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TITLE

The limits of discretion of the Court of Cassation of the Republic of Armenia in its judgments on admissibility of a cassation complaint

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ABSTRACT

Judiciary is the basic branch that ensures the protection of human rights, fundamental freedoms and legitimate interests of people. Looking back to the history of mankind we can see that in times of absolute monarchy people turned to the King in order to reach a fair solution to their dispute or to protect their rights from being violated by others. Nowadays, the judicial power is the third among equals in the theory of separation of powers and High Courts play the role of Kings, with an important difference - the rules on which the courts base their decision are stipulated by people through the legislative body. Courts are the resort to turn to and the High Court is the last of them. Last but not least. High Courts all over the world though having different authorities based on the legal traditions of the country of origin in 21th century began to gain a specific aim of ensuring the uniformity of the law. In this scope the discretion of the High Courts have become a source for debate. What are the limits of discretion or should the Court have it at all? What are the advantages of it and what are the disadvantages?

All these questions though debatable in any case can be answered by a profound study on the topic. This paper will try to pursue the study of one element of the abovementioned global issue that is the limits of discretion of the High Courts in general, and Cassation Court of RA in particular in giving reasoning to its admissibility decisions.

INTRODUCTION

Mere precedent is a dangerous source of authority ... The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. [1]

Indeed High Courts are the representatives of the judicial power equal to the Executive and Legislative. In the Republic of Armenia the High Court of the country is the RA Court of Cassation (hereafter, the Court), the nature and the role of which has changed over time with regard to Constitutional reforms taken place in the Republic of Armenia in 2005.

When first established the Court was intended to be a mere third instance court with a power to review appeals on the decisions of the lower Courts (first instance and appellate).

On 27 November 2005 Constitutional amendments were introduced in Armenia with effect from 6 December 2005. As a result of these amendments the Court of Cassation was entrusted with a new role, namely to ensure the uniform application of the law.[2] The new role of the Court was reflected in the RA Constitution and other legislative acts. Amendments were made to the Judicial, Civil Procedure and Criminal Procedure Code of RA. Article 92 of the Constitution of the Republic of Armenia states:

1. "The highest court instance in the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation, which shall ensure uniformity in the implementation of the law.
2. The powers of the Court of Cassation shall be defined by the Constitution and the law."

[1] Philip Kurland, Ralph Lerner, *The Founders' Constitution (5 Volume Set),* (Liberty Fund, 2000) September 25, 2012/http://press-pubs.uchicago.edu/founders/documents/a1_8_18s20.html
[2] *Grigoryan v. Armenia*, App. no.3627/06 (ECtHR, 10 July 2012), para 3

The article reflects the general nature and role of the Court whose powers are enshrined in a more detailed manner in Article 50 of the Judicial Code of RA and corresponding articles of Civil Procedure and Criminal Procedure Code of RA, according to which the main aim of the Cassation Court of RA is to ensure the uniform application and facilitate the development of law

Together with a new role and establishment of a precedential power of the Court's decisions in Article 15 of the Judicial Code of RA, new admissibility criteria for lodging a cassation complaint were introduced. Corresponding articles of Civil and Criminal Procedure Codes, together with the alike articles, enshrined in the Judicial code set forth the 4 criteria for an appeal to the Court, that is: significance to the uniform application of law, a prima facie conflict with earlier decisions of the Cassation Court (the precedents), prima facie judicial error, which may give or has given rise to grave consequences or in other words substantive damage and newly emerged or new circumstances. The interpretation of this admissibility criteria, that is what amounts to the damage to be substantive, what it is understood under grave consequences and how they are decided in each specific case constitute an independent topic for a research doesn't covered by this specific paper due to the limits of the research paper. In any case, what is important is that all these points according to RA legislation constitute a ground for an appeal in case of judicial mistake, done by the lower courts, be it in applying material or procedural norms.

Along with the admissibility criteria the legislator put an obligation on the RA Cassation Court to give reasoning to its judgments on admissibility of the complaint. This was reflected in the Article 50. 4 of the Judicial Code, Article $414^1.2^1$ of the Criminal Procedure Code and Article 233.2 of the Civil Procedure Code of RA. Article 50.4 of the Judicial Code states: "The Cassation Court's must give reasoning to its decision on returning a cassation complaint in case when the grounds stipulated by Paragraph 3 of this Article are absent".

This is a crucial point where the question serving as a base for this research arises, that is: Should the RA Court of Cassation have an obligation to give reasoning to its admissibility decisions? Is the burden of giving reason to its admissibility decisions not a step backwards to the Cassation Court as a mere third instance which was changed by the Constitutional Reform of 2005? Is there a need in limits of discretion of the Court of Cassation if it has gained the status of a court of law, taking into account that it will be a deviation from the best international practice of the general rules on courts of law (example, in US Supreme Court, Canadian Supreme Court,

Australian Supreme Court expressly stated that the court has no obligation to give reasoning to its admissibility decision, in Germany, Austria no law setting that obligation on the court)?

Though Armenian legislation and prior decision of the Constitutional Court of RA[3] give an explicit answer to this question, setting forth a direct obligation on the court to give reasoning to its admissibility decisions, the author of the paper will profoundly study the question in order to come to an objective conclusion without prejudice to existing legislation.

The justification for choosing this specific topic is that topic is on roots of a debatable question whether the RA Court of Cassation's reasoning underlying its judgments on admissibility of the complaint is sufficient that give rise to a need in exploring the essence of the Court of Cassation as a court of law. Besides, the novelty and reformative character of the topic may serve a base for a future judicial reform in the sphere.

The literature reviewed covers such individual aspects of the paper as: the nature of the judicial discretion, the roles of the High Courts of the state mainly in the realm of the interpretation of legal acts and the methods of interpretation and also the issues of judicial precedent. Addressing the issues arising from the role of judicial discretion, legal scholars comprise two parallel groups, some are for the wide discretional power of the Court and some are absolutely against that idea. Some scholars, headed by R. Dworkin[4], are of an opinion that though it is not possible anymore to deny the presence and role of judicial discretion, it should not be based on specific individual preferences of the judge, but be in line with the standards, established by the law. Addressing indirectly the issue of discretion on the example of the US Supreme Court, Kevin M. Scott [5]emphasizes the role of external factors on the specific policy under the use of its discretion by the Court in granting a writ of certiorari, such as political and social environment of the state and the practice of lower courts as well. In a way this idea has its partial continuation in the collective work of Mark J. Richards and Herbert M. Kritzer[6] that express an opinion that Supreme Court discretion is not autonomous and is in line with the

[3] Decision of the Constitutional Court of RA (SDW-690), 9 April 2007, para 3
[4] R. Dworkin, 'Judicial Discretion', (1963) The Journal of Philosophy Vol. 60, No. 21, American Philosophical Association, Eastern Division, Sixtieth Annual Meeting
[5] Kevin M. Scott, 'Shaping the Supreme Court's Federal Certiorari Docket',(2006) Justice System Journal 27(2): 191-207
[6] Herbert M. Kritzer, Mark J. Richards, 'Jurisprudential Regimes and Supreme Court Decision making: The Lemon Regime and Establishment Clause Cases', (2003) Law & Society Review, Volume 37, Number 4, p. 827 - 840

jurisprudential regime of the state. Segal and Spaeth[7], the leading proponents of the attitudinal model of Supreme Court decision making, argue that justices of the Court are free to decide cases solely in line with their policy (attitudinal) preferences and al-most always do so decide. The debate on the issue dates back to the times of Aristotle, who used to declare that a judge is not entitled to pursue the "individualization of justice," a goal those modern writers such as Roscoe Pound urge on judges. A great work has been done by Neil MacCormick and Robert S. Summers, that have discussed three main directions of interpretation by the High Courts of the statutes[8], precedents[9]. Besides presenting the methods of interpretation, the authors also covered the issue of the roles of the High Courts in the judicial system of almost dozen of countries, including France, Italy, Germany, US, UK etc, covering both the specifics of Civil and Common Law tradition countries.

The role of precedent and more specifically the reasoning of the court and possibilities of judicial erroneous reasoning are addressed among others by Thomas D. Perry in his article "Judicial method and the concept of reasoning"[10], where he presents several philosophical approaches on the issue, including the way of skepticism and intellectual radicalism. An interesting and contributing report, written by a committee of legal scholars headed by A. Hammerstein greatly contributed to the research done on the paper. In the report, the authors make a proposal on reforming the Supreme Court of Netherlands, granting it with more discretion on the issues of admissibility of appeals, suggesting to add admissibility criteria and new pre-trial procedures to reduce the amount of appeals heard by the Court and as a result make it more effective in preserving the uniformity of the law. The reviewed literature constitutes a firm and objective base for the research.

In order to reach the aim of the paper and answer to the research question the following steps will be completed. In Step 1 a research of the role of the High Courts in general and the "Courts of Law" in particular in different countries representing both continental and common law legal systems is going to be pursued. In Step 2 the best international practice and experience

[7] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the attitudinal model revisited,* (Cambridge University Press 2002)
[8] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991)
[9] Neil MacCormick, Robert S. Summers, D. Neil Maccormick, *Interpreting Precedents: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991)
[10] Thomas D. Perry , 'Judicial method and the concept of reasoning', (1969) Ethics Vol. 80 N. 1

regarding the status of the Courts of Law and their limits of discretion in judgments on admissibility is going to be studied. And finally, in Step 3 the best international practice and the essence of the notion of the "court of law" will be assessed so as to examine the role and limits of discretion of the Cassation Court of RA.

The study is limited to, first of all, the research on the basic obligation to give reasoning for the judgments on admissibility and not the issues of interpretation and implementation of admissibility criteria.. Secondly, the specific criteria for lodging an appeal to the Cassation Court of RA, that is the presence of "newly emerged and new circumstances" will not be included in the study, as the author finds that the proceedings in the Cassation Court based on abovementioned criteria form a specific and independent procedure and authority of the Court, not directly linked with its role as a High Court and therefore, not in the scope of the research. And thirdly, the research of the essence of the «precedents» as an important element of the role of the High Courts in general and the Court of Cassation of RA in particular in so far as needed to answer the question set by the paper.

I. THE NATURE OF "HIGH COURTS" AND THEIR ROLE IN THE JUDICIAL SYSTEM

According to the Montesquieu's theory of separation of powers, the judicial power is the third power, together with the legislative and executive. But as the two others, judicial power also has some restrictions on it. High Courts are the representatives of judicial power in the state, be it a court like the Supreme Court of United States, that has among others also the power of constitutional review or the Cassation Court of France. High Courts depending on the country of origin may have the appellate power to review the judicial mistakes of lower courts together with the general conceptual duty to ensure the uniformity in the implementation of the law, in common law and few civil law countries also establishing the law of precedents. Speaking about the limitation on the exercise of judicial power by High Courts, few can be mentioned: the restriction on reassessing evidences or taking into consideration new ones, duty to examine the claim within its limits and a limitation on the power to interpret statutes. Concerning the second limitation there is an interesting concept in the French judicial system, according to which the court has the duty to raise an argument not mentioned by the parties if it touches upon public order. The aim of the third limitation is to ensure the non-derogation from the basics of the separation of powers. Interpretation of statutes in abstracto is therefore strictly prohibited, it is permitted only when it didn't appear to be a creation or recreation of the law thus only in concreto[11], that is based on the facts and circumstances of the individual case.

For example, according to MacCormick and Summers the general role of the courts in the French system is unquestionably small, compared to what it is in the Common Law tradition, even if it is much larger than in the East European "socialist" countries. This is mainly owing to the distrust of the "Parliaments" of the ancient regime, judges who exercised true legislative power.[12]

[11] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991), p. 204
[12] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991), p. 203

The Cour de Cassation of France cannot make law – properly so called – and its jurisprudence is a mere authority, although nobody denies its practical importance. And since the Cour does not make law, its decisions can be extremely brief, lacking any 'case law technique' familiar from common law.[13] The same is also more or less true about judicial systems of most West European countries. But at the same time, in Germany courts play quite an important role, which has been vigorously criticized, mainly in the light of the separation of powers.[14] This difference is eye-catching mostly when the question arises about the role of the High Courts of the states.

Though the 21st century has deepened the developing process of convergence of legal traditions of Common and Civil law, the conceptual difference between them still exists, which will be further shown at the examples of the role of the High Courts in different countries, representing both Common and Civil law traditions. For example, stare decisis is still an important difference, even though, admittedly, a diminishing one.[15]

The difference between the Civil and Common Law tradition countries is presented in an interesting way by H.Bernstein, U Drobnig and H Kötz with reference to the work of Cappelletti[16]. Cappelletti highlights three 'still important differences' a) the organization of higher courts (into different hierarchies, which leads to 'more diffuse authority of both the organs themselves and their decisions'), b) their lack of discretion to select cases that they want to hear (which, apart from a huge workload, has an impact on judges' understanding of their task in the legal system – which is not to create precedents but rather to control the application of the law by lower courts in thousands of cases) and finally c) the kind of people who sit on the bench

[13] Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de cassation' (2008-2009) Cambridge Yearbook of European Legal Studies 11, p.3

[14] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991), p.107

[15] H.Bernstein, U Drobnig and H Kötz (eds), 'The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference - or no Difference at All?', (1981) Festschrift für Konrad Zweigert 70, Mohr, Tübingen, p. 392

[16] Mauro Cappelletti, *Judicial Review in the Contemporary World,* (Indianapolis: Bobbs-Merrill, 1971)

in the highest courts.[17] On the other hand, it is 'no longer especially controversial to insist that common law judges make law,'[18]and a doctrine of precedent is a paradigmatic feature of the US legal system, which belongs to the common law tradition.

In the Civil law tradition countries the role of High Courts is more restricted by the rules of the Court. In France, The Court of Cassation is the final instance for civil and criminal matters. This specialized court never rules on the facts of a case but is exclusively required to interpret a rule of law whether the said rule is substantive or procedural, or part of old or new legislation. This naturally enhances the importance of its decisions.[19] In Germany there are five federal courts with different cope of authority, comprising civil and criminal jurisdiction, administrative, fiscal, social and the jurisdiction in labour matters. The highest court of general jurisdiction is the Federal Court of Justice. Its most important role is to hear the appeals (Revision) from the decisions by the higher courts of the states and it hears only legal, not factual questions.[20] In Italy the highest court instance in the ordinary judicial system (except constitutional and administrative matters) is the Corte di Cassazione (the Court of Cassation). It has 500 members, decides approximately 12.000 civil cases and 43.000 criminal cases a year and is heavily overloaded. As a rule, the task of the Court is to check and ensure that the substantive and procedural law is correctly applied in the several cases by the inferior courts of first instance and appellate.[21] The Court reviews not the facts but the correctness of the application of the particular law to the facts and circumstances of the individual case. One of its main roles is to ensure the uniform application of the law, that is function of protection of the law and case-law uniformity is inherent for the Court. The actual meaning of both these functions is widely discussed; while the former is inherent in the role of the Supreme Court in controlling the

[17] H.Bernstein, U Drobnig and H Kötz (eds), 'The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference - or no Difference at All?", (1981) Festschrift für Konrad Zweigert 70, Mohr, Tübingen, p. 383-388.
[18] Frederick Schauer, 'Do Cases Make Bad Law?', (2006) 73 U. Chi. L. Rev., p. 883-918, p. 886.
[19] Official website of the Cour de Cassation de France. / 30.10.2012/ http://www.courdecassation.fr/about_the_court_9256.html#3
[20] *Ibid.*, at p.115
[21] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991), p. 214

equality of the lower courts decisions, the latter is actually not performed since the court is unable even to ensure the uniformity of its own case-law.[22]

In Poland, the highest court, excluding constitutional and administrative matters, is the Supreme Court. The judicial system in general and the Supreme Court in particular is based on the principle of judicial subordination to statute law. Furthermore, there is no system of binding precedent, though the decisions of the High Court do have an important functional impact on later decisions of the same or of lower courts.[23] An interesting role is stipulated by the Swedish legislation for the Supreme Court of Sweden. As the Swedish judicial system is a mixture of both civil and common law traditions, in comparison with other countries of the civil law tradition, in Sweden the role of the judicial precedent is very important in the establishment of the objective, clear and uniform application of the law. The Supreme Court report shows on the average about 130-160 cases per year with full written opinions and 160-180 cases of lesser importance with a very short or no opinion at all. The Court mainly handles questions of law, or mixed questions of fact and law, on a basis equivalent to the Anglo-American *certiorari*.[24] Working with certiorari the Court tries, with some exceptions, mostly very important questions of law, at the same time the court does review the merits of the case.[25]

Referring to the High Courts of the Common Law tradition countries the role of the most influential and authoritative courts of the Common law system - US Supreme Court will be studied. Thus, according to Section 1 of Article III of US Constitution[26] the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time establish. The scope of the subject that is under the jurisdiction of the Supreme Court are set forth in Clause 1 and 2 of Section 2 Article III US Constitution According to Clause 1 the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;to all Cases affecting Ambassadors, other public Ministers and Consuls;to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall

[22] *Ibid.*, at p. 250
[23] J. Wroblewski, *Meaning and truth in the judicial decision*, *2-nd ed.* (Helsinki 1983), p. 157-179
[24] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991), p. 311
[25] *Ibid*., at p. 355
[26] U.S. Const., Art. III, Sec. 1

be a Party;to Controversies between two or more States;between a State and Citizens of another state;between Citizens of different States.[27] Clause 2 establishes the original jurisdiction of the Court that arises in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.[28]

Another common law country with a solid legal system is Canada. The Supreme Court of Canada is Canada's final court of appeal. It serves Canadians by deciding legal issues of public importance, thereby contributing to the development of all branches of law applicable within Canada. There are three procedures by which cases can come before the Court. First, in most cases, a party who wishes to appeal the decision of a lower court must obtain permission, or leave to appeal, from a panel of three judges of the Supreme Court. Second, there are cases, referred to as appeals "as of right", for which leave to appeal is not required. These include certain criminal cases and appeals from opinions pronounced by courts of appeal on matters referred to them by a provincial government. Third, the Court provides advisory opinions on questions referred to it by the Governor in Council.[29]

Thus in Common Law tradition countries and nowadays also in most of the Civil law tradition countries the High courts are policy-making institutions, some vested with power to review the cases of lower courts, others established with the aim to ensure the uniformity of the legal practice. Their role and authority is growing together with the development of human rights and mechanisms of their protection, that have been in the centre of the international community attention since the 18-th century revolutions.

[27] U.S. Const., Art. III, Sec. 2, Cl. 1
[28] U.S. Const., Art. III, Sec. 2, Cl. 2
[29] Official website of the Supreme Court of Canada / accessed 27.11.2012 / http://www.scc-csc.gc.ca/court-cour/role/index-eng.asp

II. LIMITS OF DISCRETION IN JUDGEMENTS ON ADMISSIBILITY OF THE HIGH COURTS: INTERNATIONAL BEST EXPERIENCE

"...An arbitrator goes by the equity of a case, a judge by the strict law."[30]

Aristotle

As we can see, for Aristotle a judge is not entitled to pursue the "individualization of justice," a goal that modern writers such as Roscoe Pound urge on judges.[31] So, whether the courts should have wide discretional power, or should be absolutely restricted is a matter of opinion, but for that start, the main question to be answered for the start is - what is a discretion?

Discretionary review is the authority of the Court to decide which appeals they will consider from among the cases submitted to them. The court will then be able to decide substantive cases with the lowest opportunity cost.[32] Discretionary review contrasts with mandatory review, in which appellate courts must consider all appeals submitted. The advantage to discretionary review is that it enables the court to focus its limited resources on developing a coherent body of case law. The disadvantage is that it reduces the ability of litigants to seek review of incorrect decisions of lower courts. However, the problem with allowing appeals of right through all appellate levels is that it encourages parties to exploit every technical error of each level of the court system as a basis for further review. Discretionary review forces parties to always concentrate their resources on persuading the trial court to make a right decision (rather than assuming an appellate court will "fix it later"), thus increasing the overall efficiency of the judicial system. Of course, it also partially leaves them at the mercy of the discretion of the trial court.[33]

Some countries leave it for the High Court to decide what case it will be hearing, and which one it will not. This practice is widely used in countries, where the High Court is a court of law and not a third instance court, thus, it can be often seen in the countries of the Common

[30] Aristotle. *Rhetoric* (1374) , Book I, Chapter 13, p. 20-21.
[31] Barry Hoffmaster, "Understanding Judicial Discretion", Law and Philosophy Vol. 1, No. 1 (1982). p. 21-55, p. 21
[32] Andrew F. Daughety, Jennifer F. Reinganum. *Speaking Up: A Model of Judicial Dissent and Discretionary Review (*University of Chicago 2006), p. 1
[33] Academic Dictionaries and Encyclopedias website / accessed 28.11.2012/ http://en.academic.ru/dic.nsf/enwiki/718102

law tradition, where courts grant a "certiorari" or in others word "leave for appeal" to the applicants when taking the case into consideration for a hearing. The general proposition that the exercise of judicial choice or discretion within areas circumscribed more or less tightly by rules is not an occasional misfiring but a characteristic feature of legal process, is today almost a law school cliché.[34] The professional opinion uses "discretion" in a more characteristic sense to mean that the judge must sometimes reach his decision by means other than the application of the standards and that such standards sometimes leave him free to choose.[35]

As there are no academic research papers or articles found on the specific subject of discretion in judgments on admissibility of High Courts and their consequent limits, the research will be done and a conclusion will be made on the basis of profound study of judicial acts of different states, representing Civil And Common Law tradition states for a more full and objective review.

The Court of Cassation of France as a representative of the Continental law tradition is of great interest for a profound study of international practice. Though the limits of discretion of the court is rather narrow, the legislature has established an indirect admissibility step for an appeals to the court, that is the institute of certified lawyers (lawyers of the Council of State and Court of Cassation).[36] Referring to the information about the Court of Cassation on its official website, an appeal to the Court of Cassation shall be lodged with the Court Clerk's Office by a lawyer of the Council of State and Court of Cassation. Further on, another indirect admissibility criterion is that appeals are only possible against decisions which have been rendered at last instance, on the merits of the case. Any debate on the facts of the case are excluded from such a form of appeal. The Court takes the case into consideration, when there has been a violation of (civil or criminal) law or the lower court's decision lacked a legal basis , including lack of legal grounds and the failure to reply to submissions – so called "legislative control" function of the Court and when the ethic and fairness of the lower courts are at the basis of the appeal, including fulfillment of the requirement to provide legal reasoning, the obligation not to contradict themselves, not to use

[34] R. Dworkin , 'Judicial Discretion', (1963) The Journal of Philosophy Vol. 60, No. 21, American Philosophical Association, Eastern Division, Sixtieth Annual Meeting, p. 624-638, p. 624

[35] *Ibid*., at p. 625

[36] It is worth mentioning, that a similar institute of certified lawyers of the RA Court of Cassation has been declared by the Constitutional Court of RA to be violating the norms of RA Constitution, that is unconstitutional and as a result-void.

hypothetical or dubious grounds and not to use inoperative grounds- so called "disciplinary control' function. If the appeal is inadmissible or is not founded on serious grounds, the case may then be fast-tracked by a streamlined procedure which is called the non-admission procedure. This procedure, which was established by an Act of 25 June 2001, has restored the preliminary review of appeals, albeit in a different form, which existed in civil cases at least until 1947. This screening process has a number of advantages. It is fast and simple and although it naturally presupposes that a Judge-Rapporteur has carefully examined the case and that the Public Prosecutor's Office has been consulted, the reasons behind decisions of non-admission need not be given. Moreover, by freeing the Court of Cassation of undeserving cases, it is able to focus on its foremost task which is to draw up case law based on the replies given to legitimate legal issues. A significant number of appeals are processed in this way : 30% in the civil divisions and 35% in the Criminal Division.[37] Thus, it can be reaffirmed that the French Court of Cassation lacks a wide discretion in its admissibility judgments, but the legislator has adopted few mechanism serving as indirect admissibility criteria instead. Some of these mechanisms are worth considering for implementation in the Republic of Armenia too.

In Italy, there is no machinery for selecting cases to be submitted to the Court of Cassation, nor has it any possibility of choosing the cases it deals with. On the contrary, a constitutional rule (Article 111, al. 2) states that every judgment by an inferior court can be submitted to the Supreme Court. [38] The appeal to the Court is an appeal as of a right, no special prerequisite is needed and no selection of cases can be made. [39]The cost of an appeal is relatively low and the Court is overloaded with cases, the time for hearing of which is growing from year to year. This raises a number of problems. The first one is that the great number of cases puts the court under great pressure to decide: this often means deciding case at a low level of interpretations of statutes. The second feature concerns the kind of cases with complex, interesting and doubtful questions concerning the interpretation of a statutory rule, but very often

[37] Official website of the Cour de Cassation de France. / accessed 30.10.2012/ http://www.courdecassation.fr/about_the_court_9256.html#3
[38] Neil MacCormick, Robert S. Summers, *Interpreting Statutes: A Comparative Study (Applied Legal Philosophy) (*Dartmouth Pub Co 1991), p.215
[39] *Ibid.,* at p.250

they are routine cases. [40] Thus, legislation of Italy doesn't provide its Supreme Court with any level discretion in its admissibility judgments.

In Germany, according to the official website of the German Court of Justice, in civil cases, the remedy of appeal on points of law (Revision) is available against final judgments passed by regional and higher regional courts acting as appellate courts. In practice, the possibility of lodging an appeal against a first-instance judgment given by a regional court is very rarely used. Appeal proceedings will only take place if the lower appellate court has granted leave to appeal in its judgment, or if allowed by the court of appeal following an appeal against refusal of leave to appeal. The appeal shall be allowed if the case is of fundamental legal importance, or if the development of the law or ensuring uniformity of the law calls for a decision by the court of appeal. The court of appeal is bound by the leave to appeal granted by the lower appellate court. If the Panel holds that an appeal is inadmissible, it will be dismissed by judgment or order. In criminal cases, only serious ("capital") crimes tried before a regional court criminal division by a mixed bench of professional and lay judges, as well as any other criminal offences of a certain degree of severity if, at the time the charge was brought before the regional court, the public prosecutor's office considered that a sentence of more than four years in prison, confinement in a psychiatric hospital or preventive detention was to be expected are being heard by the Court. Also included are any crimes against state security where in the first instance charges were brought before the state security division of a regional court or, as in proceedings against terrorist organizations, the criminal division of a higher regional court. If the Panel unanimously considers an appeal to be manifestly unfounded or an appeal lodged for the benefit of the defendant to be well-founded, it may decide the case by court order without a hearing.[41]

A transitional regulation provides that until 31 December 2011, appeals against refusal of leave to appeal are only admissible if the value of the matter in dispute exceeds 20,000 euros. If the Panel holds that an appeal is inadmissible, it will be dismissed. In the other cases, a judgment on the appeal will normally be handed down following a hearing before the Panel.[42] Thus, The

[40] *Ibid.,* at p. 251
[41] Official website of the German Court of Justice. / accessed 30.10.2012/ http://www.bundesgerichtshof.de/EN/FCoJ/TaskOrganisation/Proceedings/proceedings_node.html
[42] The Federal Court of Justice. Published by the Federal Court of Justice, Karlsruhe, 2010, p.10

German Court of Justice has some kind of discretion in considering the appeal to be well-founded or manifestly unfounded. In case of declaring the appeal inadmissible a mere order constituting the fact of inadmissibility of the appeal is granted without hearing.

In the Dutch Legal system a special Committee aimed at researching the role of the Supreme Court of Netherlands and presenting a report on possible reforms is advising the legislature to take a step forwards widening the scope of discretion of the Court and limiting the scope of grounds for appeals, which can be heard by the Court. It is worth presenting a brief portion of the report:

> "Practice shows that a substantial proportion of cassation appeals do not really merit the attention of the Supreme Court because they do not contain issues that need to be answered in the interests of the uniform application or development of the law, nor do they involve an important aspect of legal protection. The Committee therefore proposes that a selection mechanism be introduced by law to enable the Supreme Court to rule that a case which is unsuitable for cassation proceedings is inadmissible. Such a selection mechanism could be regarded as a further step along the path adopted by section 81 of the Judiciary (Organization) Act. A selection chamber would then have to filter out cases that are unsuitable for cassation. An effective selection mechanism could strengthen the authority of the Supreme Court since it would enable both the court and the Procurator General's Office to concentrate their attention on subjects of importance to the quality of the administration of justice. Provision must be made, particularly for the civil division, to prevent cases involving legal issues on which a landmark judgment of the Supreme Court may reasonably be assumed to be required in the public interest failing to reach the Supreme Court or to reach it in time".[43]

Referring to the Common Law tradition on the issue again as a first example US Supreme Court is going to be studied. In general, the American doctrine of judicial re-view was far more

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http://www.bundesgerichtshof.de/SharedDocs/Downloads/EN/BGH/brochure.pdf;jsessionid=07B781F24808D8C0D2A0E488991E0B52.2_cid354?__blob=publicationFile

[43] A. Hammerstein, I.M. Abels, P.M.M. van der Grinten, J. de Hullu, L. Strikwerda, T.J. van Laar, R. Kuiper, Improving cassation procedure. Report of the Hammerstein Committee on the Normative Role of the Supreme Court, The Hague, February 2008

concerned with federalism than with separation of powers. It is a wide-known fact, that the discretion of the US Supreme Court is the widest in the list of all other court of the world, be it a civil tradition or common law tradition one. The discretionary character of the Supreme Court is set forth in Part III Rule 10 of the Supreme Court Rules, according to which:

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law".[44] A writ of certiorari or so called "leave for appeal" is a term used to describe the admissibility decision and the overall procedure of taking the case into consideration by the High Court in common law countries and several civil law ones, that is to say a so-called permission of the court to commence an appeal and at the same time a decision on hearing the appeal.

[44] Rules of the Supreme Court of the United States 2010. Part III Rule 10

It can be inferred from the abovementioned rule that the admissibility criteria are not "fully measuring or controlling" the Court's discretion in any way, but are just for consideration and also a hint for lawyers and applicants. The Rule 11 of the same Act states that the writ of certiorari will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in the Supreme Court.[45]

Caldeira, Wright and Zorn find that appeals court dissents are statistically significant in influencing the granting of U.S. Supreme Court review.[46] At present the US Supreme Court grants review in little more than 1% of all petitions; of these granted petitions, even fewer come from state courts, whereas for the years 1998 to 2002 it was approximately 17% of cases.[47]
In Canada, most appeals are heard by the Court only if leave is first given. Leave to appeal is granted by the Court if the case involves a question of public importance or if it raises an important issue of law (or an issue of both law and fact) that warrants consideration by the Court. The Court's decision whether to grant leave to appeal is based on its assessment of the public importance of the legal issues raised in the case in question. The Court thus has control over its docket and is able to supervise the growth and development of Canadian jurisprudence. The Court generally does not give reasons for its decisions on applications for leave to appeal.[48]

Thus, based on the abovementioned it can be said that a discretionary character of High Courts is not just a means for reducing costs spent by the Government on routine cases, heard by the Supreme Courts. More than that, it contributes to the concentration of the attention of the High Court judges on cases of vital importance for the uniformity of law, reducing controversies in the legal practice and development of judicial system and also gives the lower courts more autonomy in deciding the case with prejudice only to precedents or case-law of the High Court but not an absolute reconsideration of its judgements.

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[45] *Ibid.*, Part III Rule 11
[46] Gregory A. Caldeira, John R. Wright and Christopher J.W. Zorn, "Strategic Voting and Gatekeeping in the Supreme Court*",* (1999)15 (3) J L, Econ, & Org 549, p.8
[47] James E Pfander, 'Köbler v Austria: Expositional Supremacy and Member State Liability', (2006) Eur. Business L. Rev. 27,p. 275, p. 297
[48] Official website of the Supreme Court of Canada / accessed 27.11.2012 / http://www.scc-csc.gc.ca/court-cour/role/index-eng.asp

III. CASSATION COURT OF RA AND ITS LIMITS OF DISCRETION IN ITS JUDGEMENTS ON ADMISSIBILITY

According to Article 92 of RA Constitution the highest court instance in the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation (hereafter, the Court), which shall ensure uniformity in the implementation of the law and whose powers shall be set forth by the Constitution and law. The article reflects the main aim and purpose of the Court that is to ensure that the lower courts and the Cassation court itself interprets and implements the law in the same manner, thus ensuring the uniform legal practice. The Cassation Court's activities are aimed at ensuring also the so-called legal certainty, that is an element of quality of the law. Legal certainty appears in this context in the authority of the Court to rule on the cases where two or more lower instance courts interpret the same rule in a different way, that is depriving an individual of his right to certain, expected and anticipated result that the law and overall the legal suit may have in regard to his rights. The legal certainty is one of the underlying principles of the ECHR and is accordingly inherent throughout the law of the Convention.[49] The principle of legal certainty is based on the Court's interpretation of the temr "prescribed by law" as a guarantee of non arbirary decisions of the Courts. Thus, as the ECtHR stated in it Sunday times v UK decision:

" The following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to

[49] *Marckx v Belgium,* App. 6833/74 (ECtHR, 13 June 1979), para. 58

a greater or lesser extent, are vague and whose interpretation and application are questions of practice."[50] So it is reasonable to say that the Cassation Court also ensures the correspondence of the legal environment of RA to its international obligations in the field of human rights protection.

The current legal position of the Court has been established by constitutional reforms, taken place in 2005 and at the present time the Constitution and consequent norms of Civil Procedure, Criminal Procedure, and Judicial Codes stipulate the role of the Cassation Court, as a court of law. Looking back on the history of the Court one can see the way it has undergone, from a mere third instance to the highest court of the state on all matters, excluding the constitutional matters. Article 21 of the Law of the Republic of Armenia "On the Judicial System", replaced by nowadays Judicial Code, stated:

> "The Court of Cassation is a court that reviews substantive judicial acts of the first instance courts and appellate courts that had entered into force, judicial acts of the appellate court on criminal and military cases that had not yet entered into force on the basis of a cassation complaint and within the scope of the grounds and justifications presented in the cassation complaint."
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> So, before the year of 2005 the Court had no discretion at all in choosing the cases to grant an appeal, but was a mere third instance court that reviewed all the case on their merits.

Nowadays, Article 50 of the Judicial Code of RA and corresponding articles of Civil Procedure and Criminal Procedure Code of RA. Article 50 of the Judicial Code states that firstly, the purpose of the Cassation Court's activity is to ensure the uniform application of law, and secondly, in carrying out this mission, the Cassation Court shall strive to facilitate the development of law

The 2005 reform not only granted special role to the Cassation Court, but also introduced admissibility criteria for lodging an appeal to the Court. The criteria is set up in Articles 234 of the Civil Procedure Code, 414².1 of the Criminal Procedure Code and Article 50.3 of the Judicial Code of RA is a judicial mistake: violation of material or procedural norms which may influence the outcome of the case or the newly emerged or the new circumstances in case if the Cassation Court believes that the claim has justified that:

[50] *Sunday Times v UK (No. I)*, App. 6538/74 (ECtHR, 26 April 1979), para. 49

- The Cassation Court's decision on the issue raised in the complaint may be of material significance to the uniform application of law; or
- The reviewed judicial act prima facie conflicts with earlier decisions of the Cassation Court; or
- A lower court has made a prima facie judicial error, which may give or has given rise to grave consequences.
- Newly emerged or new circumstance is present.

As stated in the introduction to the paper, as to the author the specific criteria for lodging an appeal to the Cassation Court of RA, that is the "newly emerged and new circumstances" as a basis for proceedings in the Cassation Court form a specific and independent procedure and authority of the Court, not directly linked with its role as a High Court and therefore, not in the scope of the research. Referring to the rest three criteria, only two are inherent to the nature of the court of law, that is the material significance of the issue at hand for the uniform application of law and the prima facie conflicts with earlier decisions of the Cassation Court. Those two authorities of the Court are closely linked to each other both having the aim of establishing an unambiguous, solid legal system and ensuring the uniform practice of interpretation of the laws and other legal acts by the courts..

Though we have the criteria of substantive damage in our codes as an admissibility ground, the author thinks that the criteria of judicial mistake, be it a material or procedural, which doesn't raise an issue of uniformity of law or is not contradicting the Cassation Court precedent, notwithstanding the qualification of the damage caused to the applicant as being substantive or not should not be considered by the Cassation Court, but rather be a base for lodging appeal to the Court of Appeals. The latter is in fact established for that purpose and in a sense is less restricted in its actions, at the same time possessing more resources for correcting the judicial error and evaluating the substantiveness of the damage caused to the appellant and it should be more specialized in those matters of practical concern. Thus, for all other cases except ones, involving abovementioned two basic law-preserving criteria, the court of the last resort should be the Appeals Court of RA. That is to say, all the effort of the advocates to reach a reasoned high quality court decision should be aimed at the trial courts at first and Court of Appeals, as the second and in most cases the last instance court.

In brief, referring to the authority of the Court to establish a case-law, that according to Article 15 of the Judicial Code of RA has a precedential power, there has been much debate going on concerning the issue. The main issue arising from the problem is whether the individual case lies within the scope of a specific precedent? Is the difference is so substantial as to raise a doubt for the Cassation Court judges about the applicability of the precedent to the specific factual situations. In connection with this issue it is worth mentioning that it is on the basis of the facts of the precedent case that subsequent courts identify binding elements of the precedent decision – its ratio ('holdings' in the American parlance), or distinguish the precedent case from the one before them in order to explain that they are not bound by the precedent rule.[51] As N. Duxbury describes the process of US Supreme Court on ruling based on precedent, the Court will consider if the case is factually similar to or different from the case to be decided. Case-law, unlike statute law, tends to be analogized rather than interpreted.[52]

According to Raz the characteristics of precedents makes the judge-made law revisable, constantly open to the possibility of being distinguished.[53] Yet, many of the advocates argue that the not constant character of the Cassation Court case-law is volatile and it is partially worth agreeing with, especially when referring to the problem in the light of the main goal of the Court that is uniformity in the application of the law. At the same time Justice Holmes' famous statement: "great cases like hard cases make bad law" leaves space for consideration. In reality, famous cases with wide public attention are not the best base for establishing a sustainable practice of legal application.

Further on, continuing the discussion about the discretional power of the Court and its limits, it is worth making a reference to Ronald Dworkin, according to which: "Discretion is not implied by the fact that the decision may be final or non-appealable, nor by the fact that it may be controversial or wrong". Discretionary decisions incur opportunity costs, borne both by judges and justices that reflect foregone chances to promote and review (respectively) other

[51] Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de cassation' (2008-2009) Cambridge Yearbook of European Legal Studies 11, p. 11
[52] N. Duxbury, *The Nature and Authority of Precedent* (CUP, Cambridge 2008) , p. 59
[53] J. Raz, *The Authority of Law. Essays on Law and Morality* (OUP, Oxford 1979) , p.195

cases through which they could also influence the evolution of the law.[54] As MacCallum rightly mentions in his comments on the Dwrokin's work on judicial discretion, such authority may be granted "under an obligation to make every decision so as to further a specific policy" and, thus, not expected to decide on the basis of their private preferences.[55] That is the Court is not absolutely free in exercising discretion, but rather every act of discretionary power, be it the granting a leave for appeal or a decision on the merits should be in a logical line of the practice set forth by the court and in accordance with its policy. No one expects the case-law to never change - it absolutely should, together with the policy and the overall legal and socio-economic environment in the state, but at the same time the judicial system ideally should not be dependent upon a certain political party in power or a specific person who is the President of the Cassation Court.

In fact, there are instances where judges cannot find, within the recognizably established accumulation of policies, etc., guidance sufficient to lead them to one and only one decision in an instant case, either because of insufficient guidance as to the relative weights to be attached to realizing various policies or acting in accordance with various principles and rules found antagonistic to each other, or because clearly applicable policies, etc. do not un-equivocally guide them to one and only one specific decision.[56] If adding to this the situations where norm of two or more different legal acts are in contradiction with each other on a specific issue or when the practice of implementing a legal norm differs from one court to another, that is the scope of the issues, falling under the main duty of the Court of Cassation to be the guarantor of a uniform application of the law. And reasonably, only the judge, but not strict rules may decide if the question in fact is under that scope or not.

Regarding the obligation of the Court of Cassation to give reasoning to its admissibility decisions, it is worth turning to firstly the brief history of the rule and the best international practice on the case. Accordingly, the Court has gained its obligation to give reasoning to its decisions on admissibility after the consequent Decision of the Constitutional Court of RA from

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[54] Andrew F. Daughety, Jennifer F. Reinganum. *Speaking Up: A Model of Judicial Dissent and Discretionary Review (*University of Chicago 2006), p. 1

[55] G. C. MacCallum, Jr., 'Dworkin on Judicial Discretion: Comments', (1963) The Journal of Philosophy Vol. 60, No. 21, American Philosophical Association, Eastern Division, Sixtieth Annual Meeting , p. 638-641, p. 639

[56] *Ibid.,* p. 640

9 April, 2007. In its decision the Court decided that Article 231.1 of the Civil Procedure Code of RA in the part of not providing a for an obligation for the Court of Cassation to provide reasoning on returning a cassation complaint, thus not providing legal guarantees for the effectiveness of justice and sufficient access to justice is in contradiction to Articles 3; 6(part 1,2); 18.1; 19.1 and void. The legitimacy of this kind of decision of the Constitutional Court can be a source of debates about whether the Constitutional Court is empowered to set obligations on the Court of Cassation of RA by interpreting the rules of the Constitution protecting the right to fair trial of the individual. After all, as stated in Article 92 of the Constitution, only the Constitution and the legislator by adopting laws can set forth obligations on the Highest Court of the state. The aim of this provision is to ensure that only people by exercising their power to elect their legislative body and vote on referendum on the norms of the Constitution preserve the power to decide on the most important issues concerning their country and the leading bodies representing the three branches of power in the state. Unfortunately the limits of the papers do not let this issue be profoundly studied here, as it may constitute a separate issue for a research.

Having studied the rules on High Courts, enshrined in specific rules of courts, such as in US, Canada, New Zealand or set forth in the Codes, such as in France, Germany it can be said that non of the acts contain an obligation of the Court to give reasoning on its decisions on granting a leave for appeal or writ of certiorari. The only exception seen so far is the New Zealand Supreme Court Act of 2003, where, article 16 states that Court must reason its refusal to give leave to appeal. The reasons may be stated briefly, and may be stated in general terms only.[57] Referring to another common law state - Canada, it is directly and clearly stated in the Rules on the Supreme Court of Canada and Supreme Court Act of Canada that the Court does not issue reasons for its decisions to allow or dismiss applications for leave to appeal.

The author suggests a new mechanism to govern the rules on admissibility to be set forth in RA legislation. That is, the jurisdiction of the Court to be devided into 2 parts, one called ‘original’, the other ‘discretionary’. In cases when the applicant brings evidence that the decision in its case and at least two more judgements of lower instance courts contradict each other or give different interpretation as to the same norm of the law, the Cout of Cassation has an obligation to take the case into consideration and make a precedential decision, interpreting the norm of the law, thus ensuring the uniform practice and the certainty of the law. Cases of

[57] New Zealand Supreme Court Act (No. 53) 2003

discretionary jurisdiction involve cases where there is a contradiction of the lower court's judgement to the precedents of the Court. In this cases the Court should have a wide discretion as to taking the case into consideration or not, leaving it to the Appeals court to make its judgements in accordance with the precedents of the Cassation Court, and not double the work, as the Appeals Court in 90% cases is the last resort for the litigants. This will also make the public and judiciary concentrate on the quality of the decision of the Court of Appeals, its reasoning and overall case practice. At the same time, as I have mentioned above, Appeals court has more resources for that purpose. If the Appeals court deviates from the precedent based on alleged change of social, economic situation in the country, it should refer the case to the Court of Cassation for a special hearing. This mechanism may be alike the ones present in Common law system and we tend to say that we are the representatives of the Civil law tradition, but the institute we have taken is originally a common law institute, thus their experience with special attention to our countrie's specifics will be a step forward.

In the scope of the obligation to give reasoning a cornerstone decision for RA is the decision of the European Court of Human Rights on Meltex where the Court in point 87, when adressing the issue of violation of article 6 as a result of an unreasoned decision of the court, stated : "The extent to which this duty to give reasons applies may vary according to the nature of the decision. Furthermore, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision".[58] A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal.[59] Thus it can be inferred that the ECtHR sets a clear difference between an obligation of the lower courts to reason their judgements, delcaring it compulsory and same obligation of the Highest Court of the State.

Besides, an important problem will be solved by partially freeing the Court from giving reasoning to its admissibility decisions, that is a practical problem RA still has in its legal sphere, where advocates and appellants still consider the Cassation Court as a required instance that should be appealed to in any case. The public, and indeed, attorneys often cannot understand why the state's highest court cannot correct every perceived wrong that has occurred in the lower

[58] *Meltex LTD AND Mesrop Movsesyan v. Armenia*. App. 32283/04 (ECtHR, 17 June 2008), para 87

[59] *Hirvisaari v. Finland*.App. 49684/99 (ECtHR, 27 September 2001),para 30

courts. In fact, the reason is that the jurisdiction of the Court, being limited, tends to be strictly construed. In fact, the same is true about the Cassation Court of RA based on the constitutional status it has now.[60]

Regarding the issue, it will be also interesting to present a very useful idea that was stated by the Supreme Court of Florida with regard to this:

> Counsel should consider, therefore, advising clients at the beginning of the appellate process that Florida's judicial system is structured so that the district courts are often the courts of last resort, and it is the exception that further review will be granted by Florida's highest court.[61]

Considering the abovementioned situation we have now, together with the practical problems and best international practice in the sphere, it would be better to have the Cassation Court of RA not giving reasoning to its admissibility decisions in cases presented above and leave the Court to exercise the power of its discretion, paying attention to the policy the Court is creating.

To conclude it will be useful to present an idea, enshrined in the Supreme Court Act of Canada: "The case must raise an issue that goes beyond the immediate interests of the parties to the case". The same mechanism we have in Armenia that is the Court of Cassation is not aimed at the interests of specific individuals, but on creating firm and solid legal system and interpretational practice, maybe in future also a solid case law for the benefit of the community. In any case, if the legislator chose to grant the Court with a special mandate it is better not to mix and match it with other responsibilities, that are hardly possible to enact by 17 judges comprising the Court. In case if it has become clear that RA needs a third instance court, it is worth re-establishing a Cassation court in a way for it to be the second appellate instance with corresponding amount of judges, rules of procedure and limited discretion. But if the legal system of RA has made a step forward to common law institutes, setting forth the power of the Cassation court to create precedents, together with specific admissibility criteria for applying to the Court, it is preferable to continue to follow the chosen path and work on the quality of the decisions of the Cassation Court, to increase the level of competence of the Court's judges at the

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[60] H. L. Anstead, G. Kogan, T. D. Hall, R.C. Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, (Nova Law Review 2005), p. 53

[61] *University of Miami v. Wilson*, 948 So. 2d 774, 789 (Fla. 3d D.C.A. 2006)

same time increasing the level of the Court's authority and concentrating the attention in regard to specific cases and judicial errors on the decision of trial courts and court of appeals at most.

IV. CONCLUSION

There are questions, especially in humanities and moreover, in legal theory, that don't have one and only one correct answer. Most of them don't. The fairness or the correctness of this or that point of view is merely a subject of an opinion. The question addressed by the paper are also from this row. More or less objective conclusion can be made regarding the role of the High Courts. In fact, the only answer that can be given is that- it depends. The same can be said about the discretion of that courts. It depends on the country of origin of the court, on its traditions in general and legal tradition in particular, its society and its legal education and comprehension.

As it was mentioned, in general, the Common Law tradition countries tend to grant their Supreme Courts with wide discretional powers, with the aim of uniform application of the law. In federal countries the main aim of high Courts is to ensure the uniformity between the laws and judicial decisions of the courts of different states. With the convergence between the civil and common law traditions a lot of civil law countries can be said to have the same mechanism of High Courts. Thus, in France, Germany and Sweden the High Courts though granted less discretionary power are also courts of law not fact, also ensuring the uniform application. After the EU coming into the international arena some of these standards have become European and applicable throughout the EU in its member states.

The issue of judicial discretion as it is, taken separately is also a philosophical issue. Be it good or bad, it is a modern reality, corresponding to the policy of making all the governance and judicial system cost effective. Discretion of the court is one of the mechanisms of reducing the quantity of appeals, getting the most important issues of law to the attention of the High Courts. In reality we have now, it is not the worst solution after all.

At last, but not least referring to the question of limits of discretion of the Cassation Court, based on the abovementioned, the only thing that is left to say is that in reality, it would be for the benefit of the legal system of RA, including individuals, advocates and judges to understand that the Court of Cassation as we have it now is not for a benefit of a specific person, or better to say, that is not its main aim. It should be a policy-making institutions whose main aim is the benefit of the whole judicial system of RA.

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