

# CIVIL REMEDIES AS A FACTOR FOR A DIALOGUE NOURISHING THE PROCESS OF LAW-MAKING BY THE JUDICIARY

## COMPARING CIVIL FRENCH AND ENGLISH PROCEDURES

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**Remedies.** Remedies are means provided to litigants within a legal system and by which they can ask for their case to be re-examined<sup>1</sup>. For this reason remedies exercised against a ruling result in a dialogue between judges about the settlement of disputes. Remedies indeed invite a superior jurisdiction to re-examine the previous ruling<sup>2</sup> based on different arguments, including sometimes the meaning or the extent of the law. The dialogue that ensues over interpretations of legal rules which sometimes differ from one judge to another, feeds the process of law-making by the judiciary<sup>3</sup>.

**Dialogue.** The word “dialogue” in the context of this work is taken to mean that a discussion involving various arguments takes place amongst judges on different legal matters. This study of remedies open to litigants and procedural prerogatives of judges, through selected examples, shows the influence of civil procedure on the creation of a normative dialogue amongst the judiciary. The aim is to assess the frequency and intensity of such a dialogue in the context of remedies and understand its place within the process of judges creating the law.

**Structure.** A direct dialogue between judges occurs within the course of the same instance which leads to a rather consistent production of legal rules (I). An indirect dialogue amongst the judiciary also takes place in the course of distinct instances and leaves room for possible inconsistencies within positive law (II).

### I - A direct dialogue within the same instance: a consistent production of legal rules

**Access to the French civil<sup>4</sup> supreme court.** The French supreme court<sup>5</sup> for civil and criminal matters is called the *Cour de cassation*. This jurisdiction is divided into six chambers<sup>6</sup> and has the particularity of not being a third-level jurisdiction, meaning it does not deliver the final solution to a dispute. For a case to reach the *Cour de cassation*, a specific remedy has to be exercised by litigants called *le pourvoi en cassation*. Such a remedy allows a party to criticise the reasoning of a

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<sup>1</sup> GUINCHARD Serge et DEBARD Thierry (dir.), *Lexique des termes juridiques*, Dalloz, 2016, pp. 1126-1127.

<sup>2</sup> This is true for certain types of remedies only, particularly in France: see for a detailed account of civil remedies CADIET Loïc and JEULAND Emmanuel, *Droit judiciaire privé*, 9<sup>th</sup> ed., LexisNexis, 2016.

<sup>3</sup> GHESTIN Jacques, GOUBEAUX Gilles et FABRE-MAGNAN Muriel, *Traité de droit civil. Introduction générale*, 4<sup>th</sup> ed., LGDJ, 1994, n<sup>o</sup>s 475, *et seq.*, pp. 442 *et seq.*

<sup>4</sup> It also deals with criminal matters. “Civil” here refers to the distinction between private law and public law which exists in France.

<sup>5</sup> No capitals are used to distinguish this generic use from the expression referring to the Supreme Court of the United Kingdom which actually bears the name “Supreme Court”.

<sup>6</sup> Three civil chambers each with their areas of expertise, a social chamber, a commercial chamber and a criminal chamber.

lower court - usually a court of appeal<sup>7</sup> - on points of law. The *Cour de cassation* will then decide, upon the arguments presented by the party, whether the decision of the lower court was justified. If it is satisfied with it, it will reject the *pourvoi*. If it is not, it will then annul<sup>8</sup> the decision and return the dispute to another lower court of the same level. This return jurisdiction<sup>9</sup> will then deliver the solution to the dispute.

**Resistance and return.** The return jurisdiction will usually conform to the supreme court's decision. However, it sometimes happens that lower courts, also called *juges du fond*<sup>10</sup> decide to resist the *Cour de cassation's* decision. When such an event occurs and one litigant forms a second *pourvoi en cassation* presenting the same arguments as the first, the supreme court has a legal obligation<sup>11</sup> to sit as the *Assemblée plénière*<sup>12</sup> which is a specific and rare panel. This means the *Cour de cassation* will gather its *Premier président*<sup>13</sup> and, for each chamber, its President, its Dean and one of its advisers appointed by the *Premier président*<sup>14</sup>. The *Cour de cassation* sitting as the *Assemblée plénière* will answer the arguments presented by the party and decide whether the ruling of the lower court must stand. If it decides that it should not, the *Assemblée plénière* will again return the dispute to a return jurisdiction for it to be settled. The difference this time is that the return jurisdiction has a legal obligation to follow the decision of the *Cour de cassation*<sup>15</sup> on every point of law it has dealt with<sup>16</sup>.

Such an obligation has two levels. The first is rather straightforward: the return jurisdiction cannot rule differently than the *Assemblée plénière*. Such resistance has actually never taken place<sup>17</sup>. The second point shows how serious the obligation on the return jurisdiction is. It could not even settle the dispute in accordance with the *Assemblée plénière* while expressing disagreement in its reasons. Despite lower courts' possibility to resist the *Cour de cassation's* positions, procedure was designed so that the French supreme court sitting as a full court would have the last word<sup>18</sup>. The dialogue between judges is then put at an end.

**A rare occasion.** Such intervention of the *Assemblée plénière* does not occur very often. First, the number of *pourvois* examined by all chambers of the *Cour de cassation* is very low compared to the number of cases dealt with by lower courts. In 2015, first level jurisdictions dealt with approximately 3,084,642 civil and criminal cases. 11.34% of them went to an appeal jurisdiction.

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<sup>7</sup> Since there are several, no capital letters are used to refer to French courts of appeals.

<sup>8</sup> More precisely, la *Cour de cassation* "casse et annule" the lower court's decision, hence the name *Cour de cassation*, "casser" meaning to break.

<sup>9</sup> "Jurisdiction de renvoi" refers to the court to which the *Cour de cassation* has returned the case.

<sup>10</sup> Judge entitled to assess both facts and applicable law, unlike the *Cour de cassation*.

<sup>11</sup> Art. L. 431-6 of the *Code de l'organisation judiciaire*.

<sup>12</sup> Plenary assembly, or full court. The name can be explained by the composition of the court, as it gathers judges from all the six chambers. Originally, this assembly bore the name of "united chambers" was composed of the presidents, deans and advisers of all chambers, cf. statute law n°47-4366, 23<sup>rd</sup> July 1947, Title III, art. 58 to 60.

<sup>13</sup> First President.

<sup>14</sup> Art. L. 421-5 of the *Code de l'organisation judiciaire*.

[https://www.courdecassation.fr/jurisprudence\\_2/assemblee\\_pleniere\\_22/composition\\_assemblee\\_pleniere\\_8601.html](https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/composition_assemblee_pleniere_8601.html) [Online] (Consulted the 13/06/2017)

<sup>15</sup> Art. L. 431-4 al. 2 of the *Code de l'organisation judiciaire*.

<sup>16</sup> BORE Jacques et BORE Jouis, *La cassation en matière civile*, 5<sup>e</sup> éd., 2015, Dalloz, coll. Dalloz action, n° 133.94, p. 747.

<sup>17</sup> BORE Jacques et BORE Jouis, *La cassation en matière civile*, 5<sup>e</sup> éd., 2015, Dalloz, coll. Dalloz action, n° 133.95, p. 747.

<sup>18</sup> Statute law n°47-4366, 23<sup>rd</sup> July 1947, Title III, art. 58 to 60.

Only 0.91% of cases treated by first-level jurisdictions went to the *Cour de cassation*<sup>19</sup> which shows how rarely this remedy is exercised<sup>20</sup> by litigants<sup>21</sup>.

More specifically, as far as the activity of the *Assemblée plénière* is concerned only seventy-two rulings have been issued by this particular panel since April 2006. In contrast, in the space of year 2015, 28,144 rulings were issued by the *Cour de cassation* all chambers combined<sup>22</sup>. Out of the total rulings issued by the *Assemblée plénière*, only twenty-two were issued<sup>23</sup> after the *Cour de cassation* had initially returned the case to a lower court<sup>24</sup>. Within these twenty-two rulings, a majority of nineteen is the consequence of a lower court resisting the position of the *Cour de cassation*. This number shows such resistance, and therefore dialogue, seldom occurs. The reason for this may be the fear and knowledge by the lower court that, should a *pourvoi* be exercised, its decision may be annulled so that resisting is pointless. However, interestingly on nine occasions the *Assemblée plénière* has fallen in with the courts of appeal's decisions and rejected the position of the initially competent chamber of the *Cour de cassation*.

**Circumventing statutory law.** For instance, a controversy arose amongst the judiciary in matters of criminal procedure. A victim of incest had murdered eight of her new-borns fearing they might be the children of her own father. French criminal law sets a prescription delay: “prosecution of a crime must occur within 10 years of its perpetration”<sup>25</sup>. The murders except for one were committed before 2000 so that when the bodies were discovered in July 2010 delay had passed for prosecution to be launched against the mother. However the *chambre de l’instruction*<sup>26</sup> of the court of appeal of Paris tried to circumvent a strict application of statutory law. It found that there was an “*insuperable obstacle*” to prosecution as the births of the deceased babies were not registered and their deaths entirely concealed as were the pregnancies given the mother’s obesity. In other words, it was entirely impossible to suspect that there was matter for criminal prosecution before the facts were fully discovered so that the law here could not be applied literally and the delay could not have started upon perpetration. However, the *Cour de cassation* in 2013 refused the existence of such a notion as “*insuperable obstacle*”. It annulled the decision and returned the case<sup>27</sup> to the *chambre de l’instruction* of the court of appeal of Paris which maintained

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<sup>19</sup> Those numbers are based on the Ministry of Justice report for 2016 available online at [http://www.justice.gouv.fr/art\\_pix/stat\\_CC%202016.pdf](http://www.justice.gouv.fr/art_pix/stat_CC%202016.pdf) particularly p. 10 for civil cases and p. 15 for criminal cases. (Consulted the 24/06/2017)

<sup>20</sup> This does not prevent the *Cour de cassation* from being a very active court especially compared to the Supreme Court of the United Kingdom, see *infra*.

<sup>21</sup> While unlike the appeal forming a *pourvoi* is free of taxes to be paid to the State, litigants must pay for their lawyer which can be quite onerous especially since the number of lawyers allowed to appear before the French supreme court is limited (only 112 lawyers in 2017, according to the Order’s website: <http://www.ordre-avocats-cassation.fr/mot-presidente/2017/le-mot-de-la-presidente> [Online] (Consulted the 19/06/2017))

<sup>22</sup> According to the Ministry of Justice report for 2016, 20,412 in civil cases, p. 10 and 7,732 in criminal cases, p. 15.

<sup>23</sup> Others deal mostly with matters of great and/or public importance calling for the *Assemblée plénière* to set the precedent. For example, on the extent of a lawyer’s freedom of speech: *Assemblée plénière*, 16<sup>th</sup> December 2016, n° 08-86295.

<sup>24</sup> [https://www.courdecassation.fr/jurisprudence\\_2/assemblee\\_pleniere\\_22/calendrier\\_567/](https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/calendrier_567/) [Online] (Consulted the 21/06/2017)

<sup>25</sup> Art. 7, §1, *Code de Procédure Pénale*.

<sup>26</sup> An “instruction chamber” within a French court of appeal is in charge of appreciating factual elements and deciding whether they may amount to an offense requiring that a criminal jurisdiction issues a ruling, GUINCHARD Serge (dir.), *Lexique des termes juridiques 2016-2017*, Dalloz, 2016, p. 600. As such, a *chambre de l’instruction* should take notice of an expiration of a prescription delay and conclude that prosecution cannot be launched.

<sup>27</sup> Crim., 16<sup>th</sup> October 2013, n°s 11-89002 and 13-85232, Bull. crim. 2013, n° 192.

its initial position. As this is a case of a lower court deliberately ignoring a ruling by the highest jurisdiction, the latter was forced to sit as a full court.

**A possibly fruitful resistance.** The *Assemblée plénière* issued a ruling on the 7<sup>th</sup> of November 2014<sup>28</sup>. Two comments can be made regarding this decision. Firstly, the *Assemblée plénière* found that as a matter of principle there was such a notion as “*insuperable obstacle*” able to defeat a strict application of the prescription delay. Secondly, the *Assemblée plénière* accepted that there was a sovereign power of all chambers of instruction to find if they saw fit an “*insuperable obstacle*” so that the highest jurisdiction itself was not at liberty to overturn their decisions on this matter. This case is one of the few cases dealt with by the *Assemblée plénière* that have set the law on important matters. One can see how resistance by lower courts and the dialogue that ensued through civil remedies has borne fruit here as lower courts were granted power to decide whether strict application of the prescription delay in criminal matters was justified based on the facts that the *Cour de cassation*, as a judge of the law, is not supposed to assess. This statement from the *Assemblée plénière* ensures that from then on, the rule established will be applied creating consistency in positive law.

**Reciprocating movement.** One could think that in the case of *pourvoi en cassation*, the situation is only that of a well-argued monologue made by each court and there is actually no discussion between judges as the case simply moves on from one court to another. However, the process of return to a lower court creates a certain form of dialogue as there is a reciprocating movement of the case between courts. Lower courts resisting the *Cour de cassation* is a good example of this process because in such a case not one but two returns are made to a lower court.

**Third-level jurisdiction.** Such a process does not exist in the United Kingdom. The Supreme Court of the United Kingdom<sup>29</sup> is indeed a third-level jurisdiction therefore able to settle the dispute. As a consequence no return is made to a lower jurisdiction therefore there is no reciprocating movement of the case between courts as there is in France. However, this does not mean there is no kind of dialogue amongst judges within a same instance. For example, in a 2002 ruling<sup>30</sup> the House of Lords overturned a decision of the England and Wales Court of Appeal regarding torts. An employee had been regularly exposed to asbestos and developed a rare and particularly violent type of cancer<sup>31</sup>. He sued his employers for damages on the ground of negligence. A problem arose in establishing causation between the negligence and the damage. Since the claimant had indeed worked for two companies each of whom exposed him to asbestos dust, it was impossible to identify which exposition caused the disease and therefore to know which employer was liable<sup>32</sup>. The usual test for deciding whether a fact had caused a damage was the “but-for” test, or *causa sine qua none*, by which judges ask themselves whether without the action the damage would still have occurred. If such is not the case, then causation is

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<sup>28</sup> *Assemblée plénière*, 7<sup>th</sup> November 2014, n° 14-83739, Bull. crim., 2014, *Assemblée plénière*, n° 1.

<sup>29</sup> Initially called the House of Lords. The name was changed by Constitutional Reform Act 2005 which started operating on 1<sup>st</sup> October 2009.

<sup>30</sup> House of Lords, 20<sup>th</sup> June 2002, *Fairchild v Glenhaven Funeral Services Ltd & Others*, [2002] UKHL 22, [2002] 3 All ER 305, [2002] 3 WLR 89.

<sup>31</sup> Mesothelioma.

<sup>32</sup> Facts summarised by WINFIELD Percy Henry and JOLOWICZ John Anthony (initial authors), ROGERS W.V.H, *Tort*, Sweet and Maxwell, 2010, n° 6-9, pp. 319 and 320.

established<sup>33</sup>. In the asbestos case, the House of Lords disagreed with the Court of Appeal and ruled that the “but-for” test should not apply to the case because it would result in dismissing the claim when such an “*outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands*”<sup>34</sup>. The claimant indeed could prove that either of his employers was responsible but “*because of the current state of medical knowledge*”<sup>35</sup> he could not prove exactly during which period of employment he had contracted the disease. Therefore the House of Lords rejected the strict application the Court of Appeal made of the previously established test.

**Shape of the judiciary’s dialogue.** Each judge of the House of Lords presented his reasons for overturning the lower court’s decision. An example will show which shape the dialogue between a lower court and the Supreme Court may take. Lord Justice BROOKE, giving the judgment for the Court of Appeal<sup>36</sup>, wrote that accepting causation on the basis that both employers must have contributed to the damage was a solution “*susceptible of unjust results. It may impose liability for the whole of an insidious disease on an employer with whom the claimant was employed for quite a short time in a long working life, when the claimant is wholly unable to prove on the balance of probabilities that that period of employment had any causative relationship with the inception of the disease*”<sup>37</sup>. After expressly quoting this paragraph, Lord BINGHAM OF CORNHILL in the House of Lords replied: “*I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim*”<sup>38</sup>. The judge here gives an example of an undesirable outcome of the Court of Appeal’s decision to better argue that it should be overturned.

**Frequency of the judiciary’s dialogue.** Two comments can be drawn from this brief study of the French criminal procedure case and the English asbestos case. Firstly, in the English procedural system, the reciprocating movement of cases between courts is less vigorous. This is so quite simply because as a third-level jurisdiction the Supreme Court of the United Kingdom settles the dispute and no return is made to the Court of Appeal. This inhibits the dialogue amongst English judges when the French process of return, where resistance by lower courts is always a possibility<sup>39</sup>, creates more opportunity for a discussion. As far as is the activity of both courts are concerned, the Supreme Court of the United Kingdom has issued 92 rulings from 1<sup>st</sup> April 2015 to 31<sup>st</sup> March 2016<sup>40</sup> which is very few compared to the *Cour de cassation*’s 28,144 in 2015. This shows how even more rarely appeals reach the Supreme Court and therefore how limited the dialogue is amongst the English judiciary.

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<sup>33</sup> For an illustration, see *Barnett v. Chelsea & Kensington Hospital Management Committee*, [1968] 2 WLR 422 where a man went to the hospital complaining of vomiting and was told by the night doctor to go home and see his own doctor later. The man died of arsenic poisoning later in the night. It was held that despite the hospital’s breach of duty no causation could be established because the man was probably too sick by the time he had gotten to the hospital to have been saved so the “but-for” test had failed.

<sup>34</sup> Lord NICHOLLS OF BIRKENHEAD, [2002] UKHL 22, at 36.

<sup>35</sup> Lord RODGER OF EARLSFERRY, [2002] UKHL 22, at 124.

<sup>36</sup> England and Wales Court of Appeal, 11<sup>th</sup> December, 2001, *Fairchild v. Glenhaven*, [2002] 1 WLR 1052, [2001] EWCA Civ 1881.

<sup>37</sup> Lord Justice BROOKE, [2002] 1 WLR 1052, at 103.

<sup>38</sup> Lord BINGHAM OF CORNHILL, [2002] UKHL 22, at 33.

<sup>39</sup> Of course only when the return is made by one chamber of the *Cour de cassation* and not by its *Assemblée plénière*.

<sup>40</sup> <https://www.supremecourt.uk/faqs.html#1h> [Online] (Consulted the 28/06/2017). Unlike the *pourvoi* which is free, appealing to the SCUK costs between £800 and £1,000 which may also discourage litigants. See <https://www.supremecourt.uk/procedures/fees-and-costs.html> [Online] (Consulted the 28/06/2017)

**Quality of the judiciary's dialogue.** However and secondly, the tradition of separate and detailed opinions in the United Kingdom allows judges to extensively quote and discuss not only precedents they study regarding the case before them, but also the decision given by the lower court from which the appeal comes. By contrast, decisions of French courts and especially the *Cour de cassation* are particularly short and therefore the dialogue is less luxuriant. The English asbestos case shows how political and social considerations can be determinant in the process of establishing a precedent. Such arguments may be taken into account by French courts<sup>41</sup> but if that is so it is never disclosed making for a less transparent dialogue of judges in France.

**Same decision dialogue.** In the United Kingdom, dialogue can occur within the same decision. The asbestos case was settled by a unanimous decision but judges may strongly disagree with each other in the course of dealing with a case. In a century-old landmark case relating to contract law<sup>42</sup>, the House of Lords was much divided. Two companies had entered into a time charterparty by which the owner would for a certain time leave his boat with the charterer who in exchange would pay a certain sum every month. In the course of the contract being performed, the steamer was requisitioned by the British Government to be used in the transportation of troops in that time of war. The owner wanting to make sure he would regain use of his ship afterwards argued the contract was terminated upon requisition of the boat by the Government. The first instance judge held that the requisitioning of the vessel did not put an end to or suspend the charterparty. His decision was affirmed by the Court of Appeal. The case arrived before the House of Lords posing the issue of whether the contract was frustrated and more broadly under which circumstances a contract may be frustrated. The stakes of admitting frustration are high: the parties are relieved from any contractual obligation. In the case of the charterparty that would mean the owner does not have to leave the boat at the disposal of the charterer who does not have to pay any longer. The House of Lords found for the charterer and ruled that there was no frustration. However this “*test case*”<sup>43</sup> was decided at a very weak majority. Five judges heard the case, only three of them found for the charterer. Lord ATKINSON and Viscount HALDANE dissented. Each of the five judges first goes over the facts of the case and then quotes the authorities he believes are relevant and also the ones the lower court may have relied upon. For example, Viscount HALDANE first expresses his “*reluctance*” to “*differ from the conclusions at which others of [their] Lordships have arrived*”<sup>44</sup>. He goes on to explain that there was no way to predict how long the Government would use the ship for and that its use of it “*might extend until after the period of the charterparty had run out*” so that “*the entire basis of the contract (...) seem[ed] to [him] to have been swept away*”<sup>45</sup>. Therefore the parties were not bound by a contract whose foundation had disappeared due to requisition by the Government and the appeal from the owners should succeed<sup>46</sup>. One sees how English judges clearly state their dissent from the majority in very detailed reasons making for an abundant dialogue amongst the judiciary.

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<sup>41</sup> FRANK Ernest, « L'élaboration des décisions de la Cour de cassation ou la partie immergée de l'iceberg », *D.* 1983, Chron. 119

<sup>42</sup> House of Lords, 24<sup>th</sup> July 2016, *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company Limited*, [1916] 2 A.C. 397.

<sup>43</sup> Case of a particularly great importance because it calls for the House of Lords to set a principle ; Lord Atkinson, [1916] 2 A.C. 397, at 412.

<sup>44</sup> Viscount HALDANE, [1916] 2 A.C. 397, at 406.

<sup>45</sup> Viscount HALDANE, [1916] 2 A.C. 397, at 411.

<sup>46</sup> Viscount HALDANE, [1916] 2 A.C. 397, at 411 ; see also Lord ATKINSON at 422.

**Separate opinions and united front of the judiciary.** It must be stressed that such a dialogue occurring within the reasons given for a single decision is permitted by the existence of separate opinions of judges and the possibility for them to form dissenting opinions. Contrastingly, the French judiciary shows a united front. This requirement is based on the thought that the authority of a ruling would become fragile if it were revealed that it was the result of a weak majority. Authors however have argued that a ruling does necessarily benefit from an apparent unity which could easily be questioned by an overruling<sup>47</sup>. Nonetheless in assessing the intensity of the dialogue amongst French judges one must point out that the lack of separate opinions greatly decreases its vigor<sup>48</sup>.

The dialogue which takes place within a same instance allows a law-making process mostly by the supreme court which will annul or overturn a lower court's decision. Coherence is then preserved in the judiciary's work. However this is less the case when the dialogue takes place in the course of distinct instances.

## **II - An indirect dialogue in the course of distinct instances: a possibility of inconsistencies within positive law**

**Delayed resistance in France.** Sometimes lower courts will initiate a dialogue within a different instance rather than in the course of the same trial. In France, this happens when the *Cour de cassation* has set a precedent<sup>49</sup> and lower courts, when faced with identical facts, rule differently. Such delayed resistance can occur in all areas. Let us take an example regarding intellectual property. An employee working for a company designing perfumes had been terminated and was suing her former employer for payment relating to the fragrances she had created. The court of appeal of Versailles rejected the claim arguing that such creation did not fall within the scope of authorship protection law. The employee formed a *pourvoi en cassation* based on violation of the law regarding authorship by the court of appeal for two reasons. Firstly, a perfume should be recognised as an “*oeuvre de l'esprit*”<sup>50</sup> mentioned in the law as the object of authorship protection<sup>51</sup>. Secondly, the list offered by the law is not limitative as it uses the following expression: “*By oeuvres de l'esprit, this Code notably means: (...)*”<sup>52</sup> therefore the fact that perfumes are not mentioned in the list does not mean they must be excluded from authorship protection. Those arguments did not convince the *Cour de cassation* which rejected the *pourvoi* and ruled in 2006<sup>53</sup> that a perfume could not be protected under French rules of authorship as it was not an “*oeuvre de l'esprit*”<sup>54</sup> therefore falling outside the scope of the law. Since the *pourvoi* was rejected by the supreme court, there was

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<sup>47</sup> TOUFFAIT Adolphe et TUNC André, « Pour une motivation plus explicite des décisions de justice, notamment de celles de la *Cour de cassation* », *RTD civ.*, 1974, p. 497 *et seq.*

<sup>48</sup> However such a remark can be qualified. Dialogue may occur amongst French judges within the same instance and within a same court for a same case, particularly in the *Cour de cassation*. All of its chambers work with several *rapporteurs* who are in charge of issuing reports to judges in which they expose all possible solutions and explain why one has their preference. See FRANK Ernest, « L'élaboration des décisions de la Cour de cassation ou la partie immergée de l'iceberg », *D.* 1983, Chron. 119, esp. p. 121.

<sup>49</sup> In the common law sense, meaning the *Cour de cassation* has provided an answer to an important matter and has set a principle lower courts and itself are supposed to rely on in the future although they are not bound by it as in the United Kingdom. See SLAPPER Gary and KELLY David, *The English legal system*, 15<sup>th</sup> ed., Routledge, 2014, p. 129.

<sup>50</sup> Work of the mind.

<sup>51</sup> Art. L. 112-1 *Code de la propriété intellectuelle*.

<sup>52</sup> Art. L. 112-2 *Code de la propriété intellectuelle*. Emphasis added by the author.

<sup>53</sup> Civ. 1<sup>ère</sup>, 13<sup>th</sup> June 2006, n° 02-44718, Bull., 2006, I, n° 307, p. 267.

<sup>54</sup> Art. L. 112-1 and L. 112-2, *Code de la propriété intellectuelle*.

no return to a lower jurisdiction and the decision of the court of appeal of Versailles stood and settled the dispute.

However, in the course of perfectly distinct trials relating to the same matter, other tribunals and courts have expressed a different view than the *Cour de cassation* and refused to conform to its position. The first instance tribunal of Bobigny ruled on 28<sup>th</sup> November 2006 that a perfume is “*the result of an artistic research carried on by specialists called “noses”*” and therefore is an “*oeuvre de l’esprit*” and as such should fall within the scope of the law. The tribunal added, as it was suggested by the *pourvoi* presented to the *Cour de cassation* in the previous dispute that the list provided by the law was not limitative and the protection not reserved to artistic work that could be seen or heard.

Similarly, the court of appeal of Paris on 14<sup>th</sup> February 2007 ruled that perfumes should be protected so long as “*they are the product of a previously unseen combination essences in proportions such that their scent (...) reflects the creative effort of its author*”. According to the court of appeal, the criterion for authorship protection is the creativity and unprecedented character of the artistic work so that at least some perfumes could fall within the scope of the law. In contrast the *Cour de cassation* takes the law to exclude all perfumes from authorship protection.

**Sending a message.** There was no appeal against the decision of the tribunal and no *pourvoi* against the decision of the court of appeal. Therefore, those disputes were solved by lower courts, despite the inconsistency of these rulings with the position of the *Cour de cassation*. In such cases of a decision inconsistent with the doctrine of the *Cour de cassation* within a different instance, dialogue occurs in the sense that courts are usually aware of decisions issued by other courts. More precisely, lower courts are aware of the *Cour de cassation*’s decisions because they are widely published<sup>55</sup>. Here the tribunal and court of appeal knew of the position of the supreme court on authorship protection for perfumes. By expressly quoting the *Cour de cassation*’s reasons given in the ruling of June 2006 and quoting authorship law they are emphasising their disagreement on the meaning of the statute. These lower courts clearly sent a message to the supreme court. Unlike the situation of a return made to a court of appeal resisting the *Cour de cassation*’s position, the lower court’s opposition here is less frontal since it was not given the correct course to follow directly by the *Cour de cassation* during in the same trial. Therefore, an indirect dialogue takes place through interposed cases.

**Indirect dialogue in the United Kingdom.** In the United Kingdom dialogue also occurs in the course of separate trials. It is actually even more obvious as rulings are written in a very different way than in France. Reasons are much more detailed in English court’s decisions and judges frequently quote each other’s previous speeches in their separate opinions to better make their point and show their approval or disagreement. A good illustration of this can be seen in the controversy regarding mistake in contract law.

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<sup>55</sup> Rulings issued by the *Cour de cassation* are published in various records: « *Bulletin des arrêts* » of the chamber which issued the decision, *Bulletin d’information de la Cour de cassation*, and the annual report of the *Cour de cassation*. They also may be available on *Cour de cassation*’s website and at <https://www.legifrance.gouv.fr>.

**Creating law.** Mistake “negatives consent where it puts the parties at cross-purposes so as to prevent them from reaching agreement, e. g. because they intend to contract about different things”<sup>56</sup>. The consequence of finding a mistake is that the contract is void and parties are put back in the situation they were in before its conclusion. The doctrine of mistake did not exist in English law before 1931 when an essential precedent was set<sup>57</sup>. Lord ATKIN’s speech is considered to be “*the birth of a doctrine of precedent of contractual mistake based on a failure to consent*”<sup>58</sup> and remains a good example of how English judges create law. Lord ATKIN wondered under which circumstances a mistake could “nullify consent”<sup>59</sup> and established that a contract could be void on the ground of mistake only if “*it is clear that the intention*” of the mistaken party was to get something from the bargain that he did not get<sup>60</sup>. In the case before the House of Lords at the time employers had terminated contracts of employment in exchange for a redundancy payment. They later discovered that the employees had breached their contract of employment in such a way that the employers could have terminated them without paying termination indemnity. They sought to have the contract by which they terminated employees in exchange for payment annulled. The House of Lords decided that what the employers had in mind upon entering into such a bargain was the termination of the employment contracts which they did get eventually. Therefore, there was no discrepancy between what they wanted and what they received.

**A bold opposition.** This precedent could be deemed a rather strict position on mistake. Lord Justice DENNING in the Court of Appeal believed so. In 1950, the Court of Appeal of which he was Master of the Rolls<sup>61</sup>, meaning he had great influence on the Court’s positions, issued a ruling<sup>62</sup> aiming at counteracting the effect of the 1931 precedent by offering a “*more just solution*”<sup>63</sup>. A flat had been let for £250, both parties believing that it was free from rent control. It turned out the flat was subject to the Rent Acts<sup>64</sup> and the rent could not exceed £140 per year. The tenant asked for the overpaid rent to be given back to him. The landlord argued the contract was void on the ground of mistake as both parties were mistaken about rent regulation. The Court of Appeal held, in full opposition with the precedent set by *Lever Brothers Ltd v. Bell*<sup>65</sup> in 1931, that the contract could be annulled. More specifically, Lord DENNING MR expressed the view that there were two kinds of mistakes<sup>66</sup>: one under common law, and one under equity<sup>67</sup>. According to

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<sup>56</sup> TREITEL Guenter Heinz (initial author), PEEL Edwin Arthur, *Contract law*, Sweet and Maxwell, 2011, n° 8-001, p. 310 ; the word “negative” being in italic in the original text.

<sup>57</sup> House of Lords, 15<sup>th</sup> December 1931, *Lever Brothers Ltd v. Bell*, [1931] UKHL 2, [1932] AC 161.

<sup>58</sup> MACMILLAN Catherine, *Mistakes in contract law*, Hart Publishing, 2010, p. 272.

<sup>59</sup> Lord ATKIN, *Lever Brothers Ltd v. Bell*, [1931] UKHL 2, at 4.

<sup>60</sup> *Ibid.*

<sup>61</sup> President of the civil section of the Court of Appeal. Commonly abbreviated: MR.

<sup>62</sup> England and Wales Court of Appeal, *Solle v. Butcher*, [1950] 1 KB 671.

<sup>63</sup> WHINCUP Michael, *Contract Law and Practice: the English system and Continental comparisons*, 3<sup>rd</sup> ed., Kluwer Law International, 1996, p. 229.

<sup>64</sup> *Furnished Houses (Rent Control) Act 1946 ; Landlord and Tenant (Rent Control) Act 1949*. Both are now united within the *rent Act 1969* and have been amended by the *Rent Act 1977*.

<sup>65</sup> House of Lords, 15<sup>th</sup> December 1931, *Lever Brothers Ltd v. Bell*, [1931] UKHL 2, [1932] AC 161.

<sup>66</sup> “ (...) *first, mistake which renders the contract void, that is, a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law; and, secondly, mistake which renders the contract not void, but voidable, that is, liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by the courts of equity*”, Lord Denning MR, *Solle v. Butcher*, [1950] 1 KB 671, p. 690.

<sup>67</sup> In the 13<sup>th</sup> century, Courts of Equity, initially the Lord Chancellor alone, appeared to settle disputes common law courts did not take care of because no specific procedure existed for it. The name comes from the fact that the Lord Chancellor “*based his decisions on principles of natural justice and fairness, making a decision on what seemed ‘right’ in the particular case rather than on the strict following of previous precedents*”, see MARTIN Jacqueline, *The English legal system*, 7<sup>th</sup> ed., Hachette

this speech, judges relying on the equitable doctrine should be able to set aside a contract if it were “*unconscientious*<sup>68</sup> for the other party to avail himself of the legal advantage which he had obtained”<sup>69</sup>. No appeal was formed against this decision and so this precedent lived on. The problem was that “*no satisfactory way was ever found of explaining the relationship between th[e] leading case*” of *Lever Brothers Ltd v. Bell* and the equitable precedent<sup>70</sup>. The two rulings led to a great inconsistency in contract law as some cases were solved on the basis of *Lever Brothers*, others on the basis of *Solle v. Butcher*<sup>71</sup>. Moreover many subsequent rulings discussed the relevance of the latter case and how it could be reconciled with the leading precedent<sup>72</sup>. For instance, in *Japanese Bank v. Credit du Nord*<sup>73</sup>, Justice STEYN wrote: “*a narrow doctrine of common law mistake (as enunciated in Bell v. Lever Brothers Ltd. (...)), supplemented by the more flexible doctrine of mistake in equity (as developed in Solle v. Butcher (...)) seems to me to be an entirely sensible and satisfactory state of the law*”<sup>74</sup>. On the other hand, Justice TOULSON in his first-instance decision<sup>75</sup> for the Great Shipping case strongly criticised *Solle v. Butcher* saying it found no ground in previously set precedents<sup>76</sup> and the three main cases decided upon it<sup>77</sup> “*were, in [his] respectful opinion, wrongly decided*”<sup>78</sup>. One can see how this controversy has sparked intense dialogue amongst the judiciary. It was only fifty-two years later that the debate was put at an end with the Court of Appeal overruling the equitable case of *Solle v. Butcher*<sup>79</sup>. In the Great Shipping case in 2002<sup>80</sup>, both cases were lengthily discussed and Lord PHILLIPS MR carefully admitted that he “*c[ould] see no way that Solle v. Butcher c[ould] stand with Bell v. Lever Brothers*”<sup>81</sup>. In other words, the controversial case had been overruled and the dialogue had come to an end.

**Inconsistencies.** Much like the dialogue which takes place within a same instance, if no *pourvoi* or appeal is exercised by litigants supreme courts will not have the opportunity to answer. Again, the exercise of remedies by the parties determines the intensity and quality of the normative dialogue amongst the judiciary. The supreme court does not get a chance to annul the lower court’s decision which allows an incoherent ruling to settle the dispute. Procedure as a contributing factor for a dialogue nourishing the process of law-making by the judiciary meets a

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UK, 2013, n° 2.3.1, p. 18. The two have been combined by the Judicature Act 1873-1875 and since English courts have ruled both at common law and in equity.

<sup>68</sup> Unprincipled, morally wrong.

<sup>69</sup> Lord DENNING MR was quoting *Torrance v. Bolton* (1872) LR 8 Ch App 118, p. 124.

<sup>70</sup> TREITEL Guenter Heinz (initial author), PEEL Edwin Arthur, *Contract law*, 13<sup>th</sup> ed., Sweet and Maxwell, 2011, n° 8-028, p. 328.

<sup>71</sup> For example, England and Wales Court of Appeal, *Magee v. Pennine Insurance Co. Ltd.*, [1969] 2 QB 507, [1969] 2 All ER 891, when Lord DENNING was still Master of the Rolls ; *Grist v. Bailey* [1967] Ch 532, [1966] 2 All ER 875, [1967] 1 Ch 532; and *Laurence v. Lexcourt Holdings Ltd* [1978] 1 WLR 1128.

<sup>72</sup> Lord PHILLIPS MR, 14<sup>th</sup> October 2002, *Great Peace Shipping Ltd. v. Tsavlis (International) Ltd.*, [2002] 3 WLR 1617, [2003] QB 679, [2002] EWCA Civ 1407, at 1: “*Over the last fifty years judges and jurists have wrestled with the problem of reconciling these two decisions and identifying with precision the principles that they lay down*”.

<sup>73</sup> *Japanese Bank v. Credit du Nord*, [1989] 1 WLR 255, [1988] 3 All ER 902.

<sup>74</sup> Lord STEYN, *Japanese Bank v. Credit du Nord*, [1989] 1 WLR 255, at 266.

<sup>75</sup> England and Wales High Court, Queen’s Bench, 9<sup>th</sup> November 2001, *Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd.*, [2001] EWHC 529 (QB).

<sup>76</sup> Justice TOULSON, *Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd.*, [2001] EWHC 529 (QB), at 87.

<sup>77</sup> See footnote 66.

<sup>78</sup> Justice TOULSON, *Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd.*, [2001] EWHC 529 (QB), at 111.

<sup>79</sup> England and Wales Court of Appeal, *Solle v. Butcher*, [1950] 1 KB 671.

<sup>80</sup> England and Wales Court of Appeal, 14<sup>th</sup> October 2002, *Great Peace Shipping Ltd. v. Tsavlis (International) Ltd.*, [2002] 3 WLR 1617, [2003] QB 679, [2002] EWCA Civ 1407.

<sup>81</sup> Lord PHILLIPS MR, *Great Peace Shipping Ltd. v. Tsavlis (International) Ltd.*, [2002] EWCA Civ 1407, at 160.

strong limit here as those examples show plainly how when remedies are not exercised inconsistencies persist between lower courts' and supreme courts' rulings.

**Dévolution as a limit to the dialogue.** English judges extensively use *obiter dicta*. *Obiter dicta*, as opposed to *ratio decidendi*, means “a statement by the way”. The *ratio decidendi* is “the rule of law on which the decision is founded” found in an “abstraction of the facts of the case”<sup>82</sup>. The *obiter dictum* is everything “that is not an essential part of the *ratio decidendi*”<sup>83</sup>. As such it does not participate in settling the case in point but allows the judge to clarify his thoughts on the law. For example, in *Lever Brothers*<sup>84</sup> the House of Lords had to deal with an issue relating to contracts of employment. However to better explain his views on the principle he was setting regarding mistake as a consent vitiating factor, Lord ATKIN presented the example of a contract for sale of a painting. He wrote that even if a buyer had entered into such a bargain on the ground that the painting was that of an old master, there would still be no mistake<sup>85</sup>. This reasoning is an *obiter dictum* as it does not express the principle upon which the case was decided. These side remarks, often quite detailed, about what the settlement could have been had the facts been slightly different, the analysis of various legal solutions to the case, make the discussion quite rich. *Obiter dicta* cause the dialogue amongst judges to be much wider. *Prima facie*, *obiter dicta* should not occur in France<sup>86</sup>. A court of appeal is entitled to re-examine all the facts of a case and all relevant law because it is a second-level jurisdiction. The appeal is said to be a “reform remedy”<sup>87</sup>. However the court of appeal is not entitled to leave the strict scope of the case argued before it<sup>88</sup>. This limitation of what is passed on to the court of appeal is called *dévolution*. The appeal is said to have an *effet dévolutif*<sup>89</sup>. Before the *Cour de cassation*, the issue presents itself a bit differently. The scope of what is passed on to the supreme court is also limited but this is not because the *pourvoi* has an *effet dévolutif*. The *Cour de cassation* not being a third-level jurisdiction means it is only competent to decide whether the lower court's ruling follows legal principles. The *pourvoi* is an “annulment remedy”<sup>90</sup> meaning the court only has the power to annul the ruling or reject the *pourvoi*. Therefore the extent of issues to be examined will be determined by the arguments presented by the litigant exercising the *pourvoi*<sup>91</sup>. This brief study shows that the scope of the dialogue in France is much more limited than in England where an appeal, whether it is to access the Court of Appeal or the Supreme Court, does not have a specific effect of limiting the subject-matter to be discussed leaving room for ample discussion.

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<sup>82</sup> SLAPPER Gary and KELLY David, *The English legal system*, 15<sup>th</sup> ed., Routledge, 2014, n° 4.5, p. 153.

<sup>83</sup> *Ibid.*

<sup>84</sup> House of Lords, 15<sup>th</sup> December 1931, *Lever Brothers Ltd v. Bell*, [1931] UKHL 2, [1932] AC 161.

<sup>85</sup> Lord ATKIN, *Lever Brothers Ltd v. Bell*, [1931] UKHL 2, at 9.

<sup>86</sup> Although a doctorate study is currently in progress arguing that the *Cour de cassation* uses *obiter dicta*. HORTALA Solenne, *Les obiter dicta dans la jurisprudence civile de la Cour de cassation*, Toulouse 1 Capitole University, JULIEN Jérôme supervising.

<sup>87</sup> “*Voie de reformation*”; *ibid.*, n° 835, p. 687. That is because it may “reform” the first-instance decision.

<sup>88</sup> Art. 562, §1, *Code de procédure civile*.

<sup>89</sup> CADIET Loïc and JEULAND Emmanuel, *Droit judiciaire privé*, 9<sup>th</sup> ed., LexisNexis, 2016, n° 837, p. 689.

<sup>90</sup> “*Voie d'annulation*”; *ibid.*, n° 797, p. 663.

<sup>91</sup> *Ibid.*, n° 877, p. 723.

## Conclusion

**A more frequent dialogue in France.** Neither the *Cour de cassation* nor the Supreme Court of the United Kingdom has the power to rule spontaneously on a case. As far as the French system is concerned, only a *pourvoi* exercised by a litigant could cause either the return jurisdiction's decision<sup>92</sup> or the lower court's decision<sup>93</sup> to be examined by the *Cour de cassation*. The same can be said for the English system: an appeal must be exercised for the Court of Appeal or the Supreme Court of the United Kingdom to have an opportunity to discuss a lower court's decision. The process therefore is not systematic. Consequently, from a procedural point of view, the dialogue of the judiciary is entirely dependent on whether parties decide to exercise a remedy. Civil remedies create opportunities for judges to discuss points of law and settlements of disputes in so far as they are exercised by litigants.

**A more luxuriant dialogue in the UK.** The tradition of separate opinions in the United Kingdom allows for a more intense dialogue than in France as dialogue then takes the shape of detailed arguments and reasons. Moreover it even creates a discussion within a same ruling which, though sometimes confusing as to what the law is<sup>94</sup> has great significance in terms of sustaining the dialogue.

**End of dialogue: hierarchy of courts.** Both in France and in the United Kingdom, the dialogue between judges is settled thanks to the hierarchy established amongst the courts: the Supreme Court of the United Kingdom has the last word as does the *Cour de cassation* sitting as the *Assemblée plénière*. The difference is that the Supreme Court of the United Kingdom is a third-level jurisdiction which can settle the dispute whereas the *Cour de cassation* is not and must return the case to a lower court to see the dispute ended. It could be argued that such an issue would not arise if French courts were bound by the doctrine of precedent as English courts are. Indeed the precedent doctrine is a principle by which a previous decision issued by a court binds all lower or equivalent courts for the future should they come across a case with identical facts<sup>95</sup>. When judges must follow a precedent set previously by a superior court in a different instance, the risk of inconsistencies between rulings decreases considerably<sup>96</sup>. Consequently, the lack of precedent doctrine in the French system allows the return jurisdiction to resist the supreme court's position. Contrastingly, in the United Kingdom the thought that a lower court may downright resist the Supreme Court's position is very unlikely.

**Prerogatives of supreme courts.** However as one may have deduced from the controversy regarding mistake in contract law<sup>97</sup>, the doctrine of precedent does not prevent all inconsistencies. When an incoherent ruling lives on the process of law-making by the judiciary is disorganised and disrupted. Within a same instance, the process of annulment or overturning by a supreme court

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<sup>92</sup> If resistance occurs within the same instance.

<sup>93</sup> If resistance occurs in the course of separate instances.

<sup>94</sup> See the controversy regarding mistake, *supra*.

<sup>95</sup> SLAPPER Gary and KELLY David, *The English legal system*, 15<sup>th</sup> ed., Routledge, 2014, n° 4.2, p. 129

<sup>96</sup> However the doctrine of precedent is not absolute. The use of a distinguishing technique allows judges to avoid the application of *stare decisis*. A judge argues and discusses the relevance of a precedent to the current case based on facts. If facts of the present case are so different they call for a new rule, a normative dialogue takes place. In the asbestos case, the House of Lords ultimately found good reasons to depart from the established "but-for" test in matters of causation between breach of duty and damage.

<sup>97</sup> England and Wales Court of Appeal, *Solle v. Butcher*, [1950] 1 KB 671.

allows consistency as the lower court's decision disappears. Moreover, the ability for a supreme court to clearly state its position and overrule a previous decision causing disturbance allows coherence to be restored within the judiciary's work on positive law.