FIFTEEN COMMENTS ON THE APPEAL FOR CIVIL CASSATION IN THE CODE OF CIVIL PROCEDURE BILL DRAFT OF PANAMA

BY PUBLIO CORTÉS

In a commendable initiative, the Plenary of the Supreme Court of Justice of Panama has placed on the public debate a Bill Draft of the Civil Procedure Code (THE BILL DRAFT) to update the regulations and refresh them to date. The need to update is more than evident: the courts are crammed with files, the business sector is increasingly fleeing to arbitration justice, which is expensive but it helps settlements, and the pandemic made the delays more evident for the legislation to adapt to an increasing application of technology tools each time. My undeniable standing ovation for the Justices' initiative.

During my first intervention in this debate, I will provide some comments on the proposals for reforms to the Appeal for Civil Cassation. I will eventually comment on some other institutions, such as the version of "Discovery" that has been introduced in THE BILL DRAFT. However, I will first deal with the Appeal for Civil Cassation because it is the procedural figure that is identified with my first contact with the practical application of Law, at the time of my first job as Clerk in the office

a Justice in the Civil Chamber of the Supreme Court of Panama. I am fond of the Appeal for Civil Cassation, which is why I speak of it in the first place.

FIRST COMMENT: Changes in the object of the Appeal for Cassation: If most of the litigating lawyers in Panama and the parties they represent are asked about the object of this extraordinary appeal, no one will doubt that it is the last “round” to win a case. It is the last opportunity to get the defendant to be sentenced to do or not do something, to pay the money, etc., or vice versa if the defendant is the represented party. No one will argue that this is the reason for the appeal. That is the practical answer.

Now, this approach is theoretically not the only one. As CARLOS LUCAS LÓPEZ T. once explained to me over 4 years ago, there is another approach to the Appeal for Cassation which is that it is intended to give coherence to the jurisprudential interpretation of the written Law. So that, at the top of the justice system, the precedents that serve as a guide for the lower courts are established.

This is what is called the "non-phylactic" end of appeal. This somewhat strange word comes from the Greek and literally refers to the “protection of the legal norm”. That is: the public task of defending the meaning of the legal norm, unifying the application of the Law to diminish the possibility when, in the face of similar conflicts with the same applicable Law, the country's courts are giving responses that are too disparate, without prejudice to maintain respect for judicial independence and the principle of double instance.

A vision of the object of the Appeal for Cassation is immediate and close to the parties who seek to resolve their particular conflict. The other is rather public and of general interest.

Which is the correct view? This discussion is historically old and most likely dates back to the very origin of the institute of *cassation* in France in the years close to the French Revolution. It is not mandatory to choose one or the other extreme because both methods can coexist, in fact coexistence is the most common. In the end it is a decision of each country and the consensus that is achieved.

In the case of Spain, for example, with a practical vision, both objects coexist without so many proclamations, as can be read in Section 477 of the LEC, in which it is observed that sentences that exceed 600,000 Euros are appealable in Cassation and the same goes, regardless of the amount, to those that show "cassational interest", a concept that is defined in paragraph 3 of the same Section, as follows:

"*3. An appeal that presents a cassational interest will be considered, when the appealed judgment opposes the jurisprudential doctrine of the Supreme Court or resolves points and questions on which there is contradictory jurisprudence of the Provincial Courts or applies norms that have not been in force for more than five years, provided that, in the latter case, there is no jurisprudential doctrine of the Supreme Court regarding previous norms of the same or similar content*". (Cited from the version updated to December 12, 2021 of the LEC, in BOE-A-2000-323 FREE TRANSLATION)

Meaning that, in Spain, when the matter does not have what is called "cassational interest" or when it does not activate the civil protection of fundamental rights, the Cassation could proceed only for the particular interest of unleashing the controversy, provided that they are complied with other requirements, including the amount.

In Colombia the two interests are combined: public and private, but emphasis is placed on the public purpose. This is guided by the General Process Code which provides:

"***Article 333. Purposes of the appeal for cassation***. *The purpose of the extraordinary appeal of cassation is to defend the unity and integrity of the legal system, achieve the effectiveness of the international instruments signed by Colombia in domestic law, protect constitutional rights, control the legality of judgments, unify national jurisprudence and repair the grievances against the parties on the occasion of the appealed ruling."* (Cited from the text published on the website of the Ministry of Foreign Affairs of Colombia: cancilleria.gov.co).

In the case of Panama, the legislation in force since the 1987 Judicial Code, also proclaims that it combines the two objectives, but, contrary to what happens in Colombia, the private purpose was given priority here. This can clearly be read in Section 1162 of the Judicial Code, according to which it initially says:

"*The appeal is **primarily** intended to amend the grievances inflicted on the parties ...*" (The underlining is ours).

And then adds:

"*The appeal for cassation is **also** intended to ensure the exact observance of the laws by the Courts and to standardize national jurisprudence ...*" (underlining is ours).

Those rules were not the product of chance. The writers of the Code, including JORGE FÁBREGA PONCE, CARLOS LUCAS LÓPEZ T. and PEDRO BARSALLO, were not only experts in Civil Procedural Law, but were always consummate litigants, and thus,

approached the handling of the issue in a realistic way. They made a reasonable choice based on the practical situation of Panama.

The key to this approach to the matter is that they prioritized the objective whereas the appeal be seen as an instrument to unleash in an **extraordinary way** a particular conflict between parties, without prejudice to the fact that – in addition - it also served to unify the jurisprudence.

On this matter, THE BILL DRAFT makes a change that I consider relevant, and which is important to talk about. In fact, whilst, as we have mentioned, for the current Judicial Code the act of "*amending the grievances inflicted on the parties*" is the MAIN object of the appeal and that the non-phylactic object is an additional matter, in THE BILL DRAFT, I perceive that the vision of general interest elevates the profile.

The new proposed text says, in its Section 546, the following:

"*The extraordinary appeal for cassation is intended to defend the unity and integrity of the legal system, seeking and promoting the application and interpretation in the most favorable way to the purpose of unifying national jurisprudence, controlling the legality of judgments* ***and*** *repairing grievances infringed upon the parties on the occasion of the appealed ruling.*" (The underlining is ours).

In my opinion, the fact that the new proposed text places the nomophylactic end first and the repair of the grievances of the parties in second, although both elements are linked by the copulative conjunction "AND", it seems that it reflects a change of approach, whereas the public purpose of the remedy is suggested as the main one.

This change in perspective is not consistent with current judicial custom and practice in Panama. I would recommend further reflection and conversation on the point, so that we all have a better understanding of why the above approach deserves to be modified.

SECOND COMMENT: Changes in the role of the Cassation Jurisprudence within the Civil and Commercial System of Legal Sources: Let's start by clarifying some concepts. In Continental Civil Law of countries like Panama, the matter works more or less like this:

JURISPRUDENCE is the set of court decisions that apply the Law contained in written Law to specific cases. If the written Law does not change, the jurisprudence may change, because its application to specific cases evolves.

LAW is the set of rules approved by written laws as an abstract statement not applied to specific cases. If the Law is not reformed, it cannot be modified by case Law. The weight of jurisprudence is less than in Common Law countries.

In our country, jurisprudence has never had the power to modify written Law. What it can do and has always done is change the way in which the Law has been applied to specific cases.

Based on this, Jurisprudence has a very important value because it is a non-mandatory guide but of great weight in the application of Law, both for the courts and for society.

This is how things have been up to now and also in matters of Civil Cassation, therefore Section 1162 of the Judicial Code currently provides the following:

"*...**three uniform decisions** of the Supreme Court of Justice, as Court of Cassation, on the same point of law, **constitute probable doctrine and the Judges may apply it to similar cases**, which does not prevent the Court from varying doctrine when judging previous decisions were wrong*". (The underlining is ours).

Acknowledging the importance of the Civil Cassation Jurisprudence, the Judicial Code establishes a rule to identify what can be called "Jurisprudence". It is not just any decision, a minimum of 3 decisions is required "on the same point of law". It is only so, that it is "probable doctrine", meaning, that this is the only way it is considered "Jurisprudence".

In addition, the two basic rules that reflect the weight of Jurisprudence in the system are also very clearly established. In the first place, that – despite its importance- the lower judges "may" apply the probable doctrine, meaning, **it is not mandatory**, which leaves a space for interpretation in specific cases for the lower courts, which is typical of the respect for one of the factors that make up the principle of

"judicial independence." Second, that Jurisprudence is not set in stone, because the Civil Chamber can change it.

Well, THE BILL DRAFT introduces a new wording which confuses those rules. In Section 546 we find the following text:

"***Jurisprudence is a source of law that involves a set of decisions, criteria or judgments issued by a court on which guidelines or a probable doctrine are contemplated, with respect to which similar situations or legal approaches, which must be resolved under the same premise or criterion**. Consequently, four uniform decisions of the Supreme Court of Justice, as Court of Cassation, on the same point of law, constitute probable doctrine and the judges may apply it to similar cases, which does not prevent the Court from varying doctrine when judge the previous decisions erroneous.*" (The underlining is ours)

Let's begin by commenting on the non-underlined part of the rule. The one in the background. Collected there, are almost exactly the same approaches already regulated by the current Section 1162 of the Judicial Code, with the only difference that now 4 decisions of the

Court on the same item of law would be required for there to be *"probable doctrine"*. If that non-underlined paragraph were the only rule, there would really be no change to the essence of what currently exists.

What confuses things is the text of the first paragraph which we have underlined. In that part there are two contradictory rules with the second paragraph. The first rule is the one saying that "jurisprudence is a source of law" and the second, consistent with the previous one, says that jurisprudence is mandatory, because, according to that rule, similar cases MUST also be decided in the same way.

I do not agree with the underlined paragraph. In Panama, the Jurisprudence of the Civil Chamber cannot be a source of Law. That would mean that the Civil Chamber of the Court could reform, modify, the written Law contained in laws approved by the National Assembly and its regulations. Converting the Jurisprudence of the Civil Chamber into a source of Law, is equivalent to transforming the essence of the Continental Law which is in the roots of the historical tradition of the legal system of our country.

In fact, it is an issue that, due to its relevance, is not a matter of codes, it would be a constitutional issue, because the Constitution does not say that the decisions of the Court are a source of Law. I do not think that this omission is a coincidence, because it was simply not considered necessary to clarify the obvious because our system is not Common Law.

If the 1983 Constitution and its reforms had wanted to turn jurisprudence into a source of Law, they would have expressly said so. The historical logic of our Spanish and French legal tradition would have required an express rule because this would mean a break, a relevant change.

Let us remember that both in the 1983 Political Constitution and in the 1987 Judicial Code, JORGE FÁBREGA PONCE himself played a relevant role. Suffice to review Section 215 of the Constitution, where "procedural economy" was raised to constitutional status, to note the presence of JORGE FÁBREGA PONCE. I find it quite difficult for that generation of lawyers to be in favor of introducing such an important change as turning jurisprudence into a "source of Law." Had that been the intention - I reiterate - the change in the 1983 Constitution would have been introduced FIRST and THEN in the 1987 Judicial Code.

On the other hand, given that until now the Jurisprudence has not been a source of Law, and in view of the fact that the non-phylactic aspect of the Appeal for Cassation has not been the most relevant, we have a little organized and systematized Civil Chamber Jurisprudence, on occasions even contradictory, which opens up a world of complications if we gave these precedents the rank of directly applicable Law. Above all, because our Civil Chamber has always lacked the ability to review, in each case, the state of jurisprudence on the point under debate, even changing the previous criteria without reasoning the reasons for the changes.

I suggest deleting the underlined part of the paragraph cited above from the BILL DRAFT.

In addition, it seems to me that 3 decisions of the Civil Chamber on a point of Law should be maintained, so that the "*probable doctrine*" is configured. Already in itself, achieving this coincidence of decisions is an important challenge, I see no reason to complicate the exercise further by increasing it to 4. Rather, setting such a goal put the non-phylactic end of the Appeal that is so enthusiastically proclaimed to the beginning, as a target more difficult to reach.

THIRD COMMENT: Changes in the requirements of the appeal: The first thing that stands out is that the minimum amount is doubled for an appeal to be admissible, which would now be B/.50,000.00. In general terms I agree. Not so many cases should reach the Court.

I would suggest that an apparent tongue twister that comes from the Judicial Code be corrected in THE BILL DRAFT, because when the amount is in the claim, it is required that it "be no

less" than B/.50,000.00, that is, it includes cases with amounts of exactly B/.50,000.00, however, in such other cases in which the amount is not in the claim and there are elements to determine it, it is established that the appeal proceeds "if it exceeds" B/.50,000.00, which excludes cases of exactly B/.50,000.00. The healthiest thing to do is to use the same wording in both cases.

Now, this matter of the amount casts some doubt on the non-phylactic character as an essential goal of the appeal in THE BILL DRAFT. If the main object were truly non-phylactic, then some space should have been left, as in the LEC, for appeals against judgments to be admissible, regardless of the amount, only in order to "unify the jurisprudence". This is not very clear in THE BILL DRAFT, and if it is, then it is too confusing. It is evident that the same interpretation of a norm, for example, the Commercial Code, can have an impact in a case of B/.40,000.00 or a million, in many cases the reasoning is independent of the amount.

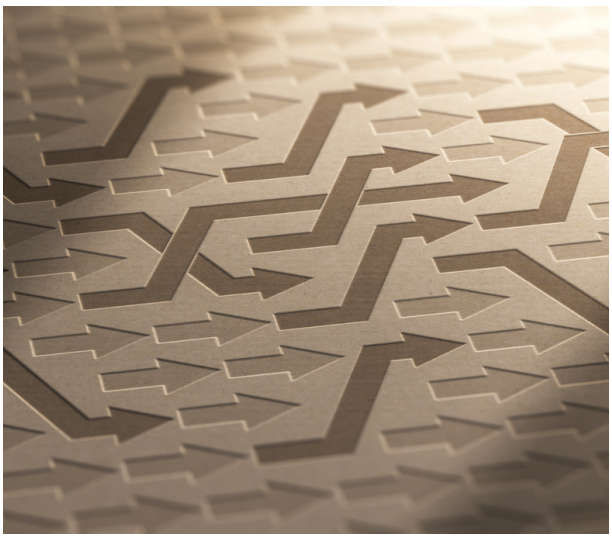
Incidentally, THE BILL DRAFT suggests a change by adding, among the matters subject to Civil Cassation, regardless of the amount, those related to "filiation and measures of confinement of minors for more than two years." That does not exist today in the Civil Cassation of the Judicial Code. At first glance I don't understand the change. It is true that these protective measures against minor offenders are not Criminal Law, but they are not strictly a matter of Civil Law. Perhaps it is a subject more akin to Criminal Law and it would be better if it

was elucidated in the Criminal Chamber of the Court, especially when on many occasions these acts are linked to criminal behavior by adults. It is a matter that deserves debate.

FOURTH COMMENT: Reorganization of the list of actionable rulings: THE BILL DRAFT makes a reorganization of the wording of the rulings subject to the appeal in article 548, without substantive changes on what is in force today. In this sense, it is very positive that it is being formally inserted within the Civil Cassation regulations, the rules regarding the Appeal of Cassation in processes of the Jurisdiction of Consumer Protection and Competition Defense, under the same terms already regulated by Law 45 of 2007.

FIFTH COMMENT: Elimination of the Cassation per saltum: As of today, the Judicial Code provides the following in article 1165:

"*Art. 1165. The Appeal for Cassation also proceeds against the judgments or orders issued in first instance by the Circuit Judges, when the parties agree to dispense with the second instance and so manifest it in writing within the term of their execution, provided that the matter is one of those that admit the appeal in accordance with articles 1163 and 1164. In this case the appeal may only be based on appeal on the merits.*"



This formula of the Appeal of Cassation is what the doctrine calls Cassation per saltum, because they "skip" the second instance and it goes directly, from the first instance to the extraordinary review of the Appeal for Cassation. In this regard, the Statement of Motives of THE BILL DRAFT justifies the elimination of this procedural route in the following terms:

"*The suppression of figures such as cassation per saltum due to its little use and due to the tendency of most modern procedural codes to be a means of challenge against second instance decisions of the Superior Court.*"

I agree with the change. Especially due to the fact that this formula was practically not used, because reality showed that it was very difficult to reach an agreement between the parties to waive the second instance.

SIXTH COMMENT: More time to file/announce and formalize the appeal. Opponents' right to question the filing: In the current system, there are three (3) days from the notification to FILE/ANNOUNCE the Appeal, THE BILL DRAFT extends it to five (5) days. In the current system there are ten (10) days, after the file is withdrawn, to formalize the appeal before the Superior Court, THE BILL DRAFT raises it to fifteen (15) days. The fine for the

appellant who files/announces the Appeal for Cassation and does not formalize it, is also raised: today it is from B/.50.00 to B/.500.00 and it is proposed to go up to a range from B/.100.00 to B/.700.00.

A period of fifteen (15) days is created for the opposing party to the Appeal for Cassation pronounces on the filing and formalization before the Superior Court, which is an excellent and balanced reform proposal. It seems fair that the opponent claims on the matter.

When the origin of the appeal is denied in the Superior Court, there is a procedural device named “Recurso De Hecho” which is available before the Civil Chamber, the fine for the loser of this one rose to a range between B/.200.00 and B/.600.00.

I agree to all these changes. There are no major additional reforms proposed regarding filing, memorial requirements, formalization and sending of the case from the Superior Court to the Civil Chamber.

SEVENTH COMMENT: Public order cassation: Both the current Judicial Code and THE BILL DRAFT contemplate the rule according to which the Court, as cassation court, can only pronounce on the grounds invoked by the appellant. However, THE BILL DRAFT presents an important novelty in Section 550, because on that subject it adds the following:

"*...however, [the Court] may void the sentence, when it is evident that it seriously compromises public order or violates procedural rights and guarantees.*"

Two comments come to mind about this novelty. The first, is that this provision does do a bit of honor to the non-phylactic objective of the Cassation proclaimed by THE BILL DRAFT. It would seem that it could be seen as such in some way because, on top of the formalities of the appeal, a space is opened for the Court, in the name of the defense of the Law and justice, to restore the legal order in a case, even if the affected party has not requested it correctly. However, it is clear that the norm does not mention the goal of jurisprudential unification.

Now, it seems that this general interest goal is born with bit of an alibi, since it can only occur in such cases in which the petition has already been admitted and the most common thing, except for those exceptions mentioned; is that this would occur in cases with amounts of at least B/.50,000.00. Which means that serious commitments to public order and to the procedural guarantees of second instance judgments in cases of lower amounts, will never have the option of having the Civil Chamber correct them.

My second observation is a call for caution. To say that the Court can void in any case, even if the alleged cause or causes do not proceed, based on a serious impairment of public order or procedural rights and guarantees, is too vague a concept.

Take the case of the concept of "public order" for example. When Dr. CÉSAR QUINTERO, a great Panamanian Professor on Constitutional Law, was once asked about the meaning of that concept, regarding the constitutional norm that allows the retroactivity of the Law in cases of "public order" as indicated by the Law itself, the distinguished Professor replied that "public order" was what the legislators wanted. In our case, the concept of public order introduced here, although developed doctrinally, will require a new specific development for the Civil Cassation of Panama, since it is new.

The same will happen with the serious impact on procedural rights and guarantees... Will Civil Cassation compete with the "Amparo" which is an Action for Protection of Constitutional Guarantees for the violation of Due Process that today is a something under the umbrella of the Supreme Court, en banc? When is the effect on procedural guarantees considered "serious"?

In short, a totally new path opens here, which we must see with great prudence, mainly because the beginning of its journey is proposed at a time when public opinion does not have the best image on the Judicial Branch. We cannot rule out that there will be those who may think that this device could be used to grant excessive discretion to the Civil Chamber of the Court. Perhaps it would be prudent to go further in recovering the prestige of this State Body before going forward into such levels.

Except for this special "legal grounds", there is no substantial change in the grounds for Cassation in substance and form. Of course, THE BILL DRAFT presents them better organized and in a slightly more didactic way.

EIGHTH COMMENT: Cassation and arbitration: Today, the Judicial Code still has article 1166, which includes 3 legal grounds for Cassation in form, against awards issued by arbitrators. Such norm was tacitly repealed long ago because the special arbitration legislation refers the judicial review of the arbitration to the Fourth Chamber of General Business of the Supreme Court, without the formalities of Civil Cassation. Currently the matter is regulated by articles 66 and 67 of Law 131 of 2013. THE BILL DRAFT correctly exempts the issue of arbitration from Civil Cassation.

NINTH COMMENT: Game change in the admission of the appeal for cassation: THE BILL DRAFT proposes important changes in the admission criteria by the Court. All litigants have to be very attentive. We highlight 3 changes at this point, namely:

(1) THE BILL DRAFT allows more time to argue about admissibility. Before, there

were 3 days for opponent and 3 for the party asking for the review. Now it is suggested that 5 days be given to each. I agree.

(2) Once the pleadings on admission have been fulfilled, Section 1180 of the Judicial Code establishes the following:

"*Art. 1180. Once the listing term has been concluded, the Court will decide whether the appeal for cassation has been granted through the concurrence of the following requirements:*

1. If the ruling object of the appeal is one of those against which it is granted by law;
2. If the appeal has been filed in a timely manner;
3. If the document by which it was filed, meets all the requirements ordered by article 1175; and
4. If the cause expressed is one of those indicated by the Law."

It is hereby observed that the statement of the admission requirements is quite simple and punctual. In spite of that, the Civil Chamber has been establishing around them by jurisprudence, certain parameters which today places the Civil Cassation among one of the most difficult remedies to admit.

Well, THE BILL DRAFT makes the matter even more difficult from the very writing of the standard. Let's see part of Section 555 of THE BILL DRAFT:

"*Once said term has concluded, the appeal may only be inadmissible for the following:*

1. Failure to comply with the demands and requirements established in this Code for the filing and formalization document, which includes the lack of relationship of the rules of law cited as infringed with the debated issues and the claim that the interpretation and assessment of the evidence under opposing or exclusive grounds.

2. Manifest lack of foundation in the appeal for cassation or having other substantially equal appeals dismissed. In the latter case, the Supreme Court of Justice may, however, admit the appeal for cassation if it reasonably understands that it is appropriate to allow the evolution of the jurisprudential line maintained until then.

3. … … …"

Numeral 1 of the requirements has a longer wording than the requirements of the current Judicial Code. Some of the suppositions contemplated established creations of the Jurisprudence in the Law. The less specific wording of THE BILL DRAFT opens a much greater space for interpretation.

The same occurs with the assumption of numeral 2 which refers to "*manifest lack of foundation in the appeal.*" Whatever can be "*manifest*", clear or patent for an analyst may not be so for another one. The same thing happens when that same section, establishes that the

appeal for cassation should not be admitted because of "*other substantially equal appeals have been dismissed.*" When are they "*substantially the same*"? It is at the discretion of the Civil Chamber.

(3) This Section 555 of THE BILL DRAFT also presents a contradiction regarding the admissibility requirements and the non-phylactic purpose of the Cassation that deserves a specific analysis. Let's review:

As we mentioned above, one of the factors by which, according to THE BILL DRAFT, an Appeal for Cassation should not be admitted is because of "*other substantially equal appeals have been dismissed.*" Well, since the norm has been transcribed, regarding this factor, adds: "*In this last case, the Supreme Court of Justice may, however, admit the appeal if it justifiably understands that it is appropriate to allow the evolution of the jurisprudential line maintained until that moment*." This option seems fully consistent to us, with the proclaimed nomophylactic purpose of the Cassation since it leaves space for the Court to rule, at its sole discretion, on cases that are substantially the same as others, which have previously received decisions from the Chamber itself, to revisit the item and allow potential changes in the jurisprudential line.

Notwithstanding the above, in a subsequent paragraph of the same article, THE BILL DRAFT points in the opposite direction. The paragraph reads as follows:

"*The appeal for cassation shall be declared inadmissible, despite not concurring with the grounds of inadmissibility provided in this article, the Court understands reasonably and motivated that it does not present a cassational interest, as the judgment is in accordance with the reiterated doctrine of the jurisprudence of the Civil Chamber, for lacking the appearance of good law that contributes to the defense of the legal system or for not having sufficient aptitude to redress the petitioner.*"

Firstly, we want to emphasize that this rule is not discretionary: it maintains an imperative language that must be followed by the Court. The concept "cassational interest" is introduced, whereas it did not exist in Panama before, and which in fact states that, despite the fact that of "grounds for inadmissibility" of the appeal are not proven, in any case it should be inadmissible when the Court considers that there is no such "cassational interest".

There are three cases where the proposed rule considers that there is a proven "cassational interest". One of them being: "because the sentence [contested] is in accordance with the reiterated doctrine of the jurisprudence of the Civil Chamber." Which, in simple words, means that if the judgment of the Superior Court is consistent with the reiterated jurisprudence of the Civil Chamber, the Appeal for Cassation will never be admitted.

The contradiction is manifest because, on the one hand, numeral 2 establishes that the Court could admit an appeal against a judgment equivalent to others that have been the subject of

"*substantially equal*" appeals that have been dismissed, when, in the opinion of the Court, you want to consider the option of "*allowing the evolution of the jurisprudential line.*" However, later, the same rule of THE BILL DRAFT, uses an imperative wording that allows to conclude that it is MANDATORY for the Civil Chamber not to admit the appeal, when "*the sentence [disputed is] in accordance with the reiterated doctrine of the jurisprudence of the Civil Chamber*".

I totally disagree with the second statement, inasmuch as it seems that it bets on a stagnation of the Jurisprudence of the Civil Chamber of the Court, which should, according to this, remain static and unchanged, to the point that the mere coincidence of the ruling challenged with said Jurisprudence, would obligate the Civil Chamber not to admit an Appeal for Cassation.

This contradiction is very serious. Based on it and on all the reflections previously made in the matter of the application in the text of the nomophylactic vision of the Appeal for Cassation, it would be justifiable to review and reorder all the regulations proposed in THE BILL DRAFT, to confirm what is wanted to achieve, including the matter on the relationship between the amount and said proclaimed nomophylactic vision.

In this analysis, it is also necessary to better reflect on the other two elements of the so-called "cassational interest", which appear ambiguous.

TENTH COMMENT: Examination for Lawyers on Cassation Technique: Article 556 of THE BILL DRAFT introduced a very new concept:

"*Article 556. Cassation technique. The Supreme Court of Justice will regulate the provision of training in the matter of cassation technique so that the appeal in question is preferably presented by lawyers who have taken and passed the corresponding exam.*"

I know this proposed rule will be controversial, but I commend the Court for the courage to bring this issue to the table. It is a reality: not every lawyer is prepared to file an Appeal for Cassation and that lack of technical knowledge is one of the factors that creates a gridlock in the number of cases pending decision in the Civil Chamber. If the resources presented met the basic technical elements, everything would flow more efficiently.

I support the initiative of the Court in proposing that a training system for Lawyers on Civil Cassation be established by Law.

I believe a decision needs to be made

on this, because if the Cassation Technique exam leaves the person who passed it in a gray area, I think there will be problems. Saying that those who approved the requirement will only have “preference” creates a scenario where Lawyers with a Cassation License and Lawyers without a Cassation License will coexist, a situation which is worth asking: What is the “preference” of those who did pass the exam?

That question is important because a Licensed Attorney on Cassation may not necessarily have the best case. It could be a client of an unfounded case, who insists that the appeal be filed anyway, no matter how licensed the Lawyer is, the appeal may not comply with the basic technique of Cassation. How is the “preference” managed in that case if the Attorney filing the Cassation does not have a License but has a better case? A good Appeal for Civil Cassation does not solely depend on the lawyer's technique, but also on the substantive and probative legal reality of the specific case.

One option is that, if the Court offers training, then a Cassation License should be required of everyone equally. Whoever does not have a License cannot file Appeals for Cassation. This would require a transition period. The other option is to offer the training and not require a License or “preference” for any Attorney. I would agree with either option, but the middle ground does not work.

ELEVENTH COMMENT: Guidelines for the Cassation Hearing: Regarding the hearing, the main rules do not change, although there are variants. THE BILL DRAFT has an advantage whereas it puts all the rules in the Code and leaves nothing for future regulations. THE BILL DRAFT also changes the way the parties argue: the current Code speaks of a plea of one hour each party and then a second round of half an hour each; however, now a single plea is being proposed for each party for an hour and a half.

There is an important element which THE BILL DRAFT does complicates a bit, and it is easy to solve and refers to the writing of those attends the hearing. The current Judicial Code always refers to “the parties” or “the party”, assuming that each party will be represented by their Lawyer, because no one can act before the Supreme Court if not by giving power of attorney to a lawyer. However, THE BILL DRAFT, when saying who should attend the hearing, uses the following wording:

"*...the parties must attend together with their attorneys on the day and time indicated.*"

According to this text, it is not enough for the Attorneys or the Attorneys-in-fact to attend the Hearing. It would also be necessary for the same persons who granted the power of attorney to attend the litigation. This is neither practical, nor realistic, nor necessary. In any case,

it should not be forbidden, but it should be wrong for it to be mandatory. This will probably be corrected.

TWELFTH COMMENT: Contradiction regarding the rejection of the grounds for Cassation in the decision on the merits: THE BILL DRAFT incurs a contradiction between Sections 558 and 559 that deserves attention. The point in comment is among the rules that apply to determine the space of action of the decisions of the Court in matters of Cassation.

In the first norm (558) it is established that: "*if the appeal is not deemed appropriate for the reasons or causes of those invoked, it shall be declared that the ruling is not ruled out that there is no room for appeal...*", which confirms that the Civil Chamber can only evaluate and decide on the grounds which have been invoked.

Subsequently, article 559 of THE BILL DRAFT says the following about this same procedural moment: "*In the judgment, the Chamber... [will not] take into account the grounds for cassation that have not been invoked in the brief of formalization of the appeal, unless*

there is an essential identity of the case with reiterated jurisprudence of the Court and the petitioner demonstrates the need to vary its meaning". In other words, contrary to the provisions of article 558, according to article 559, it is possible for the Civil Chamber to analyze a ground for Cassation that has NOT been invoked in certain cases.

This contradiction is unnecessary. There should be a single rule to regulate the same procedural moment. If it were a Law already, the knot could be untied based on the rules of interpretation of the Civil Code, but if it is still a preliminary draft, we are just in time to straighten out and avoid long debates.

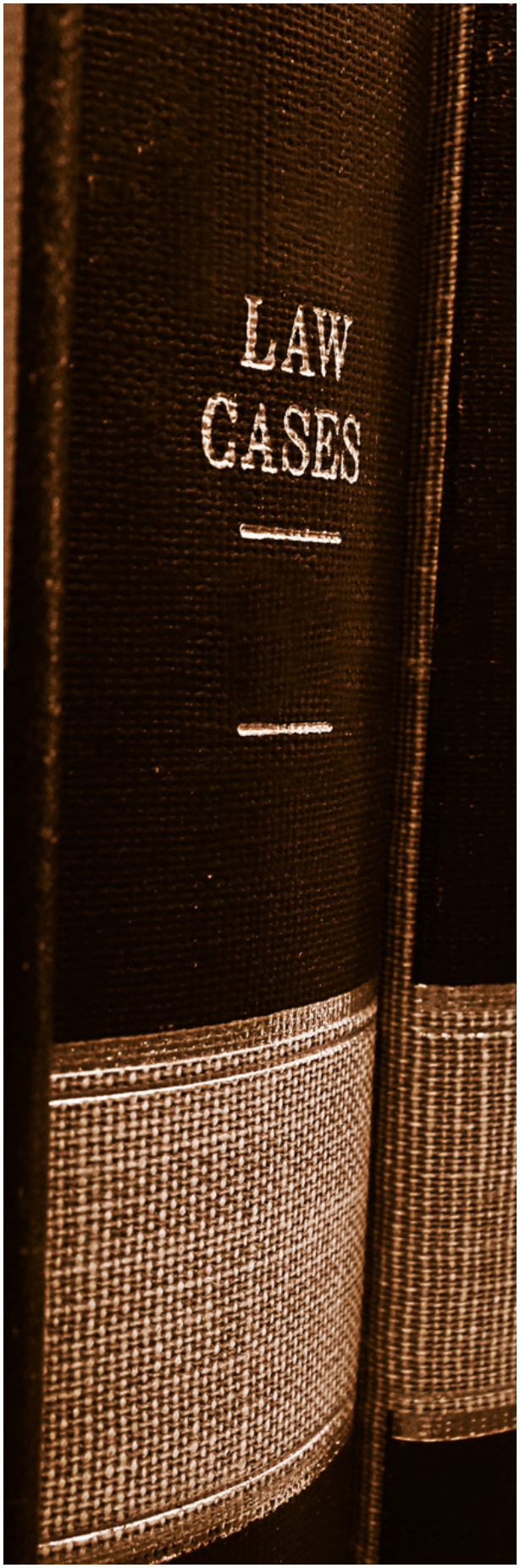
The normative version contained in article 559 of THE BILL DRAFT goes quite well in line with the nomofilactic vision of Cassation. But it does not fit with the rules of the PROJECT itself, such as a section already commented on in article 546 that refers to the invariability of Jurisprudence.

I wouldn't want to conclude this issue without pointing out that article 559 of THE BILL DRAFT includes the concept of "*essential identity*" of a case with the Jurisprudence. That term would initiate a new process of Jurisprudential creation that would add uncertainty to the Cassation. In addition, it is worth asking, at which moment could the petitioner try to convince the Court to change a reiterated criterion of the jurisprudence, referring to a non-invoked cause, if the entire procedural system of the Cassation revolves around the grounds that were invoked.

THIRTEENTH COMMENT: How to deliver the copies of the Court ruling: Section 560 of THE BILL DRAFT establishes that the Civil Chamber must provide "free" copies of the rulings that order correction of the appeal and/or the one that decides the merits of the case to the parties. I suggest that the delivery of these copies be by digital or electronic means, with the electronic signature of the Court.

At this point, each trial lawyer must be obliged to report an official email and the Civil Chamber can perfectly send the copy, for example, in PDF format or any technology that will replace it in the future, with a secure electronic signature. In fact, it is what corresponds from an ecological point of view. Of course, leaving the option for litigants to request the authenticated paper copy, at their own expense, if they so desire. In such case, the Lawyers must bring the printed copy only to be authenticated, which saves time and resources for the budget of the Judicial Branch.

FOURTEENTH COMMENT: Elimination of the "*Cassation in the interest of the Law*": Currently, the Judicial Code contains a Civil Cassation way that is applicable when the parties do not file the appeal within the term of the Law. In said circumstance the Attorney General Office is authorized to file the appeal only "in the interest of the Law", without having an impact on the specific case. Within the process, there is a very typical stage of public actions, where anyone who was interested could



file a plea. This was a nomophilic route created in 1987 that in the practice has not been effective due to its little use. THE BILL DRAFT eliminates this device.

FIFTEENTH COMMENT: General opinion on the Civil Cassation Appeal of THE BILL DRAFT: After this first glance, we esteem that THE BILL DRAFT makes a serious approach to modernize the Civil Cassation Appeal. All the important issues are on the table. In many of the issues that are not new, the bet is more on the didactic writing.

However, this effort deserves more debate, especially in regard to the impact that the non-phylactic vision of Cassation has on the new regulations, and thus, I believe it was not very well achieved. If it is approved as it is, including the issues related to the legal value of Jurisprudence, serious and extensive debates could arise which would go against the objective of the reform, which is to facilitate access to justice.

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