 1955, 163; Civ. 2e. 18 nov. 1976, D. 1977. I.R. 79; Civ. 2e. 17 fev. 1982, J.C.P. 1982, IV, 162.

[20] Mazeaud, Mazeaud et Chabas, *Traité théorique et pratique de la responsabilité civile*, III, ed. 6, Paris, 1978, p. 473.

[21] Gilles, "Die Berufung in Zivilsachen und die zivilgerichtliche Instanzordnung", in *Humane Justiz* (ed. Gilles, Kronberg, 1977) 147, 156. See also Schlosser, *loc. cit.*, n. 15.

[22] James & Hazard, *Civil Procedure*, ed. 2, Boston, 1977, nº 13.8. Space precludes discussion of procedures available in the court of first instance whereby, for example, a litigant can apply for a new trial after the jury has delivered its verdict. See James and Hazard, *op. cit.* nºs. 7.16 to 7.22ñ In this paper reference is made only to the procedure in the Federal Courts of Appeals.

verbatim transcript of the oral testimony given at the trial as well as all documentary material there used.[23] It is therefore open to an appellant to argue that the jury's verdict was "perverse" —that it was contrary to the weight of the evidence— and this opens questions of fact on the appeal. The court will not intervene except in clear cases, but if it considers a jury's verdict to be contrary to the evidence it will order a new trial.[24]

2. *Control of court of remand*

A. Civil law

Where a decision is quashed and the case remanded to another court for a new decision, then, under "pure" cassation, the procedure is exhausted unless and until the new decision is also attacked: the court of cassation cannot control in any way the decision of the court of remand. As early as 1837, however, France found it necessary to modify this rule by providing that, following a second cassation, the rulings of the court of cassation on matters of law bind the second court of remand.[25] This remains, in its essentials, the position in France to the present time,[26] but other countries have gone further: the rulings of the court on a first cassation bind the first court of remand.[27]

B. Common law

No similar explicit provision for control by the American Court of Appeals of the court in which a new trial is held exists, but none is necessary. The common law doctrine of precedent gives to the Court's

[23] F. R.A.P., Rule 10.

[24] That the verdict is against the weight of the evidence is also a ground for an application to the trial judge for a new trial: F.R.C.P., Rule 59.

[25] Loi du ler avril 1837. Under this law the second cassation came before a special formation of the Court, the Chambres Réunies, not before the Chamber originally seised.

[26] Loi nº 79-9 du 3 jan. 1979 (C. org. jud, art. L. 131-4, al. 2). The Chambres Réunies is replaced by the Assemblée Pléniaire. The position in Belgium is similar: C.J., arts. 1119, 1120.

[27] *E.g.*, since 1942, Italy: C.p.c, art. 384, which requires the court of cassation to enunciate the correct principle of law and its mode of application in the circumstances. See Liebman, *op. cit.*, n. 15, p. 348. In Mexico the Supreme Court determines the bases on which the court of remand must proceed and which that court may not disregard: Fix-Zamudio, *op. cit.*, n. 9, 131-132. For Germany see Schlosser, *loc. cit.*, n. 15, at p. 112.

determinations of questions of law the force of law. If, therefore, the judge of first instance at the new trial were to disregard them he would necessarily commit an error of law.

3. *Power of decision*

Two questions fall to be considered here. First, if the decision is quashed, can the court of cassation replace the defective decision with its own and dispose of the litigation? Secondly, if the legal reasoning of the decision is found to be defective but, in the opinion of the court of cassation, its actual disposition of the litigation is correct, may it affirm the decision on the basis of what it holds to be the correct legal reasoning? An affirmative answer to the first, even when limited to cases in which all the facts necessary are stated in the decision under attack, is an obvious element of "impurity"; it also, in substance if not in form, embraces an affirmative answer to the second. Even taken on its own, however, an affirmative answer to the second question introduces an element of "impurity". It is impossible for a court to conclude that the dispositive part of a decision correctly resolves the dispute between the parties to litigation without itself giving consideration to its substance; and that, in a "pure" system, a court of cassation must not do.[28]

A. Civil law

a. *Power to replace defective decisions*

Somewhat surprisingly, the existence of this power, though not universal even today, is not an exclusively modern development. It has for long been within the powers of some courts of "cassation" including that of Spain (and thus, previously, of Mexico), to replace a defective decision with a decision of its own if it can do so without further investigation of facts.[29] It is true that there are still some courts

[28] By parity of reasoning it seems to follow also that what, in the Mexican Ley de Amparo is called the "suplencia de la queja", where it is allowed, is also a sign of "impurity", and the reluctance of Mexican law to extend it beyond the special cases covered by art. 76 is understandable. It is open to question whether the amendment to art. 79 of 1984 introduces a further element of "impurity", but it is suggested that it probably does so.

[29] L.E.C., art. 1745. Fairén Guillén, *loc. cit.*, n. 12, at p. 53; Germany, ZPO, # 565; Salger, "La Cour Fédérale de Justice de la République Fédérale d'Allemagne", in *La Cour judiciaire suprême*, Paris, ed. Bellet et Tunc, 1978, pp. 311, 340; Netherlands, Wiarda, "Le Hoge Raad des Pays-Bas", *idem*, pp. 275, 288.

of cassation which lack the power of final decision[30] but, most significantly, the law has recently been changed in France. First, in 1967,[31] it was enacted that the *Assemblée pléniaire* of the court of cassation, on a second cassation, could como to a decision of substance if the second cassation was founded upon the same grounds as the first and provided that the facts were sufficiently set out for the court to proceed wholly upon considerations of law. Since 1979, however, the power to decide finally, on purely legal grounds, is possessed by every Chamber of the court on a first cassation.[32]

b. *Affirmation on different legal grounds*

The Belgian constitution states that the Court of cassation "*ne connait pas du fond des affaires*".[33] Perhaps for this reason, the Belgian court has no power to affirm a decision if it disapproves of its legal reasoning even if the court regards the result as correct on different grounds. In Mexico, too, it appears, the Supreme Court has no such power.[34] A number of other legal systems, including Italy, which does not allow the court of cassation to substitute its own decision after cassation, do, however, now specifically provide that a decision may be affirmed if its dispositive part is in accordance with the law: if the reasons given are incorrect, the court corrects them.[35] Even in France, but only since 1979, the court may refuse cassation by substitution of correct for incorrect legal reasoning.[36]

[30] *E.g.*, Belgium, Fettweiss, *Manuel de procédure civile*, Liège, 1985, nº 875; Italy, C.p.c., art. 383, Liebman, *op. cit.*, 15, nº 350; Mexico, Ley de Amparo, art. 80 and Fix-Zamudio, *op. cit.*, n. 9, 131-132.

[31] Loi nº 67-523 du 3 juil 1967, art. 16.

[32] Loi nº 79-9 du 3 jan. 1979; C. org. jud., art. L. 131-5; n.C.p.c., art. 675. The finality and completeness of the judgment is emphasised by express provisions that it is enforceable and that the court of cassation decides on the allocation of the costs between the parties, both those incurred on the cassation and those incurred at the earlier stages of the litigation.

[33] Art. 95.

[34] See Fix-Zamudio, *loc cit.*, n. 11, nº 111 and note 138. If Dr. Fix Zamudio's suggestion that the principle *jura novit curia* were to be extended to the whole of the amparo against judicial decisions, the power might exist by implication. It seems that the reforms of 1984 do not go so far.

[35] C.p.c., art. 384, comma 2. The same position applies in the Netherlands (Wiarda, *loc. cit.*, n. 9, at p. 288) and Germany (ZPO # 563; Salger, *loc. cit.*, n. 29, at p. 339).

[36] Now n.C.p.c., art. 620.

B. Common law: United States

a. *Power of decision*

Given the prevalence of jury trial in the United States, a finding of error by a Court of Appeals will normally require a new trial before a new jury.[37] Trial by judge alone is, however, no longer unusual, and where it occurs the judge is required to state separately his findings of fact and his conclusions of law.[38] If, then, a Court of Appeals is content with the judge's findings of fact but disagrees with his conclusion of law upon them, nothing prevents that court from substituting its own judgment for that at first instance. There is, however, also a limited possibility that a Court of Appeals will decide for itself disputed questions of fact. The trial judge's decision of fact will not be overturned unless it is "clearly erroneous", but where nothing turns upon the credibility of the witnesses, witnesses who have given oral testimony in the presence of the judge and whose demeanour he will have observed, the possibility that the Court of Appeals will adopt its own view of the facts in preference to that of the judge of first instance exists. In this respect, it is interesting to observe, the American procedure, developed from a form of "cassation", is closely similar to that established in the English "appeal".[39]

b. *Affirmation on different legal grounds*

In the common law system judgments themselves are not formally motivated. They consist only of what elsewhere would be called the dispositive part: the extensive exposition of reasoning given by common law judges —the "opinion" as it is known in the United States[40]— is independent. There is nothing, therefore, to prevent a Court of Appeals from affirming a "judgment" with which it agrees albeit for reasons different from those given by the judge of first instance.

[37] The possibility exists, in a jury trial, that a party applies to the judge of first instance for judgment in his favour *non obstante veredicto*, i.e. that despite a verdict apparently favourable to his opponent, as a matter of law he is entitled to judgment. Such an application is unusual, but from the judge's decision upon it an appeal may be brought; the decision of the Court of Appeals then disposes of the matter finally.

[38] F.R.C.P., Rule 52 (a).

[39] See *post*, pp. 2058-2060.

[40] Unfortunately, and confusingly, in England the word "judgment" is used in both senses.

There is, furthermore, a well established rule that even if error is found in the record, the Court of Appeals will not intervene unless the error is "prejudicial", and this is for the appellant to establish. It is not always easy to determine whether an error is "prejudicial" or "harmless",[41] but if it is clear that the error did not affect the substantive rights of the parties it will be disregarded and the decision will be affirmed.[42]

II. The "Impurity" of Appeals

The most important matter for consideration here is the extent to which "new" evidence or proofs —evidence or proofs which for one reason or another were not available to the court of first instance— may be taken into account on appeal. A "pure" appeal calls for fresh adjudication of the questions of which the court of appeal is seised at second or subsequent instance,[43] and this, in principle, requires that the same procedures —including those for informing the court with regard to the facts— shall be used on appeal as were used at first instance. As will appear, a *novum judicium* in that sense is more easily achieved where the court of first instance reaches its decision after a distinct process of "instruction" than where, as in the common law, it does so at the end of a "trial" at which oral testimony —the principal and preferred "mode of proof" of the common law— is given in the presence of the judge (or judge and jury) to whom the decision is entrusted.[44]

[41] See *e.g.*, Traynor, *The Riddle of Harmless Error* (Columbus, 1970).

[42] F.R.C.P., Rule 61.

[43] If a court seised of an appeal decides an issue in the litigation which has not previously been decided at first instance it acts, *pro tanto*, not as a court of appeal but as a court of first instance. In some countries, notably Belgium and France, the possibilities for a court of appeal to act in this way have nevertheless been expanded in recent years, mainly, it seems, in the interests of economy; the court is enabled to dispose of the case once and for all. For Belgium, see C.J. arts. 1068, 1069 and Fettweiss, *op cit.*, n. 30, nº 827. For France, see n.C.p.c. arts. 562, al. 2, 568 and Vincent et Guinchard, *op. cit.*, n. 15, nº 949 bis. For critical appraisal see Vincent, "Les dimensions nouvelles de l'appel en matière civile", 1973, D. Chron. 179. Though an element of "impurity" in the appeal, this development does not impinge upon the subject matter of this paper.

[44] Modern English civil procedure does make greater use of documentary material than in the past, but it is still true that the emphasis remains on the oral examination and cross-examination of witnesses in open court and in the presence of the judge who will make the decision.

1. *Civil law*

In some countries the appeal remains relatively "pure". The procedure, especially in its most important part for present purposes —the instruction— follows the pattern of the instruction at first instance and there is no restriction on the admission of new proofs. This is the case, for example, in Belgium and France [45] and it is also to some extent true in Italy.[46] In a number of other countries, however, including Mexico, a court of appeal may admit new proofs only if certain conditions are fulfilled. The conditions are not, of course, stated in identical terms everywhere, but in general they require that the omission at first instance of the proofs in question must not be attributable to any fault or lack of adequate preparation on the part of the litigant seeking their admission on appeal.[47]

From this point of view the Federal Republic of Germany presents something of a special case. There, traditionally, the appeal has been held to involve a complete re-examination of the whole case with all that involves, including freedom for the parties to offer new proofs. In practice, however, it seems that this led to a wide-spread opinion not only that the proceedings at first instance were, in a case of importance, merely preliminary to those on appeal, but also that the parties' main effort in relation to proof should be reserved for the appellate stage.[48] In 1976, therefore, and as part of a wider reform intended to simplify and expedite litigation, certain rules of preclusion for the admission of proofs on appeal were introduced.[49] It appears, however, that the court of appeal may still admit new proofs if it is satisfied that to do so will not cause delay in bringing the proceedings

[45] For Belgium see C.J. art. 1942; for France see n.C.p.c., art. 910.

[46] Although it is provided that in the absence of incompatibility or express provision to the contrary the procedure on appeal shall be as at first instance (C.p.c., art. 359) and that new proofs may be admitted on appeal (*ibid.*, art. 345, comma 2), the power of the court to admit new evidence is discretionary, is restrictively interpreted by the jurisprudence and is exercised by the full court, not by the *giudice istruttore* alone: Liebman, *op. cit.*, n. 15, nº 322; Carpi, Colesanti and Taruffo, *Commentario breve al Codice di procedura civile* (Padua, 1984), comment 7 to art. 345; Varano, "Appellate Proceedings in Italy" (1977) LXXXIX *Studi Senesi*, 359, 379. Between 1942 and 1950 new evidence was admitted on appeal only in special circumstances, and this is still so for appeals in labour cases: C.p.c., art. 473.

[47] *E.g.*, Austria, ZPO nº 482; México, Código Federal de procedimientos civiles, art. 253; México, Código de procedimientos civiles para el D.F., art. 708; Spain, L.E.C., art. 862.

[48] Gilles, *loc. cit.*, n. 21, at pp. 150, 154.

[49] Vereinsfachungnovelle, 1976. See now ZPO # 528.

to a conclusion. The element of "impurity" introduced in 1976 is thus relatively slight.

It may be that in countries other than Germany in which the admission of new proofs on appeal is restricted, one of the objects of the restrictions is, as it is in Germany, to prevent a kind of degradation of the proceedings at first instance. Their effect is, however, inevitably to deprive the appeal, at least partially, of its character as *novum judicium*. As is actually spelled out in the Mexican Federal Code of Civil Procedure,[50] save in the special cases in which new proofs are admitted, the court of appeal must confine itself to the appreciation of the facts as they have been proved at first instance. In short, the element of "impurity" introduced by the restrictions makes of the appeal in most cases little more than a *revisio prioris instantiae* and perhaps, even, no more than an examination of the complaints of the appellant and of the respondent on a cross-appeal against the decision at first instance.[51]

2. *Common law: England*

In the mid-nineteenth Century the structure of the courts and the system of civil procedure were completely reformed and reorganised.[52] A single Court of Appeal, which may sit in more than one Division, was created, and above the Court of Appeal there stands the House of Lords. The procedure before both is, in principle, intended to be that of appeal, not cassation, and the writ of error no longer exists. For the Court of Appeal it is enacted both that "an appeal to the Court of Appeal shall be by way of rehearing" [53] and that the court of Appeal "shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought." [54] As for the House of Lords, its task is to "determine what of right, and according to the law and custom of the realm, ought to be done in the subject matter of the appeal." [55] It would be difficult to find a more extensive legislative formula than that. The fact is, however, that the English appeal is unquestionably "impure". For this there are at least two reasons:

i) "New" evidence. Both the Court of Appeal and the House of

[50] Art. 256.
[51] Fix-Zamudio and Ovalle Favela, "Derecho procesal" in *Introducción al derecho mexicano*, II México, 1981, pp. 1251, 1820.
[52] Supreme Court of Judicature Acts 1873-1875. Now Supreme Court Act 1981.
[53] Rules of the Supreme Court (hereafter "R.S.C."), O. 59, r. 3.
[54] Supreme Court Act 1981, s. 15.
[55] Appellate Jurisdiction Act 1876, s. 4

Lords have a discretionary power to admit new evidence and, so far as the legislation itself is concerned, the discretion is unfettered if the new evidence relates to matters ocurring after the trial has been concluded. Otherwise "special grounds" are required.[56] Case law has, however, not only given a specific meaning to "special grounds" by laying down particular conditions that must be fulfilled, but with the general objective of securing the finality of decisions at first instance,[57] has limited the discretion for all cases. Broadly speaking, the conditions imposed are similar to those found in the legislation of other countries which restrict new evidence on appeal,[58] but even where the evidence relates to matters occurring after the trial it must, if it is to be admitted, be such as to affect substantially a basic assumption on the validity of which the judgment below depends.[59]

ii) No rehearing of oral testimony. In one most important respect the procedure on appeal differs from that at first instance, namely that witnesses who have given oral testimony at the trial do not appear again in person at the appeal; so far as the oral testimony is concerned the Court of Appeal and the House of Lords have only a written transcript of what the witnesses said under examination and cross-examination at first instance. This has a profound effect on the character of the appeal so far as questions of fact are concerned. Indeed, for some time after the Court of Appeal was first created, the view was taken that the decision on a question of fact of a judge sitting alone at first instance should be regarded as if it were the decision of a jury and therefore sacrosanct save in very exceptional circumstances. Now, however, it is accepted that the court is a court of appeal on fact as well as on law,[60] but it is emphasised that, while it is a "rehearing", it is a rehearing on the transcript of the oral testimony given at the trial, not on oral testimony given di-

[56] R.S.C., O. 59, r. 10(2). The discretion is unfettered on interlocutory appeals, but oral evidence is scarcely used in interlocutory proceedings.

[57] The maxim *interest reipublicae ut sit finis litium* is sometimes cited. *E.g., Brown* v. *Dean* [1910] A.C. 373, 374.

[58] See, e.g., the leading case of *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489. Not only must it not be through the fault of the applicant that the evidence was not available to the court of first instance, but the evidence must be such as would probably have an important influence on the outcome of the litigation and it must be apparently credible. If new evidence is admitted and in consequence it appears that a rehearing of the witnesses who had already testified at the trial is necessary, this will not take place before the Court of Appeal. A new trial will be ordered.

[59] *Mulholland* v. *Mitchell* [1971] A.C., 666.

[60] *E.g. Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243, 256.

rectly before the court. This has led to recognition of a distinction between two kinds of question of fact: there are questions of fact to the solution of which the opportunity possessed by the judge of first instance —but not by the court of appeal— to observe the demeanour of the witnesses as they give their evidence is important and there are those to which it is not.[61] This is close to, if not identical with, the distinction between questions which turn on the credibility or reliability of witnesses and those which do not. It is, to put it no higher, exceedingly unlikely that an appellate court in England will vary the judge's answer to a question of the former category, and in this respect English practice resembles quite closely the practice in the United States after trial by judge alone,[62] notwithstanding that in England the appeal is, ostensibly, a "rehearing" while in the United States it is denied that what is there called an "appeal" constitutes a retrial. In other respects the English appeal is certainly wider than the American,[63] but in the nature of things it can be a true *novum judicium* only in those cases in which no oral testimony was given at first instance and such cases, though not today inconsiderable in number, make up only a small proportion of the whole.

III. "Public" and "Private" Purposes

It seems reasonably clear that procedures in the nature of cassation —procedures in which the proceedings and decision at first instance are attacked and which can result only in the affirmation or the annulment of the decision, not its replacement— emerge earlier in the development of a legal system than do procedures in the nature of appeal. So far as England is concerned, as has been mentioned, the common law did not adopt the appeal until the reforms of the nineteenth century and until then knew only the writ of error, but even before the writ of error it developed the "writ of attaint", a procedure whereby the jury itself was charged with dishonesty,[64] and Maitland,

[61] *Watt* v. *Thomas* [1947] A.C. 484; *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370. See Goodhart, "Appeals on Questions of Fact," (1955) 71 L.Q.R. 97.

[62] *Ante*, p. 2055.

[63] The English Court of Appeal will not normally alter the decision of the judge of first instance reached in the exercise of a discretion, but it can and does substitute its own decision on a wide variety of questions not only of law but of mixed law and fact and of fact alone.

[64] See Holdsworth, *op. cit.*, n. 8, 337-342.

the great historian of English law, has pointed out that the concept of a complaint against a judgment which is not an accusation against the judge is not easily formed.[65] In France where, perhaps because of the greater influence of Roman law, the appeal came earlier, it was not until the seventeenth century that the judge of first instance ceased to be a necessary party to subsequent proceedings.[66]

That this should be so is natural enough, at least if it is accepted that the original and fundamental purpose of the entire structure of civil litigation is to replace violent by non-violent methods for the settlement of disputes, if it is accepted that, in the words of Edouardo Couture, the civil action is "civilisation's substitute for vengeance".[67] On this basis it is essential that there should be the widest possible confidence in the process of adjudication, and while this must be principally achieved through the design of that process itself, more is likely to be required. So, for example, it is one thing to entrust decisions of fact to a jury —as happened in England— and to insist that the jury's verdict be accepted as final; it is an altogether different thing to deny the right of challenge even on the ground that the jury deliberately gave a false verdict, and the writ of attaint enabled the jury's honesty to be put in question.[68] A similar point can be made about the writ of error and other forms of "pure" cassation, most obviously when complaint is made of error *in procedendo*, but also when complaint is made of error *in judicando*: a decision should no more be forced upon the parties and publicly upheld if it was reached by the erroneous application of the law than if it was reached following proceedings that were procedurally defective only through correct or at least consistent application of the law can equality of treatment be secured and be seen to be secured.

If this is right, then it may well be that the original reason for giving some scope to the private initiative of the disappointed party

[65] Pollock and Maitland, *History of English Law before the Time of Edward I*, ed. 2, Cambridge, II, 1898, p. 668.

[66] Esmein, *Histoire de droit français*, ed. 4, Paris, 1901, p. 428, citing Pothier, *Traité de procédure civile*, nos. 352, 353. In the Mexican *amparo-casación* the court whose decision is attacked is still, at least theoretically, a party to the proceedings: Ley de Amparo, art. 5; Fix-Zamudio, *op. cit.*, n. 9, p. 389.

[67] "The Nature of Judicial Process" (1950) 25 *Tulane Law Review*, 1.

[68] The earliest juries, composed of neighbours, were expected to reach their verdicts on the basis of their own knowledge of the circumstances. Only gradually did it become the rule that juries must decide exclusively on the evidence presented to them in open court: Holdsworth, *op. cit.*, n. 8, 330-337.

to litigation was, as Calamandrei said,[69] to put it to the service of the wider interest of society, in this case the maintenance of confidence in the process of adjudication. The later inclusion of other "public" interests or purposes such as securing consistency in the interpretation and application of the law, the clarification of the law and even the development of the law, is not inconsistent with that. The appeal, on the other hand, is not at first sight directed to such "public" purposes at all but to the "private" purpose of improving the quality of the decision itself as it affects the actual parties to the litigation before the court. It has, indeed, even been suggested that the appeal may reduce rather than promote confidence in the system of adjudication: "to put before a second judge a case which has already been decided by a first is deliberately to cast suspicion on the administration of justice." [70] It is not, however, necessary to go so far as this to see something new in the emergence of the appeal, namely, recognition by a legal system that the decisions of its courts should not only be accepted as finally determinative of the disputes litigated before them but that those decisions should in some, no doubt ill-defined, sense be correct.[71]

This makes it appear not only that cassation and appeal are different and distinct procedural institutions, but that each exists to meet different kinds of social purpose —the one "public", and the other "private". Such is, indeed, the classical opinion, confirmation of which is not difficult to find even in some modern legislation. The Italian law on court organisation, for example, states that, as the supreme court, the Court of cassation "assures the exact observance and the uniform interpretation of the law, the unity of national law...",[72]

[69] *Ante*, pp. 2047-2048.

[70] Esmein, *op. cit.*, n. 66, transl. author. As Esmein enquires, "if the first judge could have made a mistake, why should not this also be true of the second?" Even so, it may be suggested that the availability of an appeal today contributes more than it detracts from public confidence in the administration of justice. See e.g. the (English) *Final Report of the Committee on Supreme Court Practice and Procedure* (1953, London, H.M.S.O., Cmd. 8878) nº 473: "It would no doubt result in a considerable saving of costs if the right of appeal were abolished in all cases and the judgment of the Court of first instance were always to be regarded as final. But this is a course which has not found any serious advocate. The legal system of every civilised country recognises that Judges are fallible and provides machinery for appeal in some form or another...it would be palpably wrong to leave the defeated litigant entirely without remedy in all cases...or to deny him altogether the chance of appealing from a decision which leaves him smarting from a sense of injustice."

[71] See e.g. Gilles, *loc. cit.*, n. 21, 150.

[72] R.d., 30 January 1941, n. 12, art. 15.

but it says nothing of the rights of the parties: those are the concern of the courts of first instance and of appeal. It is, however, doubtful whether this simple view was ever completely accurate, and certainly it is not so today; matters are much more complex.[73]

A major source of this complexity is, of course, the "impurity" which, as has been briefly sketched in this paper, now infects both cassation and appeal so widely. Cassation, even where there is also appeal, now often enters into the facts of the cases under consideration and looks to the private interests of the parties —a "humane" conception of the court of cassation which can no longer allow a perceived error to go uncorrected[74]— while the appeal, by its restrictions on "new" evidence and, in common law countries, by limiting itself to a transcript instead of having the witnesses before it in person, is correspondingly less of a *novum judicium* concerned only with the "correct" resolution of the parties' dispute. Indeed, in common law countries such as England, where the highest as well as the intermediate level of jurisdiction is a jurisdiction of "appeal" not of "cassation" and where the decisions of the courts are themselves recognised as authoritative sources of law, the need for the appeal to meet the "public" purposes of unifying, clarifying and developing the law is manifest.[75] The House of Lords, for example, decides only about 50 civil cases in each year and its proceedings are both elaborate and exceedingly expensive: no one could sensibly suggest that the appeal to the House of Lords exists only to protect the "private" interest of the parties to the few cases that come before it.[76]

[73] It is of interest to compare Vincent et Guinchard, *op. cit.*, n. 15, with the previous, 19th, edition of 1978 (by Vincent). The latter gives the traditional account of the Court of cassation: its role is to achieve unification in the interpretation of the rules of law; it does not examine the facts but must accept them as they appear in the judgment under attack; having no power to substitute its own decision, when it quashes a decision it remands the case elsewhere. The later edition, in contrast, states that the court does not have as its sole objective the interests of the parties but is concerned also with the general interests of society: ed. 20, no. 1023.

[74] Mazeaud, Mazeaud et Chabas, *op. cit.*, n. 20, 473.

[75] So, for example, while it has been provided recently that, in the interests of economy, the Court of Appeal may sometimes be constituted by two judges instead of the traditional three *(ibid.*, s. 54), it is recognised that a three judge court should sit if the questions raised are of "general importance": Statement of the Master of the Rolls (who is President of the Court of Appeal in England), [1982] 1 W.L.R., 1312, 1319.

[76] Since the Administration of Justice (Appeals) Act 1934 leave to appeal to the House of Lords is always necessary. No criteria for the grant of leave are laid down, but in general leave is only granted if a point of law of importance is raised.

So much is, of course, not infrequently acknowledged, though rarely in actual legislation, and the position of the House of Lords from this point of view is not in pratice so different from that of the Supreme Court of the United States which, today, will give extensive consideration only to cases held to involve important questions of law.[77] There is, however, no need to labour the point. In many countries, if not in all, it is impossible to continue to insist that what is called "appeal" and what is called "cassation" are quite different kinds of legal institution, each serving or seeking to serve different purposes in society. The "public" and the "private" purposes of the entire legal system are served indiscriminately by both, and if it continues to appear in some systems that "cassation" looks more to the "public" purpose than does the "appeal", this is because the procedure in the highest court is there a procedure of "cassation". It is the level in the judicial hierarchy, rather than the description of the procedure employed, that most affects the proportions in which the "public" and the "private" purposes are combined.

As already suggested, many of the changes which have produced the "impurity" of cassation and of appeal have been introduced with no more profound an intention than that of reducing the time and cost involved in taking litigation through all its stages to final judgment. It is, of course, essential that everything possible should be done to improve procedural economy, but it is also essential that consideration be given to the question —a question usually asked and answered in the vaguest of terms, if at all— just what is it that should be done more cheaply and more quickly? [78]

That question goes wider than the subject matter of this paper for it extends also to proceedings at first instance and to the current tendency in many countries to enhance the powers of the judge at the expense of the dispositive powers of the parties. It is, however, also necessary that thought be given to the role of proceedings subsequent to those which led to the original adjudication, whether they be in the nature of "appeal" or "cassation" or a mixture of the two. No longer can it be assumed that the roles of "appeal" and "cassa-

[77] Exceptional cases apart, the Supreme Court of the U.S. will hear an "appeal" from a Court of Appeals only if there are "special reasons": Supreme Court Rules, Rule 19 (1). This means, in practice, that it will do so only if, in the opinion of at least four Justices of the Supreme Court, there is an important question of law involved.

[78] See Jolowicz, "'General Ideas' and the reform of civil procedure" (1983) 3 Legal, Studies 295.

tion" are distinct. It must be re-emphasised that, exceptional cases apart, the initiation of any form of legal proceedings once an initial decision has been made depends upon the exercise of a right —a procedural right— possessed by a person affected by the decision in question, and that person is far more likely than not to be motivated by self-interest. Even if future reform is directed primarily to the achievement of economy, the reasons why that self-interest should be indulged calls for consideration as do the objectives and limitations of the various forms of recourse which that self-interest may set in motion.

IV. Concluding observations

It is the principal object of this paper to argue the need for legal scholars to give fresh thought to the role and function in their legal systems of the procedures for recourse against original decisions, not to suggest what the outcome of their reflections ought to be. Much depends on the social, economic and political environment in which a legal system has to operate, and pragmatic considerations cannot be excluded. Nevertheless some general observations may be offered at this point.

1. *The Variables*

The developments mentioned in this paper indicate that between "pure" cassation on the one hand and "pure" appeal on the other there lies not a sharp cleavage but a range of intermediate positions. The place of a particular procedure within this range depends essentially upon two factors, namely, first, the nature of the outcome to which it may lead and, secondly, the nature of the questions to which the court's attention may be directed. The first of these concerns essentially the basic distinction between the power (or duty) of the court to replace a decision found to be defective with a fresh decision of its own and the power (or duty) only to annul. The second is conventionally linked to the distinction between questions of fact and questions of law, but that distinction has proved itself in practice to be a most uncertain guide: it has become, in effect, little more than a form of words used to distinguish between questions which, in a given procedure, may be reopened after decision at first instance and questions which may not. In the actual structure of a legal system

both these factors operate in conjunction, but it is convenient to separate them for the purposes of discussion.

2. *The "Right" to decide*

It is widely agreed that the right to decide which is necessarily possessed by a court of first instance or other adjudicating authority must be respected at least to the extent that subsequent proceedings should be the exception rather than the norm. Even where a "pure" appeal is open the appellant must normally show some reason why the original decision should not be left intact.[79] Further, and more importantly for present purposes, it is almost invariably the case that where a serious procedural error has occurred, the original decision is quashed, not replaced, and the case remanded whence it came for fresh decision: this is so whether the error is established in a court of "appeal" or a court of "cassation". The conclusion is not that the original decisión was wrong but that it must be annulled: no valid original decision has been made and one must be made by the jurisdiction whose right or duty it is to make it.

Error *in procedendo* does not, therefore, ordinarily deprive the original jurisdiction of its right to decide. Error *in judicando*, on the other hand, may do so and does do so whenever the erroneous decision is replaced in the superior court. Conversely, where the superior court can only quash for error *in judicando*, the consequence is to preserve the original jurisdiction's right to decide.

As, it is hoped, appears from the earlier part of this paper, it is no longer possible to regard this outcome as a mere by-product of the distinction still nominally retained by so many legal systems between courts of "cassation" and courts of "appeal": too many of the former now have the power in certain circumstances to replace defective decisions with decisions of their own. It is, however, still the case that against certain decisions the only available form of recourse for error *in judicando* can lead only to the annulment of the erroneous decision, notwithstanding the economies that would be achieved if a final decision could be given there and then rather than

[79] This is without prejudice to the question whether the court is or is not restricted to consideration of the points raised by the parties as grounds of appeal or cross-appeal. In England an appellant must state the grounds of his appeal, but the Court has a discretionary power to admit additional grounds as well. R.S.C., O. 3(2) and 3(3). In Mexico only the stated grounds of appeal and cross-appeal will be considered: Fix Zamudio and Ovalle Favela, *op. cit.*, n. 51, p. 1320. In Germany action has had to be taken to try to restore the authority of first instance decisions: *ante*, p. 2057.

remand the case elsewhere. Is any explanation available of the value that is thus apparently placed, where this is so, on preservation of the right of the original jurisdiction to dispose finally of the cases that come before it?

A complete answer to this question would require extensive comparative research, but it is believed that a preliminary answer is possible within the compass of this paper, for it appears that, by and large, it is only when litigation starts and finishes within a single judicial hierarchy that the decision of a lower court can be replaced by a superior; when the decision emanates from an external adjudicative authority as is the case, for example, with an "administrative" decision, it may be quashed, but then the case is remanded, not decided, by the court before which it comes. So, notwithstanding the absence of the word from English legal terminology, the English procedure of the "application for judicial review" retains the characteristics of "pure" cassation: the court may quash but it may not replace the decision of an administrative authority. Similarly in Mexico the federal jurisdiction, seised by amparo of the decision of a state court, may quash that decision for error *in judicando* but if it does so the new decision is made in the state not the federal jurisdiction.

Dr. Fix-Zamudio justifies this feature of Mexican federal jurisdiction in part by reference to the necessity for a central court which will unify the decisions of local courts "siendo artificial nuestro federalismo",[80] but this is not to say that Mexican federalism is nonexistent. The Supreme Court may exercise control over state courts, but it is not their direct hierarchical superior. It is, as is acknowledged by the relative "purity" of the *amparo-casación* against their decisions, for the state courts to pronounce the final judgment in litigation started in those courts and their right to decide is preserved.

A similar point can be made for the English "application for judicial review" and probably also for procedures in other countries which enable administrative decisions to be brought under scrutiny in the ordinary courts: it is the administrator, not the judge, on whom the power of decision is conferred and this, it may be presumed, is because for such cases it is the training and experience of the administrator, not the training and experience of the judge, which is thought to be appropriate —appropriate not only for determining what are the basic or "primary" facts but also for drawing any necessary inferences of

[80] *Op. cit.*, n. 9, 127.

fact and for the evaluation of the facts. The administrator's right of decision must be and is preserved.[81]

Matters stand quite differently, however, where the case is confined within a single hierarchy, for then the judges at all levels have had similar education, training and professional experience. Except for cases tried by jury in common law countries[82] —in which case a superior court may quash but may not replace the verdict— there is no obvious advantage in preserving the right to decide of the court of first instance. On the contrary, to the extent that the judges of the superior courts are as well placed in relation to the materials upon which the decision must be based as are those of the inferior to form their own opinions on the matters in dispute, their greater experience provides an additional advantage over and above the economies that are realised if they are permitted to dispose finally of the case rather than remand it for further consideration elsewhere. To insist that a court of "cassation" must always remand for no better reason than to preserve the right to decide of a lower court in the same hierarchy is, in modern conditions, little more than pedantry.

3. *The Nature of the Questions*

In a "pure" appeal all the questions raised at first instance are capable of being reopened whether they are classified as questions of law or of fact. In a "pure" cassation, on the other hand, it is accepted dogma that only questions of law may be raised. As has already been mentioned, the much-used distinction between questions of fact and questions of law is so fluid and imprecise that it has come to be little more than a formal justification for excluding certain mat-

[81] So for example, while the French Court of cassation may determine for itself the qualification of the facts, the Conseil d'Etat, when acting as a court of "cassation", may not: *ante*. n. 15. A similar point can be made with reference to any specialist "tribunal", especially if, as may be the case, an "appeal" lies to an equally specialist appellate body. For recent English recognition of this, see *R.* v. *Chief Constable of the Merseyside Police, ex p. Calvely* [1986] 2 *W.L.R.* 144.

[82] It is of interest that in the Soviet Union, where there is regular lay participation in the decision at first instance, there is no "pure" appeal but only a "cassatory appeal". The superior court must consider all aspects of the case and may replace a defective decision with a decision of its own if, but only if, it is satisfied that the facts have been correctly and completely found at first instance. Otherwise it must remand the case: Principles of Civil Procedure of the Soviet Union and the Union Republics, art. 46(4); Code of Civil Procedure of the R.S.F.S.R., art. 306. English translations by Kiralfy in, respectively, Simons (ed.) *The Soviet Codes of Law* in XXIII *Law in Eastern Europe* (Alphen aan den Rijn, 1980, 543-680) and Szirmai, *Miscellanea* in VII *Law in Eastern Europe* (Leyden, 1963, 299-317).

ters from reconsideration in certain forms of procedure.[83] This is not to say that no question can ever be classified as of law or fact, as the case may be, but when the distinction is used to describe the limits of a particular form of recourse as it operates in practice it conceals more than it reveals.[84] The problem of defining these limits is, perhaps, better approached by separate consideration of forms of recourse which do and those which do not include as one of their objectives preservation of the "right to decide" of the original adjudicative authority.

A. The Right to decide preserved

Errors *in procedendo* apart, the right to decide is, of course, best preserved by allowing the original decision to stand. It should not, therefore, be annulled unless there are cogent reasons for doing so. Such reasons include, but are not restricted to, simple instances of disregard or misinterpretation of the applicable law. In particular, while both the determination and the appreciation of the facts belong to the original adjudicator, his decisions of fact or of mixed fact and law may be so extreme, so "unreasonable", that they must be annulled. In England, for example, an administrative decision will be quashed if it is "so unreasonable that no reasonable authority could ever have come to it",[85] and in France an administrative decision will be annulled for "manifest" error or lack of "proportionality".[86] The question of the unreasonableness of a decision may be equated to a question of law by a variety of technical devices, but to do this is to do no more than restate in different words that the question is open in the superior court. What is of practical importance is that that court will annul a decision in extreme cases, but will not do so merely because its judges, had the right of decision belonged to them, would have come to a different conclusion.

[83] *Ante,* pp. 2051-2052, 2064-2065.

[84] See Jolowicz, *loc. cit.,* n. 10, pp. 134-137.

[85] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223. A more modern statement is that a decision is "unreasonable" if it is one "which no reasonable authority acting with due appreciation of its responsibilities would have decided to adopt:" *Secretary of State for Education* v. *Tameside Metropolitan Borough Council* [1977] A.C., 1014. Note also the rule that a jury's verdict may be quashed if it is "perverse" *ante,* p. 2052.

[86] E.g. *Grassin,* C.E. 26 oct. 1973, Rec. 598; *Librairie François Maspero,* C.E., 2 nov. 1973, J.C.P., 1974, I.17642. Note Drago.

B. Right to decide not preserved

Here, if what has been said earlier is correct, there is no reason of principle why the opinions of the superior court should not replace those of the inferior where there is a difference between them. The important qualification to this is that the superior court should be as well placed in relation to the materials on which the decision is to be based as was the inferior. This qualification is met where the question at issue is of pure law, but otherwise it depends on a number of factors of which the two most important are, first, whether the superior court receives the evidence or proofs in the same form as did the inferior and if not whether the difference in form is significant in the circumstances [87] and, secondly, whether the superior court is entitled to receive "new" evidence.[88]

The extent to which either or both of these factors operate in a given system is, no doubt, in part a result of history and tradition. It is, for example, the emergence of the jury that is ultimately responsible for the common law's preference for oral testimony at the trial and thus for the modern rule that questions of fact dependent upon an assessment of a witness' credibility cannot be reopened in the English Court of Appeal even if there was no jury at first instance. Similarly, given its long history as a court of "pure" cassation, it may be expected that the full effects of the recent acquisition by the French Court of cassation of power to pronounce final decisions will not be felt for some time. Subject to this, however, it seems that considerations of a pragmatic character are as influential as those of principle in determining the extent to which a particular form of recourse in a particular court places that court in the same position as the court below in relation to the materials on which a decision will be based.

One such consideration is, no doubt, the need to maintain the authority and the finality of the decision at first instance in all save a minority of cases and this, as the German experience shows, may be put at risk by over-emphasis on the appeal as a complete reconsideration of the entire case.[89] Another, to which great weight is

[87] Hence the Anglo-American insistence that even after trial by judge alone the judge's assessment of a witness' credibility must be respected: *ante*, pp. 2055, 2058-2060.

[88] Where "new" evidence is admitted the superior court may actually be better placed than the inferior, in which case, *a fortiori*, it should be entitled to substitute its own decision for that of the inferior court.

[89] *Ante*, p. 2057.

attached in many countries at the present time, is, of course, the need for economy not only in the direct cost to litigants or to publicly funded sources of legal aid but also in judicial resources; it is, indeed, not uncommon to find the right of appeal excluded in cases of small monetary value or that an appeal is allowed only on a question classified as one of law; this may be achieved either by explicit legislation to that effect or by excluding 'appeal" while allowing "cassation". Obviously a recourse limited to questions of law, however imprecise that terminology may be, is much less expensive than one under which questions of fact are also open. It is true that some measures of reform aimed only at improved economy may be introduced without significantly changing the character of the recourse affected, as is currently being attempted in England,[90] but the long term consequences of such reforms will not be known until some years after their introduction and it is to be expected that comparative study will continue to show considerable variations from one country to another, whether such variation is the outcome of deliberate intention on the part of the legislator or not. Though "pure" appeal and "pure" cassation are in the process of disappearing where there is no need to preserve a particular adjudicator's "right to decide", different procedures will continue to occupy different places in the range between the two extremes.

V. Endpiece

It is, probably, only of the recourse "in the interest of the law", where it exists, that it can be said that it serves only a "public" purpose: it can be engaged only by a public official and its outcome does not affect the rights and obligations of the parties as determined by the decision which is its subject.[91] Even the Review by way of Supervision of the Soviet Union and other East European countries which, too, can be engaged only by a public official, in-

[90] In addition to the reduction from three judges to two *(ante,* n. 75) a variety of methods for simplifying and accelerating the procedure are being tried. See Blom Cooper, "The Changing Nature of the Appellate Process" (1984) 3 C.J.Q., 295.

[91] *E.g.*, France, n.C.p.c. art. 618-1; Loi no. 67-523 du 3 juillet 1967, art. 17. México, Ley de Amparo, art. 185 Bis; Belgium, C.J. arts. 1089, 1090; Italy, C.p.c. art. 363. Nowhere, however, does it seem that it is much used. In light of the emphasis on "special reasons", perhaps the recourse to the Supreme Court of the United States serves only "public" purposes *(ante,* n. 77) but the initiative of a party is required and the Court does not always refrain from considering questions which are essentially of fact.

volves the parties in its proceedings and its outcome affects their rights and obligations.[92] So far as is know, all other procedures depend on party initiative for their engagement and all, to a greater or lesser extent, serve both "public" and "private" purposes.

The extent to which "public" or "private" purposes predominate in a given procedure —and which specific "public" purposes— depends on a number of different factors. The level within the hierarchy of the court seised of a recourse has already been mentioned, as has the nature of the questions open for reconsideration: the further a procedure is removed from the "pure" appeal, the greater the weight apparently attached to matters of public interest such as the interpretation, clarification, and development of the law. It must not be overlooked, however, that in practice a very great deal depends also on the relative ease with which a disappointed litigant can exercise a right of recourse and its predictable cost or financial risk. It is, perhaps, not inappropriate that there should always be some disincentive to the use of a right of recourse even where the predominant purpose is to secure the private interests of the parties because of the pervading "public" interest in the finality of litigation and the need for economy of judicial resources, but subject to this the disincentive here should be no stronger than can be helped.[93] On the other hand, where the predominant purpose of a recourse, whether nominally of "cassation" or of "appeal", is to serve the "public" interest, where, to repeat Calamandrei's words, the state makes use of the private, self-interested initiative of the disappointed party by putting it to the service of the wider interests of society,[94] choice of the right level of disincentive is critical: those interests will suffer if it is too low and also if it is too high.

[92] For a brief description of these procedures see Stalev, "El Proceso Civil en los Estados Socialistas" (Trans. Santiago Oñate L.) *op. cit.*, n. 4, 167, 207-210, where it is actually stated that "La revisión tiende a la defensa tanto del interés público como de los intereses reales de las partes..."

[93] The principle of double adjudication is now commonly denied in cases of less than a certain monetary value. So, in France, no appeal lies in a case worth less than 13,000 Francs and in England leave is required for an appeal from a County Court (whose jurisdiction is limited to cases of less than a certain monetary value) if the value of the case is less than one half of the jurisdictional limit of the court. This technique is unfortunate: whatever monetary limit is chosen, the sum of money in question will be significant to many litigants and potential litigants. Nor is it satisfactory to restrict appeals to "questions of law" as is not infrequently done in England: a decision which is wrong on its facts is no less unjust to the parties than one which is wrong in law.

[94] *Op. cit.*, n. 10.

In many countries the right of recourse by way of "cassation" to the highest court in the judicial hierarchy is valued more highly or, at least, is better protected by the positive law, than is the right of "appeal". In Italy it is actually enshrined in the Constitution[95] and in France it can be removed, if at all, only by parliamentary legislation.[96] The procedure on cassation is also relatively inexpensive and, in light particularly of the present willingness of the court to enter into the facts, the result has been to create a case-load of unmanageable proportion: [97] in 1978 the French Court of cassation, exclusive of its Criminal Chamber, disposed of nearly 9,000 cases [98] and the Italian in the previous year of over 7,000; [99] but notwithstanding this productivity, the number of cases pending in each court at the end of the year was greater than at its beginning. Some of these cases can be dealt with rapidly by use of an abbreviated form of procedure,[100] but even so there is no disrespect to the distinguished judges of those courts in the suggestion that they do not always have the time for reflexion which the questions they have to resolve will frequently require.[101]

A converse situation exists in the case of some final courts of appeal such as the House of Lords in England where, for a variety of reasons including the elaborate nature of the procedure and its extremely high cost [102] the number of cases decided is very low: in

[95] Art. 113.

[96] E.g. Bellet, "La Cour de cassation en France", *op. cit.*, n. 29, 193, 197. Cassation is available only against decisions against which no appeal is possible, i.e., usually, decisions of a Court of Appeal. The absence of a right of appeal does not however, exclude cassation so that a litigant defeated in an action worth less than 13,000 Francs (*ante*, n. 93) can proceed directly to the Court of cassation. Comprehensible when French cassation was "pure", this now seems paradoxical.

[97] Tunc, "Synthèse", *op. cit.*, n. 29, 5, 15.

[98] Vincent et Guinchard, *op. cit.*, n. 15, 909.

[99] Sgroi, "Cour de cassation d'Italie", *op. cit.*, n. 29, 293, 306.

[100] In France, if it appears to the President of the Court or of the appropriate Chamber that the solution of a case is obvious, the case can be assigned to a court of three rather than the usual five judges: Code Judiciaire, art. L. 131-6 (Loi no. 81-759 du 6 août 1981).

[101] Tunc, "Journées d'Etudes sur la Cour Judiciaire Suprême". 1979, *Rev. int. dr. comp.*, 641. More time yet would probably be required by the judges if the proposal for more explicit reasoning in the judgments of the Court of cassation were implemented: Touffait et Tunc, "Pour une motivation plus explicite des décisions de justice, notamment celles de la Cour de cassation". 1974. *Rev. tr. dr. civ.*, 487.

[102] Since 1934 leave to appeal to the House of Lords is necessary, but it does not seem that this is responsible for the very low number of appeals. The number was no higher before 1934. See Jolowicz, "Les décisions de la Chambre des Lords". 1979, *Rev. int. dr. comp.* 521, 522 and authorities at n. 8.

the case of the House of Lords it rarely exceeds 50 civil cases a year. This does, of course, mean that the judges of the House of Lords have adequate time for reflexion, but, however high the quality of its contributions to legal development, its opportunities to make those contributions are too few.[103] It is to the Court of Appeal, not the House of Lords, that English law looks for the majority of the authoritative decisions which are so important to its make-up and this in turn has consequences for that Court by enhancing the "public" aspect of its proceedings at the expense of its role in securing the interests of the parties to litigation themselves.

In the article cited earlier[104] Dr. Fix-Zamudio urges reforms of the Mexican *amparo-casación*, reforms aimed at its modernisation and its adaptation to the needs of modern civil procedure. Since that article was written a number of modifications to the Ley de Amparo have been introduced. It is not for a foreigner to predict what will be the outcome of those modifications, but this is an age of procedural reform in many parts of the world and further changes are no less likely in Mexico than elsewhere. What is more, the tendency everywhere seems to be to concentrate largely on pragmatic considerations, to seek —justifiably, no doubt— more efficient and less expensive methods for the administration of justice. The question that most engages the attention of procedural reformers today is "How?" and that, of course, is a question that no practical lawyer can ignore. As it has been the intention of this paper to demonstrate, however, it is no longer true that the answers to "What?" and "Why?" can be taken for granted: it can no longer be assumed that different forms of recourse against decisions serve clearly distinguishable purposes and that the only question is how those purposes are best and most economically achieved. Scholars interested in procedural reform must turn their minds once more to the purposes which the institutions of their legal systems actually serve in modern conditions, and where, as is so often the case, it is found that a number of purposes not easily reconciled with one another are served by a single institution, they must consider which of those purposes should predominate before tackling the detailed methods of implementation of reform. "What?" and "Why?" are at least as important as "How?"

[103] It has been suggested that "half a century is not an unreasonable estimate of the time that is likely to elapse before a doubtful point is settled": Devlin, *Samples of Lawmaking*, (London, 1962) 14.

[104] *Loc. cit.*, n. 11, no. 128.