



NETWORK OF THE PRESIDENTS
OF THE SUPREME JUDICIAL
COURTS OF THE
EUROPEAN UNION

**NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS
OF THE EUROPEAN UNION**

Dublin Conference

November 26-27, 2015

*Farmleigh House
Farmleigh
Castleknock,
Dublin 15, Ireland*

INTRODUCTORY REPORT

The Filtering of Appeals to the Supreme Courts

**Rimvydas Norkus
President of the Supreme Court of Lithuania**

**Colloquium organised with the support of the European Commission
Colloque organisé avec le soutien de la Commission européenne**



I. Introduction. On the Nature of Appeal to Supreme Court

Part VIII of the Constitution of 3rd May 1791 of the Polish–Lithuanian Commonwealth, the first constitution of its type in Europe, stated that the judicial authority shall not be carried out either by the legislative authority or by the King, but by magistracies instituted and elected to that end. The Constitution also mentioned appellate courts and the Supreme Court. The Constitution did not address in any way filtering of appeals. However, even long before the Constitution of 1791 was adopted, the Third Statute of Grand Duchy of Lithuania, approved in 1588, forbid to appeal intermediate decisions of lower courts to the Supreme Tribunal of the Grand Duchy. Later laws of the Grand Duchy have even established a fine for not complying with this provision. Thus the necessity to limit a right of application to Supreme Court was understood and recognized by a legal system of Lithuania long ago. Historical sources and researches reveal to us now that one of the main reasons why this was done was in fact huge workload of a superior court and delay that was not uncommon in those times. It could take ten or more years to decide some cases before the Supreme Tribunal of the Grand Duchy.

The Constitution of the Republic of Lithuania, which is currently in force, does not itself regulate access to the Supreme Court. In this way it resembles not only the Constitution of 1791, but also the Constitutions of Lithuania which were adopted in 1920ies and 1930ies before the Soviet occupation. The current Constitution directly mentions the Supreme Court as a judicial institution only in one article. It states that the courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts (Art. 111, par. 1). In addition, the Constitution provides that for the consideration of administrative, labour, family and cases of other categories, specialised courts may be established according to law. This provision of the Constitution was realized by establishing administrative courts of two levels, consisting of regional administrative courts and the Supreme Administrative Court.

The Constitution of Lithuania also guarantees that the person whose constitutional rights or freedoms are violated shall have the right to apply to court (Art. 30, par. 1). It is not clear whether the aforementioned constitutional right to court actually encompasses and grants a right to bring a case before the Supreme Court in particular. The Constitutional Court of Lithuania holds that under the Constitution a legal regulation must be established by means of a law, whereby one would be able to lodge an appeal with at least a court of higher instance against a final act of the court of first instance. Therefore, the so called ordinary appeal (appeal to the second instance court) is a part of constitutional right to court. The legislator must provide, ensure and protect it. The Constitutional Court has not yet addressed an issue, whether further appeal, i.e. appeal to the Supreme Court, is a matter and part of a constitutionally protected right of access to courts.

But why question of a nature of a right to appeal to Supreme Court, in particular its status in a national legal system as constitutional, fundamental or otherwise prominent and subject to a rigorous protection, is important for our topic? First of all, the reality which we face in Lithuania and most likely in other countries too is that Supreme Court is in fact increasingly becoming less supreme both from internal and external perspectives. There is no need to discuss in details the latter aspect, i.e. external dimension of supremacy of a national Supreme Court. This topic is directly related to a dynamic interrelationship between the national supreme court and other very important players that emerge from supra-national and international level, namely the European Court of Human Rights and the Court of Justice of the European Union. Brilliant report of our colleague Jean de Codd, First President of the *Cour de Cassation* of Belgium, excellently described relationship of the National Courts with the European Court of

Human Rights. It seems that due to profound influence of a case law of the European Court the national supreme courts are increasingly bound to pay more and more attention to the matters that were previously in the sovereign domain of their jurisdiction and interpretative realm.

During preparation of this conference the questionnaire was drawn up and sent to members of the Network in order to allow us to learn more about procedural, substantial and organizational aspects of filtering appeals to Supreme Courts. I am very grateful for all the answers we received. They were really helpful and inciting. It is clear from them and from other sources that at least in some countries an aggrieved party can bring an individual constitutional complaint to the Constitutional Court following the decision of the Supreme Court, including decision on filtering her/his appeal to the Supreme Court (e.g., Spain, Czech Republic). In addition, in some countries Constitutional Courts have actually assessed constitutionality of rules regulating access to Supreme Court or certain aspects of it, including filtering of appeals, and declared them to be in contradiction with a superior law. That has led to certain reforms in these countries (e.g. Czech Republic, Poland, Hungary). Thus at least in some jurisdictions, in addition to proliferation and expansion of international human rights protection standards, we face so called growing constitutionalisation of law, where verification of constitutionality is not random or exclusive, but rather permanent reality of functioning of legal system. It spreads and expresses provisions, principles and values entrenched in the result of constitutional verification and in the constitution itself, throughout the system of legal norms. It is said that constitutionalization is a natural way of the functionality of legal system and it is a measure to ensure materiality of human rights and freedoms, and its comprehensive reflection in ordinary law¹. Sometimes even in a quite debatable way.

If a monocentric legal system, which is based around the superiority of a Constitution, recognizes that anyone has a right to have his or her case heard and adjudicated by Supreme Court and elevates it to a level of a constitutional guarantee, any attempt to limit or restrict it by introducing filters of appeals may become complicated, raise additional issues and even face vigorous opposition by other powerful players within a legal system. For example, the Constitutional Court of Lithuania or the European Court of Human Rights can and the latter often does engage sophisticated and sometimes hardly predictable test of proportionality in its case-law. Reasonable relationship of proportionality between the means employed and the aim sought to be achieved must be established when assessing limitations or restrictions or even certain instances of application of them in practice to particular constitutional or fundamental right or freedom. One Italian professor even pointed out that an inquiry into the problems affecting the Italian Supreme Court needs to start from Article 111 of the 1948 Constitution. Its seventh paragraph introduces the guarantee of the right of appeal to the *Corte di Cassazione* for violations of the law, against every judgment. He also goes on as to say that the only way to get durable results in solving current problems is the abolition of the constitutional guarantee of the appeal to the Supreme Court².

Moreover, if one recognizes right to appeal to Supreme Court as a constitutional one or subjects its static or dynamic manifestations to intensive constitutional verification, the legality of filtering appeals to Supreme Court becomes dependent not only on decision of a legislator. In such a situation legislator is no longer free to establish rules regulating the procedure before Supreme Court and vest the latter with a carefully crafted and intended role and purpose of the

¹ Mesonis, G. Teisės konstitucionalizavimo dinamika. *Teisė*, 2014, Nr. 92.

² Chiarloni, S. Fundamental Tasks of the *Corte di Cassazione*, Heterogeneous Objectives Arose from the Constitutional Right to Appeal and Recent Reforms. In *Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe*. Ortells Ramos, Manuel (coord.). Barcelona: Difusión Jurídica y Temas de Actualidad, 2008, p. 77, 79.

Supreme Court within a national legal system. By a single judgment of Constitutional Court interpreting sometimes quite abstract constitutional provision the whole ideology of Supreme Court's role and functions can be shattered. When drafting his final report of the 1997 Thessaloniki Colloquium of the International Association of Procedural Law on national and supra-national supreme courts distinguished late professor Jolowicz most likely could not predict judgments of the Constitutional Courts of Hungary, Czech Republic, Poland, Armenia, which declared unconstitutional some rules pertaining to functioning of Supreme Court and aimed (at least *prima facie* and *inter alia*) to strengthening public role of the latter in those jurisdictions. At the very end of the twentieth century professor Jolowicz was able quite confidently to conclude that we all agree that the supreme courts must serve a variety of predominantly public purposes and now the focus need to be shifted to the "How?" question³. But would that be right to say nowadays? Here it is suffice to say that the Constitutional Courts of Hungary and Czech Republic declared unconstitutional case selection criteria, oriented towards strengthening normative functions of the Supreme Courts. In Czech Republic case selection to the Supreme Court criteria that a case has to be of "crucial legal importance" was abrogated. In Hungary the limitation of the right to extraordinary remedy before the Supreme Court requiring the existence of an issue that necessitates the harmonization of the courts' case law was deemed unconstitutional and contrary to legal certainty. In Poland the provision stipulating that a ruling to admit or reject a cassation complaint for a hearing may be passed without written justification required was found to be contradicting the Constitution of the Republic of Poland. Similarly, the Constitutional Court of Armenia found incompatible with the Constitution the lack of a legal requirement to provide reasons for a decision to return to an applicant an appeal on points of law that demonstrates no grounds for admissibility of it.

It is evident that the state which bans almost every mean of self-defence is in principle obliged to secure effective and real access to courts of law. Therefore, it is no surprise that those countries that have written constitutions usually recognize constitutional nature of right to court, sometimes in general terms, without specifying any instance or court level (e.g. Latvia, Greece, Czech Republic), and sometimes by expressly (e.g., Estonia) or through jurisprudence of Constitutional Courts (e.g. Poland, Lithuania) including right to appeal judgment of the court of first instance to a higher court. Only few jurisdictions in their answers to the questionnaire, which was send to the members of the Network before this Conference, have actually indicated that appeal to Supreme Court is recognized as a constitutionally protected right. At the same time all of the latter ones have stressed that it is the task of the ordinary legislator to determine the scope of appeals to Supreme Court (e.g., Belgium, Sweden, Austria, Estonia by way of deduction from different constitutional provisions). But what is more interesting that no jurisdiction, which actually experienced direct intervention of Constitutional Court on their mechanisms of appeal to Supreme Court, has actually indicated that there is constitutionally protected right to appeal to Supreme Court. Therefore, it seems that there is no direct and evident relationship between an intensity of expressly addressing and regulating right to appeal to Supreme Court in a written text of Constitution and a dynamic constitutionalism that may upspring from Constitutional Court and break intrinsic barriers of different areas of law by creating new constitutional dimension of appeal to Supreme Court.

It is also worth mentioning that there was no answer from the member of the Network which would clearly indicate perception of an appeal to Supreme Court that would be analogous to an understanding of it in a way that is laid down in rule No 10 of the "Rules of the Supreme Court of the United States". This rule states: "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

³ Jolowicz, J. A. The role of the Supreme Court at the national and international Level. In *The Role of the Supreme Courts at the National and International Level*. Yessiou-Faltsi (ed.). Athens: Sakkoulas, 1998, p. 63.

reasons. The following, *although neither controlling nor fully measuring the Court's discretion*, indicate the character of the reasons the Court considers <...>” [emphasis added]. According to this rule, there is no right of appeal to Supreme Court at all – selecting a case to the Supreme Court of the United States is a matter of seemingly very wide judicial discretion. Based on answers from members of the Network, rules on filtering appeals to the Supreme Court of the United Kingdom, Ireland, Sweden, Norway and Denmark at least in some aspects resemble the system in place in the United States. But for a lawyer from other jurisdiction, it is hard to say how much similar is the conception of appeal to Supreme Court in these jurisdictions to that of our colleagues from the other side of the Atlantic Ocean. In Lithuania it is common to speak about right to appeal to Supreme Court, which is granted to certain participants of a case in respective procedural codes under the conditions and limitations laid down in the legislation. Therefore, a discourse on appeal to the Supreme Court is in fact about rights of persons, not about discretion of a court. Anchoring effect of this proposition puts us in a situation that we have to elaborately substantiate any additional and further restriction of right to appeal to the Supreme Court, because it is apprehended as a limitation of personal (subjective) right. With such understanding of right to appeal there is almost no chance for a fruitful debate from the other end of a perspective – is there a place for a rather wide judicial discretion on filtering appeals to the Supreme Court and if yes whether and how it should be limited.

The abundance of reasons why in a legal discourse in Europe it is quite usual to talk about right to appeal to Supreme Court might be very different. Still one of them might be even not directly related or arising out of national legal systems, their historical traditions or culture. While Article 6 § 1 of the European Convention on Human Rights does not compel the Contracting States to set up courts of appeal or of cassation, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 § 1, states the European Court of Human Rights⁴. As access to court is one of the fundamental guarantees of Article 6 § 1, this in fact can easily lead to a conclusion that in principle there is the right of access to every Supreme Court of Contracting State of the European Convention on Human Rights. Of course the European Court regularly emphasizes that the right of access to the courts is not absolute but may be subject to limitations permitted by implication⁵. This applies in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard⁶. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a “legitimate aim” and if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”⁷. Application of all these principles to the procedure before Supreme Court was very recently affirmed by the judgment of 5th November 2015 of the European Court of Human Right in a case *Henrioud v. France*. The European Court decided that applicant had been deprived of his right of access to a tribunal because the Court of Cassation of France had been excessively formalistic in declaring his appeal on points of law inadmissible. This leads to a question is there a place in Contracting States of the European Convention on Human Rights for discretionary “pick-and-choose” system of selecting cases to be heard and adjudicated before Supreme Court?

⁴ *Platakou v. Greece*, no. 38460/97, ECHR 2001-I.

⁵ *Golder v. the United Kingdom*, 21 February 1975, § 38, Series A no. 18.

⁶ *Luordo v. Italy*, no. 32190/96, § 85, ECHR 2003-IX.

⁷ *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93.

On one hand, such system may be deemed as failing to comply with the requirements of the Convention, because in this situation right of access to Supreme Court in fact may be recognized as rather illusory than real. Moreover, there are some indications in the case law of the European Court that may be understood as meaning that an appeal on points of law for which leave is granted at the discretion of Supreme Court can be deemed as not an effective remedy that requires being exhausted before applying to the European Court of Human Rights⁸. On the other hand, we are well aware of the jurisprudence of the European Court of Human Rights which clearly states that its task is not to examine whether the applicant should have been granted leave to appeal. This question is primarily a matter for regulation by national law and it is, in principle, for the national courts to assess the grounds for granting such leave. The Court's task is to ascertain whether the proceedings as a whole were fair⁹. In addition, where a supreme court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6 of the Convention. This principle extends to the Supreme Court's decisions on applications for leave to appeal. In a description of facts of a case at hand the European Court may indicate that leave to appeal has been refused without giving reasons, but later in the reasoning part of the same decision the Court can re-qualify the situation and refer to the "limited reasons" of a national court that conforms to the requirements of the Convention¹⁰.

II. Reasons of Filtering Appeals

Following thorough discussion of a nature of appeal to Supreme Court, which may pose both constitutional constraints and supranational limitations on restricting access to Supreme Court, one may naturally ask why at all to filter appeals to Supreme Court? But before moving on with this question, it is necessary to say at least few words about filtering itself. Filtering of appeals can take very different forms, which we will address in some detail later. However, all these measures share common trend or end result to reduce workload of Supreme Court. This is done not only by restricting access to Supreme Court by various conditions and limitations, but also by enabling Supreme Court to make particular decisions in some categories of appeals without an extensive substantive reasoning (e.g. refusal to grant leave to appeal, dismissal of an appeal as clearly unfounded, etc.). The exercise of motivating judgment usually is one of the most time consuming tasks of the modern judge. Especially it is regularly the case with the judgment of Supreme Court, which by a legal tradition can gain a force of precedent to be applied in other cases (*ratione auctoritatis*) or is expected to have some persuasive authority arising of carefully drafted and convincing reasoning (*auctoritate rationis*). The situation is even more complicated taking into account the fact that judgments at higher levels of jurisdiction usually are taken not by a single judge, but collegially. Psychology tells us that the quality of a group decision has the potential to exceed that of even the most skilled individual member of the group. Each member of a collegial court can engage in a deliberative process with his/her colleagues and compensate their deficiencies, if any. But that usually comes at a price. Spending more time for discussions and negotiations in reaching a compromised solution exhausts limited time resources that could be used for dealing with other cases. And there are many cases that come before Supreme Court which due to their importance to legal, social, cultural, economic life of a country actually require in-depth study, open-minded deliberations and wise solution on a hard topic, where legal arguments can well justify any chosen decision.

The European Commission in its 2015 EU Justice Scoreboard indicated that for cases pending in European courts it is not possible to identify a clear common trend, except for a sustained

⁸ *Běleš and Others v. the Czech Republic*, no. 47273/99, § 68, ECHR 2002-IX.

⁹ *Kukkonen v. Finland* (no. 2), no. 47628/06, § 25, 13 January 2009.

¹⁰ *Nerva and Others v. the United Kingdom* (dec.), no. 42295/98, ECHR 2002-VIII.

decrease of pending cases in civil, commercial, administrative and other cases. However, in fact volumes of cases to be decided are not decreasing everywhere. For example, in 2014 Lithuanian courts received 10 percent more cases than in a previous year. In addition, every lawyer, as well as the courts, are constantly faced with the increasingly intensive and more detailed regulation, covering various levels of national and international law, particularly complex issues arising from the rapidly developing technology and commerce. The increased availability of information enables lawyers to analyze deeper and wider, facilitates comparative research and thus helps them to pose new and new challenges to the judicial system¹¹. Therefore, a demand to resolve a dispute in a high quality and cost-efficient manner with limited resources is particularly relevant for every modern judicial system. It would be absurd to say that we are entitled to the best possible legal procedure, however expensive, when we cannot lay a credible claim to the best possible health service or to the best possible transport system. We are therefore entitled to expect procedures which strive to provide a reasonable measure of protection of rights, commensurable with the resources that we can afford to spend on the administration of justice¹².

But now let's imagine the Supreme Court of Volumia that decides tens of thousands of cases every year. Hundreds of its judges, each of them deciding hundreds of cases are permanently flooded with files. Most of the cases look alike. For most of them, judges use standardized reasoning, often just copying and pasting from one decision to another. There is a requirement or pressing need that a minimum number of files be disposed of every month, because already it takes at least few years to reach a judgment at this court. This exerts permanent time pressure. The resulting excessive workload means that even in novel and complex cases, which requires more detailed attention, the reasoning of the Court is cryptic, often superficial, and unconvincing or simply so short as to be almost incomprehensible. The decisions of the Court are freely accessible to the public, but no one really read them. They are so numerous that nobody is able to study all, or even most, of them. And everyone knows that there is no point in reading them – they did not contain anything novel or groundbreaking¹³. The case law of the Supreme Court “resembles a supermarket” where the losing party in the trial can always find a favourable precedent¹⁴. This results in unpredictability and inevitably triggers the influx of a huge number of new cases and then new appeals¹⁵.

Based on this example one may advocate for a different system in which public purposes of Supreme Court shall prevail. From theoretical point of view, the public function of supreme courts' decision-making, oriented foremost to the effects of its decisions on the future, consists of safeguarding and promoting the public interest of ensuring the uniformity of case law, the development of law, and offering guidance to lower courts and thus ensuring predictability in the application of law. This has to be done in such a way as to provide maximum clarification for similar cases and preventing future private conflicts. This function can be contrasted to the one where Supreme Court focuses on the private purpose of the just and correct resolution of

¹¹ Arnold, R. Case management, judicial specialisation and intellectual property litigation. *Civil Justice Quarterly*, 2010, 29(4), p. 485.

¹² Zuckerman, A. A. S. A Reform of Civil Procedure – Rationing Procedure Rather than Access to Justice. *Journal of Law and Society*, 1995 (22).

¹³ Bobek, M. Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe. *The American Journal of Comparative Law*, 2009, Vol. 57, p. 33-34.

¹⁴ Chiarloni, S. Fundamental Tasks of the *Corte di Cassazione*, Heterogeneous Objectives Arose from the Constitutional Right to Appeal and Recent Reforms. In *Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe*. Ortells Ramos, Manuel (coord.). Barcelona: Difusión Jurídica y Temas de Actualidad, 2008, p. 79.

¹⁵ Galic, A. A Civil Law Perspective on the Supreme Court and its Functions. Paper presented at the conference “*The functions of the Supreme Court – issues of process and administration of justice*”.

every individual case, thereby striving to fulfil the expectations of litigants in the case at hand. In such a case, the activity of Supreme Court is predominantly oriented towards the past – by checking, in the interest of the individual parties, whether the law has been applied correctly in the lower courts, even if a judgment of Supreme Court would not help to develop the law generally¹⁶.

In this context it is said that supreme jurisdictions protect the individual far more by providing clear guidance in the form of predictable case law than if they were to feign individual review of every application. In addition, systems oriented towards private purposes usually face issues of transparency and “honesty”: individual is allowed to believe that a supreme jurisdiction has indeed the means and the intent to seriously deal with her or his case, which is just one of a thousand other cases, only to receive, one or two years later, a standardized “copy and paste” decision, typically rejecting the application as (manifestly) unfounded; the work of supreme jurisdiction is depreciated; covert ways of disposing of the majority of disputes are developed¹⁷. On the other hand, it may be argued that the external image of a Supreme Court is not made only by a convincing and extensive motivation of the case, but also by the raw number of cases decided each year. Increasing the access to Supreme Court’s justice, even if this implies less well explained judgments, can be beneficial since what mainly matters is the solution of a lawsuit, rather than the way such solution is motivated. The aggregation of several decisions on similar issues leads to the construction of a coherent system. This ensures both “argumentative” and “functional legitimacy” of the Supreme Court¹⁸. In addition, quashing judgments that demonstrate clear and evident violations of the laws at the lower levels of jurisdiction perhaps can also be seen as a significant public task of Supreme Court.

There may be arguments both for and against domination of one of the aforementioned doctrines. The aim of this Conference is not to settle this issue. The Network was created as a platform for exchanging ideas and learning from each other. The answers received from the members of the Network show that many European Supreme Courts position themselves as serving more public than private purposes. This is usually reflected in a various filters of appeals to Supreme Court adopted in those countries. Concentration on public purposes of Supreme Court usually comes with a rigorous filtering of appeals and ensuring private legal protection is directly related to a wide access to Supreme Court. Still it seems that in practice private purposes are almost never neglected and balanced approach is sought. It is possible to summarize it by the words of 2008 Report of the Hammerstein Committee on the Normative Role of the Supreme Court in the Netherlands: the Supreme Court plays an important role in the fields of both judicial lawmaking and legal protection, roles which cannot be viewed separately from each other. That different functions exist does not necessarily shed any light on how they should be performed in practice. This depends on how the role of cassation proceedings is viewed, the policy it is desired to pursue and the means available for this purpose.

Filtration of cases allowed to be dealt with at the highest levels of the Judiciary is not simply the result of procedural restrictions and costs, but also an issue of how and to what extent, a supreme court is expected, in the general tradition and culture of a national legal system, to

¹⁶ Galic, A. A Civil Law Perspective on the Supreme Court and its Functions. Paper presented at the conference “*The functions of the Supreme Court – issues of process and administration of justice*”.

¹⁷ Bobek, M. Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe. *The American Journal of Comparative Law*, 2009, Vol. 57.

¹⁸ Pinna, A. Filtering Applications, Number of Judgments Delivered and Judicial Discourse by Supreme Courts: Some Thoughts Based on the French Example. In *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond*. Edited by Jacco Bomhoff, Maurice Adams, Nick Huls. The Hague: T.M.C. Asser Press, 2009.

contribute to legal policies. Those differences explain why the social and political position of Supreme Court judges along with the caseload and even the style of judgments, may vary widely from one European country to another¹⁹. Some commentators also suggested that if Constitutional Courts perceive itself as *a de facto* supreme jurisdiction, it will be tempted to treat the supreme courts “bellow it” as a mere “appellate court” and hence will be reluctant to accept that the role of this “lower” court is predominantly focused on a public function of adjudication²⁰. Politicians too can be reluctant to strengthen normative (public, lawmaking) function of Supreme Court, because they may see it as a competitor and be afraid to lose, at least temporary, until new legislation is adopted, a right of final say on various sensitive issues which they would like to solve themselves. The pressure and time required to deal with an enormous amount of cases can indeed well discourage any pattern of judicial activism. Still it remains that filtering appeals is often a necessity because of the engorgement of Supreme Courts, limited resources available to the system of justice and the legitimate expectation of litigants to obtain a determination of their claim within a reasonable time, which is elevated to a level of a human right. In view of these facts, it is easy to agree that Supreme Court should focus its attention on cases of real importance from the perspective of its various functions²¹. The filters should essentially address this issue.

III. Filtering Mechanisms, Models and Procedure

There is much talk and discussion in the twenty-first century not only about globalization. A lot of books, articles are written and conferences, colloquia, symposiums held about convergence of legal systems, harmonization, unification and other alike processes in our legal systems or groups of them. Usually these papers and events end up with a conclusion that there are more and more instances of similarities in dealing with certain issues in different jurisdictions. However, when we look more carefully into particularities of filtering mechanisms in member states of our Network, it is not easy to reach such conclusion. The ways appeals are in fact filtered differs significantly. The results of filtering sometimes are even more contrasting.

The Supreme Court of Lithuania is the only court of the cassation instance for reviewing effective decisions, judgements, rulings, resolutions (except the resolutions for cases of administrative offences) of the courts of general jurisdiction. The Supreme Court of Lithuania is a court of third instance for the most of cases (civil and criminal). The cassation appeal to the Supreme Court of Lithuania as a general rule is not allowed against judgments and rulings of the courts of first instance, if they were not reviewed by the courts of appellate instance. This rule is known to other jurisdictions as well. Still some exceptions exist. For example, in the United Kingdom, Ireland, Norway leapfrog appeal is available. However, in these jurisdictions right to appeal the judgment of the court of first instance directly to Supreme Court is granted only in exceptional situations. On the other hand, some jurisdictions allow lodging an appeal with the Supreme Court against a first instance judgment, when the parties agree to skip the appeal with the second instance court. Thus interests of private parties can influence the workload of the Supreme Court, though the European Court of Human Rights stresses that the Convention imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet the requirements of it, including an obligation to do justice within a “reasonable time”²². The interests of parties cannot absolve the State from this obligation.

¹⁹ Wijffels, A. In *European Supreme Courts: A Portrait Through History*. Edited by Alan Wijffels and C. H. (Remco) van Rhee. London: Third Millennium Publishing Limited, 2013, p. 31.

²⁰ *Cit. op.*, Bobek, p. 54.

²¹ *Report of the Hammerstein Committee on the Normative Role of the Supreme Court*. The Hague, 2008, p. 10.

²² *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V.

Direct appeal to Supreme Court is sometimes allowed against judgments by a single-instance adjudication court. The latter option is not unusual. For example, decisions of the Court of Appeal of Lithuania regarding recognition and enforcement of foreign arbitral awards or court judgments are subject to cassation appeal to the Supreme Court of Lithuania. It seems natural that the legislator might decide that some cases due to their complexity, importance, public interest, sake of expediency or other reasons are to be heard in a higher level court as first instance court. The same reasons may also convince the legislator that it is more appropriate, reasonable or efficient that appeals against these judgments are heard directly by the Supreme Court. On the other hand, if ordinary appeal against judgment of a court of first instance is not allowed due to the fact that the case is considered not worth of appeal due to its specific features and reasons of efficiency and economy (e.g. small civil claims or fines not exceeding certain amount for petty offence), this can too substantiate why an appeal to Supreme Court shall not be allowed as well. It seems intrinsically contradictory to give a right to appeal to Supreme Court for let's say "simple case", when there are no sufficient reasons why this case should draw attention and require exploitation of human and other limited resources of second instance appellate court.

The Law on Courts of the Republic of Lithuania sets that the Supreme Court shall develop a uniform court practice in the interpretation and application of statutes and other legal acts. In addition, the Constitutional Court of Lithuania ruled in 2006 that the principle of rule of law, laid down in a preamble of the Constitution, presupposes that the courts of general jurisdiction are bound by their own created precedents – decisions in the analogous cases; the practice of courts has to be corrected and new court precedents may be created only when it is unavoidably and objectively necessary; such correction of practice of courts (deviation from the previous precedents) must in all cases be properly (clearly and rationally) argued in decisions of courts; under the Constitution, it is not permitted to establish any such legal regulation, nor to form any such practice of courts that would deny the constitutional nature of the Supreme Court of Lithuania, as a court of cassation instance. Therefore, one may conclude that main functions of the Supreme Court of Lithuania are public – uniformity of interpretation of law, development of law. Consequently, Lithuania has adopted different filters in order to secure due performance of the tasks assigned to the Supreme Court.

It is worth noting that in principle more rigorous filters in Lithuania are used in civil cases. This is reflected in statistics: usually more than 50 percent of incoming cassation appeals in criminal cases are admitted for adjudication on the merits in comparison to about 25 percent in civil cases. The underlying idea is that criminal cases are more sensitive and criminal conviction can have considerable impact upon an individual's liberty, reputation, and future prospects. This outweighs arguments to grant more autonomy to a court of final appeal to manage its own caseload. Therefore, it is argued, in criminal matters there should be more imperative legal protection and discipline on lower courts by the supreme jurisdiction. Many other countries follow this pattern, for example, by not requiring that the final appeal in criminal cases shall be prepared by a legally qualified person or providing more lenient conditions or grounds for an appeal to be heard and adjudicated by Supreme Court as it is in Lithuania. However, it seems that the more discretion to select a case has been given to Supreme Court itself, less significant is the differences in mechanisms of filtering appeals in criminal and civil cases. If the main task of Supreme Court is development of law, the reason to provide additional guarantees of individual legal protection to participants of criminal case appear less convincing.

The laws usually lay down that certain kinds of disputes or issues cannot be brought before the Supreme Court. For example, many countries employ *ratione valoris* criteria by precluding

cases of small amount at issue (small claim or petty fine) to be adjudicated before the Supreme Court. It is worth mentioning that in October 2011 *ratione valoris* criteria previously used in civil cases was dropped by the Lithuanian legislator. Before that cassation appeal was as a general rule not allowed in cases with the amount in dispute not exceeding circa 1 448 Euro. The change was driven by a firm conviction that the amount at issue does not *per se* and automatically mean that there is absolutely nothing of interest for the Supreme Court and for the development or uniformity of interpretation of law in such a case. Equality before the law was also discussed. The answers from the members of the Network, on the other hand, reveal a trend that the usage of *ratione valoris*, *ratione matiarae* or other formal, straightforward, rigid and inflexible statutory conditions and criteria for appeal to reach Supreme Court depends on the other factor – on which of the three emerging general models of filtering appeals the jurisdiction at hand in general relies.

The first model can be called the *leave-to-appeal* system. The United Kingdom, Ireland, Norway, Denmark, Sweden are principle examples of this kind of filtration. The cases to be heard and adjudicated before the Supreme Court are pre-selected (selection “at the door”) on the basis of quite abstract criteria, emphasizing public purposes of the Supreme Court, for example, the decision involves a matter of general importance or in the interests of justice it is necessary that there be an appeal to the Supreme Court. These criteria give much discretion into the hands of those who decide on whether to select a case. This power is usually vested in the Supreme Court itself, sometimes also to the lower courts of appeals. In Denmark cases are selected by Appeals Permission Board, consisting of a Supreme Court Judge, a High Court Judge, a District Court Judge, a lawyer and a member representing the jurisprudence. It is also worth mentioning that there is no separate Constitutional Court in these countries. Under “the leave to appeal” mechanism usually there is no requirement of mandatory representation before the Supreme Court; the latter can deal both with the questions of law and fact; the selection criteria often are alike for criminal and civil cases; likely unlawfulness of the appealed decision as a general rule does not play a major role in a selection process. The practice shows that there is simply no need for such limitations. The results of selection are rigorous, up to 100-150 cases are selected to be dealt with by a dozen or so judges and usually even less legal assistants. As a general rule no substantive reasoning for the decision to refuse leave to appeal is provided. The decision on an application for leave is given pretty fast, within 1 to 3 months. The efficiency of filtration mechanism and the Supreme Court’s work altogether are in principle in the hands of the judiciary itself.

The second model is characterized by the feature that there is *no judicial filtration stricto sensu*. France, Belgium, Netherlands, Greece, Italy are primary examples of it. These jurisdictions have their own methods how to manage workload of the Supreme Court. It is performed by two basic means. The first is private, *extra-judicial*. The cassation appeal to the Supreme Court in some categories of cases can be brought only by a special lawyer assigned to the Supreme Court or who fulfils certain requirements of experience. Therefore, it is in principle incumbent on practising lawyers to advice their clients on the chances of success and thus to filter wholly unfounded appeals to the Supreme Court. This seems to reflect an idea that Justice is a matter of many people who are or can be interactively involved in proceedings. Everybody has to share the duty to contribute to appropriateness of its functioning. Co-operation between the parties and courts and a joint responsibility is needed²³.

The second mean in the Hammerstein Report of 2008 was defined as a *disguised leave to appeal*. It can be very much functionally equivalent to leave to appeal, but is not a filter or

²³ *The Law’s Delay. Essays on Undue Delay in Civil Litigation*. Editor: C.H. van Rhee. Antwerpen – Groningen: Intersentia, 2004, p. v, 7.

leave to appeal in a true sense, because the Supreme Court in any case has to assess merits of the case and pass decision only after consideration of the substance of the case. We are speaking about a special regime of summary dismissals (case selection in principle “after the entrance”). The Supreme Court sometimes is allowed to dismiss specific categories of appeals (usually described as manifestly ill-founded or similarly) in a simplified manner. This is often proceeded without an oral hearing, with reduced number of judges in a panel and without giving a substantive reasoning, with just abridged statement of the grounds for the decision. In some jurisdictions unanimous decision is required. Prosecutor-General’s Office can play an important role in this regime (e.g. the decision is adopted only after the latter has been given an opportunity to express an opinion on the case).

All means of managing workload of the Supreme Court employed under “no judicial filtration” system can differ depending on a category of a case (civil, criminal, tax, etc.). Under this model efficiency of the system and probably the Supreme Court’s work altogether very much depends on particular features and synergic effect of combining aforementioned methods and their application in practice. For example, number of lawyers who can bring a case before the Supreme Court is very important. Private players indeed have some power to dictate the workload of the Supreme Court. The legislation can even grant them a right to ask for an oral hearing of a case that is supposed to be dealt with in a summary (simplified) manner. On the other hand, judges can also be creative and invent additional methods of reducing workload, for example, by very formally applying certain statutory requirements and limitations. In order to limit workload statutory rules may be implemented to such an extent that, for example, questions which are deemed issues of law in other jurisdictions may be regarded as questions of fact and thus not falling within the jurisdiction of the Supreme Court in these ones. In general, number of cases that the Supreme Court has to decide quite significantly depends on the size of population of a country at hand and can reach thousands or tens of thousands of new cases per year to be decided by few hundred or more judges.

The third model can be described as *mixed* one, having some features of both models indicated above, and sometimes shifting more to the leave to appeal or no judicial filtration system. It is difficult to indicate primary example of this model, but Lithuania can be attributed to it, therefore, we will present it by exploring a little bit the latter system.

There is a compulsory legal representation before the Supreme Court of Lithuania in civil cases, but no special Bar. The Supreme Court of Lithuania can verify the appealed judgment and/or ruling only from the aspect of the application of the law. However, the party can invoke before the Supreme Court a question of correct application of law to the facts established by the lower courts, as well as violation of evidence rules that can lead to flaws in facts that are deemed established by the lower instances. The Code of Criminal Procedure states that cassation appeal is heard by the Supreme Court only if one of these grounds exist: violation of substantive criminal law or serious breach of the Code of Criminal Procedure. The Court is entitled to refuse to admit cassation appeal when it is evident that no violation of substantive criminal law or serious breach of the Code of Criminal Procedure has been done. In civil cases cassation appeal is admissible only if one of these grounds for reviewing a case in a cassation procedure exist: 1) a violation of the rules of substantive or procedural law, which is essentially important for the uniform interpretation and application of the law, if this violation could lead to adoption of an unlawful judgment (ruling); 2) if in the appealed judgment (ruling) the court deviates from the practice of application and interpretation of the law formulated by the Supreme Court of Lithuania; 3) if on the question at issue the case law of the Supreme Court of Lithuania is not uniform. *Prima facie* unlawfulness / lawfulness of an appealed judgment plays an important role in selection process as is seen from above mentioned legislative provisions

and from practice of the Court. On the other hand, in civil cases general importance of a case for uniform interpretation of law is emphasized. The Court often recalls that it is not sufficient that the issue raised in the cassation appeal in civil case is of a legal nature, it must also be an important one, significance of which goes beyond particular case and its parties.

Especially for assessment of admissibility of appeals two Cassation Appeals Selection Panels are appointed – one for criminal and one for civil cases. These Panels make final determination in written proceedings whether to admit a case for examination. Three justices are appointed usually for one month to sit in each of the Panels. The Panels sit in camera. Cassation appeal is admitted if at least one of three justices votes in favour of it. There are no strict deadlines to solve the question of admissibility. Usually it takes about one week in civil cases and two-three weeks in criminal cases (from receiving cassation appeal) to adopt final decision on admissibility. The proceedings regarding admission are not adversarial. In practice decisions of the Panels to admit cassation appeal simply states that it conforms to applicable requirements and, therefore, is admitted. Decisions refusing to admit cassation appeal include reasoning that is usually concise and abstract. One may note that motivation of decisions by the Cassation Appeals Selection Panel in criminal cases usually is a bit more extensive than in civil ones. After an admission of a case, it cannot be dismissed in a simplified manner and has to be adjudicated on the merits of it by providing substantive and often extensive and detailed reasoning.

There may be different variations of above mentioned mixed system. For example, sworn advocates are required, no special case selection / admissibility panel is created, the procedure of selecting a case is adversarial and the other parties may submit their written responses, leave to appeal is granted by an appellate court, the law may state certain amount in controversy above which appeal to Supreme Court is always granted, more impetus is given on an importance of a case for uniform interpretation of a law, etc. Still the most common feature of this model is that there are certain grounds, some of them often relating to a general importance of a case (such as uniformity of jurisprudence, development of law), laid by a legislator, which appeal to Supreme Court have to comply with in order to be admitted or selected for a full examination and adjudication. If an appeal does not satisfy these grounds, it is held not admissible or is dismissed at the very beginning of an appeal procedure or later, after more thorough examination of it, usually without providing an extensive reasoning, just giving brief motivation.

Supreme Court of the United States in its 1923 judgment *United States et al. v. Carver et al.* stated that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. It seems that system of leave to appeal more or less accepts this proposition. The lawfulness or unlawfulness of an appealed judgment as a general rule does not play a major role in the case selection process, though *prima facie* unlawfulness sometimes can create a strong presumption for granting leave to appeal. Accordingly, as the procedure of leave to appeal is not designed for adjudicating a case on full merits, it seems natural that decision to refuse leave to appeal does not include reasons expressing opinion on the substance of it and thus usually does not confirm correctness of an appealed judgment. Some countries even separate the motion to grant leave to appeal, on the one hand, and filing the appeal, on the other hand, that clearly demonstrates that the selection criteria for granting such leave are quite different from the question whether the judgment against which the appeal on points of law is filed is correct or not²⁴.

²⁴ Galic, A. Reshaping the Role of Supreme Courts in the Countries of the Former Yugoslavia. In *Nobody's Perfect: Comparative Essays on Appeals and Other Means of Recourse Against Judicial Decisions in Civil Matters*. Edited by A. Uzelac and C. H. van Rhee. Intersentia, 2014.

Still other jurisdictions tend to dismiss or refuse to admit appeal with just brief and abstract reasoning when Supreme Court reckons that it is manifestly unfounded or does not correspond to admissibility or case selection / acceptance criteria, encompassing general importance of a case at hand. This practice does not in principle contradict to a maxim that “Not only must Justice be done; it must also be seen to be done”. In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court’s decision. But the devil is in details. Imagine the judge who is under constant pressure of huge backlog of cases and necessity to speed up delivery of justice or just because of her or his human nature is inclined to seek for various ways how to reduce her or his workload or avoid hard tasks. Won’t she or he in such a situation be tempted to dismiss without any substantiation not only hopeless appeals? If yes, that would be unfair to litigants. We can say that appeal is manifestly unfounded when this is indeed the case, not when we just have to keep us floating above the surface in the sea of cases or there are more important cases to be dealt with at this time.

In countries where case selection criteria combine both general importance of a case and likely unlawfulness of an appealed judgment we can face a different issue of reasoning the decision refusing to admit an appeal. If a court does not precisely indicate the reasons for not selecting / accepting case, an appellant may be left wondering in uncertainty why her/his appeal has not been admitted – she/he has not succeeded raising an important question of law, an appealed judgment is simply correct, or both. Of course, after all, we can ask, if one cannot trust the Supreme Court’s judgment in deciding what to decide, how can she/he trust its judgment in deciding what it has decided to decide?²⁵ But isn’t it that we, judges of Supreme Courts, have to build this trust?

Supreme Courts of some countries issue binding interpretative statements or uniformity decisions with binding force on the courts. This is done at a general, abstract level, independently of particular cases. Clear and convincing law or its interpretation may have an impact on number of appeals. Persons who are better aware of what the law is less likely will appeal. However, the Constitutional Court of Lithuania ruled out possibility of binding interpretative statements in 2006. The Constitutional Court declared that courts of general jurisdiction of higher level (and their judges) may not interfere in the cases considered by courts of general jurisdiction of lower instance, nor give them any instructions, either obligatory or recommendatory, on how corresponding cases must be decided etc. From the aspect of the Constitution, such instructions (whether obligatory or recommendatory) would be regarded as acting by the corresponding courts (judges) *ultra vires*. Under the Constitution, court practice is formed only when courts decide cases themselves. A different construction of the provisions of the Constitution would deny the independence of courts entrenched in the Constitution, would violate the principle that when considering cases, judges shall only obey the law.

Regulating conditions, restrictions and limitations upon a right to appeal to Supreme Court is usually the sole competence of the legislator. But, for example, the Supreme Court of Ireland adopts rules of the Superior Courts, which govern practice and procedure in the Superior Courts. Practice Directions issued by the Chief Justice complement the Rules of Court. Just recently the Supreme Court of Lithuania has published recommendations for persons drafting cassation appeals in civil cases. These recommendations are intended to facilitate preparation of a cassation appeal, to provide practical and methodical guidance to applicants, to draw their attention to the essential procedural requirements for cassation. Compliance with these recommendations is not mandatory, except for those requirements, which result from the rules

²⁵ Harvie Wilkinson III, J. If It Ain’t Broke... *Yale Law Journal Online*, 2009, vol. 67.

of procedural law and established case law of the Supreme Court. Many other countries have similar soft-law instruments. In some Nordic countries preparatory works of legislative acts were mentioned as further outlining case selection criteria and setting out in some detail what types of considerations are to be made when deciding whether to grant leave to appeal.

Only few members of the Network that can be attributed to the leave to appeal or mixed model of filtration indicated that case selection or acceptance procedure is as a general rule not adversarial. Therefore, other participants of proceedings are in principle entitled to submit their written contentions to a court, though the procedure for selection of a case in leave to appeal system is not aimed to make a decision on the substance of a case, but rather to check whether the case is worth consideration by Supreme Court. It is worth mentioning that before the Austrian Supreme Court only the electronic submission of documents is allowed via electronic data-transfer. Some countries require payment of an increased stamp duty, provision of security, compliance with appealed judgment, etc. Oral hearing of an application for permission to grant leave for appeal sometimes is allowed.

The answers to the questionnaire do not reveal in detail what is the place of legal assistants in filtering appeals. In Norway legal researcher has to prepare case memo within two weeks from the appeal was registered at the Supreme Court. Similar role is assigned to legal assistants in Lithuania. They first of all screen all incoming appeals. In fact it may be inevitable for a court to vest judicial assistants or legal researchers with more tasks in filtering appeals, if a judge is overwhelmed with a significant number of cases she/he has to adjudicate on full merits and by providing detailed reasoning. Filtering of appeals may be treated as less demanding and simpler task for which there is not enough time available for a judge to read and analyse carefully every incoming appeal. On the other hand, marginalization of filtering of appeals can have direct negative effect on adjudication of cases on the merits, because cases that are not suitable for the functions and purposes of the Supreme Court can indeed be selected.

Decision on admissibility of appeal usually is final and is not subject of any further appeal. If appeal is not admitted by the Supreme Court, new modified appeal basically can no longer be filed because of past deadlines or provisions of law. Still, for example, in Lithuania if cassation appeal was not admitted due to the fact that it did not reveal sufficient grounds for cassation, another modified cassation appeal can be submitted to the Court and accepted by the Selection Panel. Finally, general trend is felt from the answers to the questionnaire, that many states that have wide access to Supreme Court has recently introduced or are considering introducing new mechanisms that would allow to reduce the workload of the court and to concentrate more on clarification, unification and development of law, uniformity of jurisprudence.

IV. Final Remarks

We are not going to discuss in details in this report effectiveness of the aforementioned models or other aspects of filtering appeals in different countries. It can depend on various factors. In addition, the meaning of effectiveness is not self-evident and it can be understood differently, if we go across various jurisdictions. Finally, effectiveness is not always the most important thing. Courts, Supreme ones too, are called to do Justice. Although it is worth seeking proper balance between various principles, limitations, interests and imperatives related to the administration of justice, this is a complex solution, which depends much on historic, cultural, political, social and other characteristics of a particular state. Few centuries ago some Supreme Courts were established to reflect paramount authority of a central (usually, royal) authority. Now our Courts stand in a forefront of defending rule of law, democracy and human rights. It is difficult to speak about filtering any of these issues. However, sometimes it is simply

inevitable. We just have to do it right. When changes to domestic law or practice are impelled from outside, fears can be raised about loss of identity of an independent state or society. But when changes come as a result of learning from achievements or mistakes of others there is no place for concern. Learning is a process for enriching identity, not losing it. This Conference is a great opportunity to do this.