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A CIVIL LAW PERSPECTIVE ON THE SUPREME COURT AND ITS FUNCTIONS

1. INTRODUCTION

The ageless theme of the functions of supreme courts continues to preoccupy the legal community – academics, judges, practising lawyers, and drafters of legislation alike. If one could offer final, uncontroversial, and clear-cut answers regarding such questions, this would surely not be the case. A clear sign that the fundamental questions concerning supreme courts are always worthy of in-depth discussion among legal scholars and practitioners is that they – at regular intervals – find a prominent place at the conferences of the International Association of Procedural Law. To mention just two of the more recent events, these were *Thessaloniki* 1997, where late Professor Jolowicz contributed a brilliant general report based on equally brilliant national reports[1] and *Gandia* 2005, where the modern trends in the most influential European civil law jurisdictions were discussed[2]. It would therefore be much too pretentious for me to attempt to add anything truly fundamentally new to this conundrum. But perhaps it is nevertheless worth revisiting this topic in the context of the global trend towards reshaping the criteria regarding access to supreme courts.[3]

The broad title of this paper needs to be narrowed. Many potential functions of supreme courts will be left out of consideration, such as rendering advisory

[1] P. Yessiou-Paltsi (ed.), *The Role of the Supreme Courts at the National and International Level*: Reports for the Thessaloniki International Colloquium, 21–25 May 1997, Sakkoulas Publ., Thessaloniki, Athens, 1998. Another important project which should be mention here, resulted in the book, edited by T. Jolowicz and C. H. Van Rhee, *Recourse against judgments in the European union*, Kluwer Law International, 1999.

[2] M. Ortells Ramos (ed.), *Appeals to Supreme Courts in Europe*, Difusion, Juridica, Madrid 2008.

[3] About this global trend see P. H. Lindblom, *Progressiv Process – Spridda uppsatser om domstollsprocessen och samhällsutvecklingen*, Uppsala: Iustus Förlag, 2000, pp. 87–149, p. 136.

opinions in the legislative process, rendering preliminary rulings[4], deciding on cases brought by public bodies solely for the benefit of the development and uniformity of the law[5], the power to issue binding interpretational statements irrespective of any real-life pending case[6], exercising judicial review of legislation, deciding jurisdictional disputes, participating in the appointment of judges and conducting disciplinary proceedings against them, etc.). Instead I am only going to look at the functions of supreme courts in the light of the system of individual litigants' appeals (whatever they are called, e.g. cassation, revision).

2. DISTINGUISHING BETWEEN A (FINAL) APPEAL, A REVISION, AND A CASSATION; STILL A RELIABLE POINT OF DEPARTURE?

Defining the functions of supreme courts in civil law jurisdictions is a difficult task. There is simply no single civil law model or even a prevailing civil law approach. A valid and instructive starting point is perhaps still the traditional categorisation of three models: the cassation model, the revision model, and the appeal model.[7] The cassation model (with its oldest proponent being the French *Cour de cassation*) is typical of the so-called "Romanic legal circle", the "revision"

[4] E.g. so-called procedure for "resolving a disputed question of law" (*postupak za rešavanje spornog pravnog pitanja*) pursuant to Art. 180 of the Serbian Civil Procedure Act. The introduction of preliminary rulings has recently been implemented in the Netherlands as well. C. H. Van Rhee R., *Appeal in civil and administrative cases in the Netherlands*, (in:) C. H. Van Rhee, *Uzelac, Nobody's perfect: Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*, Intersentia, 2014, pp. 127–158, p. 138.

[5] E.g. *Il ricorso nell'interesse della legge* in Italy or *Cassatie in het belang der Wet* in the Netherlands. These instruments, brought by the Court's Procurator General have no immediate effect on the parties' position since adopted decisions are merely declaratory. They should be sharply distinguished from powers of public prosecutors to file appeals ("requests for protection of legality") to supreme courts, which were typical for the communist countries (and still survive, at least to a certain extent and with a different purpose, in some of them). Here, the public prosecutor's recourse to the Supreme court results in a decision that affects civil rights and obligations of the parties.

[6] Concerning this highly controversial instrument, typical for the procedural systems of the communist era (but still surviving in most post-communist states) see e.g. Z. Kühn, *The Authoritarian Legal Culture at Work: the Passivity of Parties and the Interpretational Statements of Supreme Courts*, 2 Croatian Yearbook of European Law & Policy (2006), available at: http://www.cyelp.com/index.php/cyelp/article/view/12/12 (15 May 2014).

[7] T. Jolowicz, *The Role of the Supreme Courts at the National and International Level*, (in:) P. Yessiou-Paltsi, *The Role…*, p. 50; M. Bobek, *Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe*, "American Journal of Comparative Law" 2009, Vol. 57/1, pp. 33–58, p. 36.

model was adopted in Germany and Austria and is typical of the countries with closely related procedural systems, whereas the appeal model (while being typical of common law jurisdictions) is present in the Scandinavian type of procedure (e.g. in Sweden[8], Finland[9], and Norway[10]).

What is certain is that the categorisation of procedural models concerning access to a supreme court cannot be made on the basis of "outer appearances" and form. It is not decisive how the means of recourse to the supreme court is termed ("appeal", "appeal on points of law", "cassation", revision").[11] Even less decisive is how the highest court is called. The highest court can be called a "court of cassation", but the individual appeal enabling access to this court is still a "revision" (e.g. in Serbia[12]). Or *vice versa*: there are quite a few systems which provide for a "cassation", but they are decided by a court called a supreme court (e.g. the *Sąd Najwyższy* in Poland and the *Tribunal Supremo* in Spain). Turning to another point; the criteria whether the highest court can – if the appeal is well founded – only quash the decision and remand the case to the lower court (which had traditionally been a distinctive feature of "cassation"[13]) or whether it can itself reverse the decision of the lower court and thus replace such with its own decision (which traditionally is typical of a "*revision*")[14] is no longer reliable either. For example, if the cassation appeal concerns *errores in iudicando*, the Supreme Court

[8] E.g. B. Svensson, *Managing the flow of appeals – Swedish experiences*, Conference papers, Development of the Supreme Court of Latvia, 7 October 2005, Lindblom, 2000, p. 88, available at: www.at.gov.lv/files/docs_en/.../Svensson_eng.doc (15 May 2014).

[9] P. Haapaniemi, (in:) L. Ervo (ed.), *Civil Justice in Finland*, Nagoya University Comparative Study of Civil Justice 2009, Vol. 2, pp. 200–202.

[10] I. L. Backer, *The Norwegian Reform of Civil Procedure*, (in:) *Procedural Law*, Scandinavian Studies in Law, Vol. 51, Stockholm 2007, pp. 41–76, p. 54, available at: http://www.domstol.no/upload/DA/Internett/domstol.no/Aktuelt/Backer.pdf (15 May 2014).

[11] T. Jolowicz, *Appeal, Cassation, Amparo and All That: What And Why?*, (in:) *Estudios en homenaje al doctor Hector Fix-Zamudio en sus treinta anos como investigador de las ciencias juridicas, Tomo III: Derecho Procesal*, Universidad Nacional Autonoma de Mexico, 1998, pp. 2045–2074, available at: http://biblio.juridicas.unam.mx/libros/2/643/26.pdf (15 May 2014).

[12] *Vrhovni kasacioni sud* (The Supreme Court of Cassation).

[13] See e.g. L. Cadiet, L., *El sistema de la casacion francesa*, (in:) M. Ortels Ramos, *Los Recursos ante los Tribunales Supremos in Europa*, Valencia: Difusion Juridica, 2008, pp. 21–54, p. 48. It seems that this feature of the cassation system has for a longest time survived in Belgium. See Jolowicz, p. 2054 and the judgment of the ECtHR, Delcourt v. Belgium, 17 January 1970, Series A No. 11, §§ 25, Series A No. 11.

[14] For many authors, pointing to the difference between "kassatorische" and "reformatorische" appeals is still an important method of describing differences between a cassation and a revision in civil law countries. See e.g. L. Rosenberg, K. H. Schwab, P. Gottwald, *Zivilprozess*, 16. Aufl., 2004, p. 935; T. Erecinski, *Entwicklung der Regelung der Kassation in Zivilsachen in Polen*, (in:) L. Bittner, T. Klicka, G. E. Kodek, P. Oberhammer (eds.), *Festschrift für Walter H. Rechberger zum 60. Geburtstag*, Srpnger, Wien, 2005, pp. 115–124, p. 117–118.

in the Netherlands[15] or in Spain[16] can (in principle: should) replace the decision with its own decision (unless a supplementary examination of the facts is deemed necessary). A similar approach has been adopted also in Italy (Art. 384/3 CPC).[17] On the other hand, remittals were and still are frequent in certain "revision" systems in the post-communist countries (e.g. Slovenia, Croatia) in spite of the existing powers to reverse the decision.[18] Another possible criterion for classification, namely whether a supreme court is entitled to review findings of facts or only questions of (procedural and substantive) law does not really enable any practical categorisation either. Both the cassation and the revision models only enable the correction of errors of law[19] (but it is equally well known that distinguishing between questions of law and of fact is far from clear-cut), whereas in the (Scandinavian) appeal system questions of fact can be examined by the supreme court. But it is observed that the practical importance of this power is, at least in civil cases, negligible (logically, these courts are – as will be discussed later – precedential courts and only the resolution of questions of law can have a genuine precedential value).[20]

It is also not decisive whether the appeal to the supreme court is considered to be an ordinary or extraordinary means of recourse. In some jurisdictions the "revision" is considered to be a regular appeal (Austria, Germany), whereas in others (Slovenia, Croatia) it is defined as an extraordinary appeal, which does not prevent the judgment from becoming *res iudicata*.[21] Also with regard to cassation, this appeal is considered to be ordinary in some jurisdictions (e.g. the Netherlands[22], Italy[23]), whereas it is categorised as extraordinary in others (e.g. Greece[24]). But

[15] C. H. Van Rhee, *Recourse against Judgments in the Netherlands*, (in:) J. A. Jolowicz, C. H. Van Rhee (eds.), *Recourse against Judgments in the European Union*, The Hague, 1999, pp. 239–260, chapter 3.1, available at: http://arnop.unimaas.nl/show.cgi?fid=1038 (15 May 2014).

[16] Jolowicz (quoting Fairen-Guillen), p. 2049, Espluegos-Mota, Barona-Vilar, p. 212, who note that the Spanish system of revision has always been "jurisdictional" and already in origins quite different from the French one.

[17] L. P. Comoglio, C. Ferri, M. Taruffo, *Lezioni sul processo civile*, Quinta edizione, Mulino, Bologna, 2011, p. 727.

[18] In Croatia (while the overwhelming majority of final appeals are rejected as unfounded (ca. 32%) or inadmissible; ca. 55%) statistics for the year 2012 show that remittals are almost twice as frequent as reversals (5.39–3.39%); also the mid-term trend clearly shows that comparing to reversals, cases of remittals are increasing (Uzelac, Supreme Courts between Individual Justice and System Management, lecture materials, China EU School of Law, Beijing, 2014).

[19] See e.g. Erecinski, 2005, p. 118 *et seq.*

[20] Lindblom, 2000, p. 115.

[21] The classification of the Swiss *Beschwerde in Zivilsachen* to the *Bundesgericht* remains disputed and so do the criteria for distinguishing ordinary and extraordinary appeals. I. Meier, *Schweizerisches Zivilprozessrecht*, Schulthess, Zurich, 2010, p. 455.

[22] See e.g. Van Rhee, 1999, chapter 1.4.

[23] See e.g. Comoglio, Ferri, Taruffo, 2011, p. 647.

[24] D. Maniotis, S. Tsantinis, *Civil Justice in Greece*, Nagoya University Comparative Study of Civil Justice 2010, Vol. 6, p. 74. The Greek regulation of cassation follows the French pattern,

pursuant to the criteria established by the European Court of Human Rights in the *Yanakiev* case, all these appeals are "ordinary" (hence the question whether they are compatible with the guarantees concerning *res iudicata* effect, which forms an integral part of the right of access to court enshrined in Art. 6/1 ECHR, does not arise).[25]

3. THE DECISIVE CRITERIA FOR CATEGORISATION: DOES THE SUPREME COURT HAVE A (PREDOMINANTLY) PRIVATE OR PUBLIC FUNCTION?

The main function of the supreme court when it comes to deciding final appeals can be either private or public. The supreme court can focus on the private purpose of the just and correct resolution of every individual case (in German: *Einzelfallgerechtigkeit*), thereby striving to fulfil the expectations of litigants in the case at hand.[26] In such a case, the activity of the 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.[27] The Supreme Court should intervene when serious errors by lower courts are referred to it, even if such errors merely affect the interests of parties and a judgment of the Supreme Court would not help to develop the law generally.[28] It should

rather than the German Revision (although in other aspects German law of civil procedure is based on the German model). See ibid, p. 89.

[25] Yanakiev v. Bulgaria, 40476/98, 10 August 2006. The respect for *res iudicata* has a prominent role in the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR). But notions of 'final judgment' and 'extra-ordinary appeal' are interpreted in an autonomous manner by the ECtHR. It is not decisive whether a certain appeal is considered extra-ordinary in the national legal order of a given state. The ECtHR must be satisfied that the judgment was final in the substantive, not formal sense. Thus, it found out that a case concerning an appeal to the Bulgarian supreme court did not amount to a situation in which a final and binding judgment was overturned in extraordinary proceedings. This is because review proceedings before this court were not extraordinary proceedings, but part of the normal three-instance proceedings. This was so because: (i) they were directly accessible to the litigants, (ii) were, as a rule, initiated, as in the case at hand, by the parties to the case, not by a third-party State official, (iii) the possibility of instituting them was subject to a relatively short time-limit, and (iv) in these proceedings the Supreme Court could, much as a court of cassation, examine whether the judgments of the courts below were contrary to the law or ill-founded, or whether there had been a substantial breach of procedure, and had the power to quash them. Thus, although the judgment was technically regarded as final, it was in effect not such, as it could be overturned in the review proceedings.

[26] Lindblom, 2000, p. 104.

[27] Bobek, 2009, p. 40 *et seq.*

[28] Improving cassation procedure; Report of the Hammerstein Committee on the Normative Role of the Supreme Court, The Hague, February 2008 (chapter 2.1), available at: http://www.

be guaranteed, to the maximum possible extent, that justice is done in the litigation in question.[29] The supreme court, however, can alternatively focus on the public purpose of adjudication, oriented foremost to the effects of its decisions on the future (as has traditionally been the case with supreme courts not only in common law jurisdictions, but in Scandinavia as well[30]). The public function of supreme courts' decision-making 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.[31] This must be done in such a way as to provide maximum clarification for similar cases in the future.[32] Thereby guidance in the form of clarification and development of the law materialised in a precedent prevents future private conflicts.[33] Of course, by deciding real cases (which should not be confused with rendering advisory opinions or issuing general binding legal opinions or binding interpretational statements), the supreme court also protects the private interests of the parties in these cases.[34] But this is rather merely a "by-product" or a "collateral effect" of its activity that is primarily intended to have general positive effects for the future. The subjective dimension of an appeal on points of law, i.e. protecting parties' rights in specific disputes, is not primary.[35]

Of course, the private and the public interest cannot be entirely separated. The goal that the court should achieve adequate results in every individual case by accurately determining the facts and correctly applying the law is closely linked to the general interest in ensuring the social acceptability of the outcome of legal proceedings.[36] And *vice versa*, the uniformity of case law is closely linked to the fundamental guarantee of equality before the law. Also, clear, uniform and predictable interpretation of the law enables individuals to know where they stand even before any court proceedings are initiated and this can protect their individual interests even better than the courts could.[37]

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rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/How-to-cope-with-the-growing-caseload-of-the-Supreme-Court/Pages/Report-of-the-Hammerstein-Committee.aspx.

[29] See Lindblom, 2000, p. 108.

[30] See e.g. information available on the website of the Finnish Supreme Court (http://www.kko.fi/27080.htm). In general on the Supreme courts of Sweden and Finland as precedential courts, fulfilling a public purpose, see Lindblom, 2000, p. 113 *et seq.*

[31] Bobek, 2009, p. 41 *et seq*., Lindblom, 2000, p. 105 *et seq*., Erecinski, 2005, p. 121. About the so-called *funzione nomofilattica* see also Comoglio, Ferri, Taruffo, 2011, p. 708.

[32] The Hammerstein Committee Report (chapter 2.1).

[33] Lindblom, 2000, p. 113.

[34] Compare Erecinski, 2005, p. 119.

[35] Compare Lindblom, 2000, p. 113 *et seq.*

[36] Compare Jolowicz, 1998, p. 2062.

[37] Compare Bobek, 2009, p. 40.

4. CAN SUPREME COURTS EQUALLY FOCUS ON BOTH FUNCTIONS: BETWEEN BOLD PROCLAMATIONS AND (NOT SO BOLD) REALITY?

There is no doubt that both goals – ensuring that justice is done in the individual case and ensuring the consistency and uniformity of the case law and development of law – are extremely valuable. When one is faced with a difficult choice between two equally attractive options, the most natural solution is simply: "Take them both!" The question thus arises whether a supreme court can perfectly and completely fulfil both its private and public functions. The answer to this question is yes if all the following conditions are fulfilled: (1) "The doors to the Supreme court are wide open"; everyone has a right to have his or her dispute in the last instance decided by the highest judicial authority. (2) In this manner, citizens can be confident that the state will make every effort and offer its best and most experienced judges for decision-making on their disputes, thus minimising errors to the greatest possible extent. (3) Still, in spite of its heavy caseload, the supreme court devotes its full capacity to every case and its decisions are always the product of an in-depth study (by judges and their clerks and advisors) and thorough discussions and deliberations. (4) The supreme court's judgments are all rendered within a reasonable time, and still (5) are well reasoned, convincing and logically consistent. (6) The case law of the supreme court is uniform – there are no inconsistencies and divergences between different panels within the supreme court itself. (7) The supreme court's judgments are published, and lower courts, practising lawyers, and legal scholars study them carefully. (8) Lower courts always follow the positions of the supreme court, thus making adjudication predictable already at lower levels of jurisdiction. (9) For the same reason, practising lawyers know well what to suggest to their clients and for this reason alone less cases flow into courts. In conclusion: both justice as well as legal certainty and uniformity of case law is fully achieved.

In fact, many academics and practising lawyers insist that the supreme court should equally and fully serve both the private purpose (pursuing a correct decision in every individual case) and the public purpose (striving for the uniformity of the application of law, offering guidance to lower courts).[38] Such view has been firmly promoted by certain constitutional courts as well (see *infra*, chapter 8). But what is missing is a clear answer as to whether it is realistically at all possible for

[38] E.g. S. Triva, V. Belajec, M. Dika, *Gradjansko parnično procesno pravo*, Zagreb 1986, pp. 540 and 558, R. Holzhammer, *Österreichisches Zivilprozessrecht*, Springer 1976, p. 332; W. H. Rechberger, D. A. Simotta, *Zivilprozessrecht*, 6. Aufl., Wien, 2003, p. 472, C. Esplugues-Mota, S. Barona-Vilar, *Civil Justice in Spain*, Nagoya University Comparative Study of Civil Justice, Vol. 3, 2009, p. 213.

the supreme court to adequately and to the full extent achieve both its private and public purposes.

At least when it comes to the country which I know best (Slovenia), experience, already from the era of communist rule in Yugoslavia (and until the comprehensive reform adopted in 2008) shows that this is hardly possible. Access to the Supreme Court was (nearly) unrestricted. The sole filter for access to the Supreme Court (*Vrhovno sodišče*) was the amount in controversy.[39] As this was set low and was constantly decreased due to inflation, access to the Supreme Court was widely available, which resulted in constantly growing backlogs. In order to tackle such a huge caseload, a high number of supreme court judges were appointed. But this inevitably resulted in a decrease in the esteem they enjoyed in the public opinion and in the legal community.[40] The Supreme Court decided a huge amount of cases on their merits, however this rarely offered an "added value" and could not really contribute much to legal certainty and predictability in the decision-making of the lower courts.[41] Just as attorneys often filed revisions in a "copy-paste" manner, also the supreme courts replied to them in an equally "copy-paste" manner, repeating their already well established positions, without much added value. Supreme court judges were heavily overburdened and could not devote enough time and attention to important cases which raised complex and hitherto unresolved legal questions. In addition a huge "output" made it impossible for the Supreme Court itself to keep track of its own case law. Most importantly, due to their huge amount of "output", the supreme courts were not even able to keep track of their own case law, hence inconsistency within the Supreme Court's case law was inevitable.[42] It thus became inconsistent and unpredictable as well.[43] If even this court was not truly able to follow its own case law, this could not at all be realistically expected of the lower courts, practicing lawyers and legal scholars. In the more recent era of computerization, the publication of supreme court decisions in electronic databases became widely available, but the volume of case law was simply too huge to be properly "absorbed" (noticed, studied, ana-

[39] In addition to the *ratione valore* criteria for certain types of disputes (e.g. paternity claims, maintenance, unfair competition, copy-right, patents…), access to the supreme courts was available in every case (*ratione materiae criteria*).

[40] Compare Uzelac, 2011, pp. 383–391.

[41] Compare Bobek, 2009, pp. 33–34.

[42] This is why the proposal to find the solution to the supreme courts' backlogs in appointing additional supreme court judges should be rejected. Maybe in this way backlogs could really be diminished, however for the supreme court to effectively fulfil its role, it is of paramount importance that its case law can be followed and that it finds a proper response in both the decisions of lower courts and scholarly commentaries. Furthermore, it is also necessary to ensure that the case law of the supreme court itself is uniform. See also the decision of the Slovenian Constitutional Court, U-I-302/09, 12 May 2011. Compare Bobek, 2009, p. 37 and The Hammerstein Committee Report, chapter 3.1.

[43] The same: Bobek, 2009, p. 63.

lysed, commented on, and followed). As it was nearly impossible to advise clients whether their cases have prospects of success, this in itself generated a vicious circle with an increasing number of cases flowing into the courts.[44] One further disastrous consequence of the "wide opened doors" to the second and third tiers of jurisdiction was the changing mentality of litigants and their attorneys. As they could be confident that there was still "time to catch up later", they simply too often did not take the procedure in the first instance court as seriously as they should have.

I am not confident enough that the above findings concerning the experiences of one country are immediately "transferable" to all other (civil law) countries; this is left for the reader to weigh. It is true, however, that practically an "identity crisis" of supreme courts, concerning its functions, can be detected in other countries of Central and Eastern Europe (most typically the Czech Republic).[45] It might be tempting to simply write off the importance of this discussion by considering it to be just another problem of the judiciaries in the post-communist countries in transition. But in the last couple of decades, pressure to redefine the functions of their supreme courts (triggered by a constantly growing workload) has preoccupied also Western European countries. This is an indication that the problems described above were – perhaps to a lesser or greater extent – detected in most countries which adhere to either the "cassation" or "revision" models. The most notorious example is probably Italy, where the *Corte (suprema) di Cassazione* is supposed to perform the function of ensuring uniformity and the development of law.[46] But at the same time, the private purpose is heavily accentuated since access to the *Corte di Cassazione* by way of a final appeal on a point of law is available to every dissatisfied litigant as a constitutional right[47]). The consequences are well known. The Court is confronted with an enormous caseload (ca. 30,000 new civil cases pending in 2013[48]). There are approximately 400 judges tackling this caseload.[49] But it is noted that the high volume of cases at the *Corte di Cassazione* (in combination with frequent legislative changes),

[44] Compare Lindblom, 2000, p. 136, who questions for similar reasons whether unrestricted appeal to the supreme court actually favours individual justice as much as is commonly presumed.

[45] Bobek, 2009, p. 44 *et seq.*

[46] See e.g. Comoglio, Ferri, Taruffo, 2011, pp. 708–709.

[47] Art. 111/ 7 of the Italian Constitution: "*Contro le sentenze e contro i provvedimenti sulla libertà personale, pronunciati dagli organi giurisdizionali ordinari o speciali, è sempre ammesso ricorso in Cassazione per violazione di legge*."

[48] Comoglio, Ferri, Taruffo, 2011, p. 709.

[49] See J. Komárek, *"In the Court(s) We Trust?" On the need for hierarchy and differentiation in the preliminary ruling procedure*, (2007) 32 European Law Review 32 (4), pp. 467–491, p. 471, final draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982529 (5 May 2014). The average duration of proceedings in the Corte di Cassazione is currently 42 months. See the official statistics: Corte Suprema di Cassazione, Ufficio di Statistica: *La Cassazione civile, Anno 2013*, available at: http://www.cortedicassazione.it/Documenti/AG2014-CIVILE.pdf (15 May 2014).

makes it extremely hard for it to deliver on its mandate of ensuring legal consistency.[50] The Court's intervention in the judicial system's operation is massive but it does not achieve greater uniformity of law.[51] On the contrary, contradictions within the case law of the Supreme Court are endemic.[52]It has been observed that the case law of the Supreme Court "resembles a supermarket" where the losing party in the trial can always find a favourable precedent.[53] This results in unpredictability and inevitably triggers the influx of a huge number of new cases and then new appeals.[54] The unpredictable outcome of court cases is an important factor which boosts litigation.[55]

Italy is probably the most extreme case. Therefore, I will mention just two further examples. In Germany, the problem of the inconsistency and unpredictability of the supreme court's adjudication was not perceived as a major problem to such an extent, but the problem of the excessive caseload of the Supreme Court (*Bundesgerichtshof*) was. This prompted the legislature to gradually shift the balance between the public and private functions of the Supreme Court's adjudication from a point of equilibrium more towards the public aspect. Whereas in 1980 the Federal Constitutional Court still clearly emphasised the Supreme Court's private function of ensuring *Einzelfallgerechtigkeit* (besides its role of providing guidance and ensuring uniformity), subsequent developments showed that this approach was not sustainable. As the caseload pressure on the Supreme Court grew, this resulted in the reform of 2001. Perhaps not everyone is ready to openly admit it, but this reform shows that certain choices were made as to what function should prevail (see *infra*, chapter 6). The situation concerning the caseload of the Supreme Court (*Hoge Raad*) in the Netherlands still seems – in the eyes of a foreign observer – quite comfortable (approximately 500 appeals in cassation annually in civil cases – the situation is much more critical in criminal cases). Nevertheless, it prompted the *Hammerstein Committee* to admit – although

[50] G. Esposito, S. Lanau, S. Pompe, *Judicial System Reform in Italy – A Key to Growth*; IMF Working Paper, 2014, p. 7 (available at:http://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf (5 May 2014).

[51] Komárek, p. 741; S. Chiarloni, *Fundamental Tasks of the Corte di Cassazione. Heterogenous Objectives Arisen from the Constitutional Right to Appeal and Recent Reforms*, (in:) M. Ortels Ramos, *Los Recursos ante los Tribunales Supremos in Europa*, Valencia: Difusion Juridica, 2008, p. 79; Comoglio, Ferri, Taruffo, 2011, p. 709.

[52] "[An] essay concerning conflicts [judgments] in civil matters, which consider[ed] only five years and judgments published by 12 legal journals, show[ed] that the court ha[d] fallen into contradiction no less than 864 times. M. Taruffo, M. La Torre, *Precedent in Italy*, (in:) N. MacCormick, R. S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Aldershot, 1997) at p. 144, quoted by Komárek, p. 471.

[53] Chiarloni, p. 79.

[54] See the official statistics: Corte Suprema di Cassazione, Ufficio di Statistica: *La Cassazione civile, Anno 2013*, http://www.cortedicassazione.it/Documenti/AG2014-CIVILE.pdf (15 May 2014).

[55] Esposito, Lanau, Pompe, p. 7.

in very carefully framed and balanced words and while still stressing that both functions are important – that against the background of the limited capacities of the Supreme Court "a new approach" as to what function should be given more attention is inevitable.[56] An excessive caseload consisting of cases that are not of essential importance reduces the scope for hearing important cases, thereby making it more difficult to address them promptly and give them the attention they deserve.[57]

5. HOW TO DETERMINE WHAT PREVAILS: BETWEEN THE INTENDED AND ACHIEVED FUNCTIONS?

The above findings indicate that the most important dilemma concerning the functions of the supreme court is whether the emphasis is placed on its public function or private function. But how then to determine which of these two functions prevails in a specific model of appeals to the supreme court? To start with, programmatic proclamations or historical origins are of little help here. For example, the traditional role of cassation courts (first in post-revolutionary France) was purely public as regards their purpose, namely to monitor the quality of the administration of justice[58] ("to protect the law from the courts").[59] They were intended to be a kind of a supervisory authority, separated from the regular court structure. But because the doors to these courts were wide open for individual litigants, these courts were called upon to decide thousands of cases annually. Because inconsistencies were inevitable and because it was almost impossible to "keep track" of the supreme courts' case law, the public function (the benefit for future litigants) almost vanished.[60] In Italy it is claimed that *reality has to a great extent detached itself from the theoretical model*.[61] So the model which was proclaimed to have and was intended to pursue a purely public function, in reality (at least in Italy, where no adequate selection mechanisms were – until 2009 – implemented) slid towards serving only the private function.

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[56] The Hammerstein Committee Report, chapter 2.2: "*In view of its function, it should, wherever possible, seek ways of answering legal questions, perhaps more actively than at present. To maintain the authority of its judgments (confining its attention to important cases would help to increase this authority) and also manage its workload, the Supreme Court will have to place greater emphasis on its functions of establishing legal uniformity and developing the law.*"

[57] *Ibidem*.

[58] See e.g. Bobek, 2009, p. 41.

[59] See the Hammerstein Committee Report, chapter 3.1.

[60] Bobek, 2009, p. 41, Jolowicz, 1998, p. 2049.

[61] Comoglio, Ferri, Taruffo, 2011, p. 709.

Exactly the opposite trend can be seen in the countries adhering to the "revision model". Here, rules for restricting access to supreme courts have always existed. But the main criterion for selection was whether a sufficiently high amount in controversy (as defined in the law) was reached. Clearly, such a selection criterion is oriented towards the individual interests of the litigants as it ensures that at least when much is at stake for them, the doors of the supreme court will remain open.[62] But in such system the supreme court often (and routinely) deals with questions that it had already answered on numerous occasions. On the contrary, the criterion of (sufficiently high) amount in controversy prevents a whole range of legal issues of fundamental significance from reaching the supreme court (e.g. concerning consumer contracts) although there is a pressing public interest in ensuring the supreme court's guidance in such cases. True, the criterion is to a certain extent detached from the individual litigants because for richer parties the same amount can be much less significant than for poorer parties. But in general, disputes where a high value is involved are more important *for the parties*, whereas this criterion is irrelevant from the viewpoint of the need to create precedents (in order to ensure the uniformity, clarity, and possibly the development of the law). In the previous system, if a dispute was significantly important for the parties (from the objective viewpoint of the value in dispute), the supreme court had to admit it for deciding although it was of no importance from the viewpoint of future litigants. Nowadays, however, in "revision model" jurisdictions the criterion of the threshold of the value of the claim is increasingly being abandoned (entirely, as in Germany, or at least partially, as in Slovenia) and even more so is the view that at least for certain types of disputes access to the supreme court comes as a matter of right. This amounts to a major paradigm shift. With the introduction of the "leave to appeal system" (promoting the selection criterion of the importance of the case for ensuring the uniformity of case law, the development of law, and offering guidance to lower courts), the public purpose of adjudication by the supreme court, oriented foremost to the effects of its decisions on the future, is clearly emphasised.

But even greater differences than between systems that adhere to the cassation model, on the one hand, and those that follow the revision model, on the other hand, can be detected *within* these two "groups". There is hardly any similarity left concerning the prevailing function of the supreme court between those revision models that have introduced as the criterion for granting leave to appeal the objective importance of the case (e.g. Germany) and those that still exclusively apply the criterion of the amount in dispute (e.g. Montenegro, Hungary).[63] In the former, the public function is emphasised (at least the criterion for selection is

[62] For Slovenia: The Explanatory memorandum to the draft amendment of the Civil Procedure Act, 2008, p. 156.

[63] Combined with a positive or a negative list of types of disputes, where the access is always available.

framed in such a manner), whereas the latter (at least in its practical consequence) exclusively promotes the private function.

Likewise, there are fundamental differences also within the cassation "family". Where adequate filtering mechanisms exist (e.g. Spain[64], Lithuania; Art. 346 CPA-2003, Poland[65]), especially if these are combined with the possibility to omit reasons in decisions which do not manage to "get through the gate" (e.g. France) or where, for whatever reason, the caseload of the supreme court in civil cases remains relatively low (the Netherlands), the precedential function of the supreme court's adjudication remains relevant. Italy, on the contrary (at least until the practical results of the most recent reforms are felt), is another story (see *supra*, chapter 4).

It is clear that the cassation/revision divide no longer provides a reliable tool for categorisation. Especially the (new) Spanish model of *casación*, combining – in an alternative manner – the criteria of (1) the amount in dispute; (2) the general importance of the case, and (3) the violation of constitutional rights[66], comes very close to some revision models (e.g. the Czech[67] or the German models before the 2001 reform). The same is true for the new system of *kasacja* in Poland (which combines criteria of fundamental importance and uniformity of case law on the one hand and of manifest mistake of law and grave procedural error on the other hand)[68], whereas in Bulgaria, criteria for granting leave for cassation appeal under the new Civil Procedure Act are practically identical to the criteria for *Zulassungsrevision* in the German *Zivilprozessordnung* (hereinafter: ZPO) and are exclusively public function oriented.[69]

Another possible point of categorisation concerns whether a legislature has instituted filters to reduce the inflow of cases by virtue of pre-selection (selection "at the door") or regimes of summary dismissals (selection "after the entrance"[70]). The latter used to be more typical for the cassation models and can prove to be quite effective if the power of a summary dismissal includes also the power to omit

[64] See: Esplugues-Mota, Barona-Vilar, p. 212 *et seq.*; A. De la Olivia Santos, *Spanish civil procedure act 2000: flying over common law and civil law tradition*, (in:) J. Walker, O. G. Chase, *Common Law, Civil Law and the Future of Categories*, Lexis Nexis, 2011, pp. 62–74, p. 69 and 72.

[65] See Erecinski, 2005, p. 122.

[66] See Esplueges-Mota, Barona-Vilar, p. 213 *et seq*. It should be noted that in addition to cassacion (which enables correction of *errores in iudicando*) another final appeal (so-called "extraordinary appeal for procedural error" (*El recurso extraordinario por infracción procesal*) is available for correction of *errores in procedendo*. See *ibidem*, p. 210 and J. V. Gimeno Sendra, *The Spanish Civil Cassacion: Perspectives for Reform (abridged version)*, (in:) M. Ortels Ramos, *Los Recursos ante los Tribunales Supremos in Europa*, Valencia: Difusion Juridica, 2008, pp. 153–161.

[67] About the Czech system of "revision" appeal in civil cases see Bobek, 2009, p. 45 *et seq.*

[68] See Erecinski, 2005, p. 122.

[69] O. Kollmann, *Wesentliche Neuerungen der bulgarischen Zivilprozessordnung*, (in:) T. Sutter-Somm, V. Harsagi (eds.), *Die Entwicklung des Zivilprozessrechts in Mitteleuropa um die Jahrtausendwende*, Schulthess, Zurich, 2012, pp. 165–176, p. 175.

[70] E.g. the Netherlands; see The Hammerstein Committee Report, chapter 4.

(substantive) reasons for cases not accepted for a full review. In such case even if criteria for denying (full) access are framed in a manner emphasizing the function of obtaining individual justice (typically, if the appeal is manifestly ill-founded), the possibility to omit reasons (so the individual litigant cannot realize why his appeal is "manifestly ill-founded") inevitably promotes the public function of the supreme court (concerning issue of omitting reasons in the supreme court's decisions denying leave to appeal see *infra* chapter 8).

6. THE IMPORTANCE OF THE SELECTION CRITERIA – BUT HOW ARE THEY APPLIED IN PRACTICE?

An interim conclusion can already be made: no matter what the theoretical or programmatic proclamations are, if the doors to the supreme courts are wide open, this will inevitably result in the fading away of the public function of the supreme court's adjudication.[71] The authority of the supreme court in providing guidance and developing law is undermined if "*too many cases are dealt with and the overall thrust of decided cases is thereby perhaps obscured rather than clarified*."[72] The question of access to the supreme court is a topic for another panel at this conference and I will strive to not trespass into that domain more than necessary. Nevertheless, in order to properly assess the civil law approach to the functions of the supreme court, it is necessary to have a closer look at the methods ("rules for the doorkeeper"[73]) how cases are selected for a full review by the supreme court (and how the rest are treated; and especially whether the supreme court needs to give reasons in cases that it does not select for a full review). This reveals whether private or public functions of the supreme court are given priority.[74]

What makes it all much more complicated is that reliable answers cannot be given on the basis of simply analysing the wording of the selection criteria in the law. What matters is how these criteria are applied in practice. For example the wording of Art. 543 of the German ZPO, which determines selection criteria for granting leave to appeal to the *Bundesgerichtshof*, very clearly emphasises the public function of the Supreme Court: leave is granted if there is a fundamen-

[71] Compare e.g. situation in Poland. In 1996 the legislator introducted the cassation appeal as a purely public-function oriented instrument. But because lack of adequate filtration mechanisms the Supreme Court was not able to fulfil its role and this quckly (in 2000) prompted the legislator to introduce adequate filtration criteria, thus restricting access to the Supreme Court. Only in this manner can the public function of the Supreme Court be effectively fulfilled. Concerning the development of regulation of cassation in Poland see Erecinski, 2005, pp. 121–122.

[72] The Hammerstein Committee Report, chapter 2.2.

[73] Lindblom, 2000, p. 106.

[74] *Ibidem*.

tal question of law or if a decision of the Supreme Court is required in the interest of the uniform application of the law or in the interest of the development of law. It seems that by imposing such selection criteria the legislature openly opted for the public function model; questions put to the Supreme Court should be relevant beyond the limits of the individual case. Legal errors in individual cases cannot constitute questions of fundamental importance (unless perhaps the individual decision itself has far-reaching effects, especially economic ones; but again beyond the parties to the dispute).[75] Only such questions of law that can affect an indefinite number of cases apart from the one at hand can constitute questions of fundamental importance. It should hence be clear that the function of the Supreme Court is not primarily to ensure correct justice in the individual case.[76] In general, the Supreme Court has developed restrictive criteria: errors in individual cases cannot constitute questions of fundamental importance, no matter how grave or obvious they might be.[77] If there is no danger that other courts will follow (a "symptomatic error"), an individual error cannot meet the requirement of preserving the uniform case law. But in fact, if an error is evident, the danger of repetition is, by common experience, even smaller, not bigger.[78]

The view that the main (though not the only) function of the Supreme Court is to ensure the uniformity and the development of law in the public interest and that the goal of guaranteeing a correct and just decision in an individual dispute is only secondary, seems to be a prevailing view in German legal theory today.[79] Nevertheless, the perception that the treatment of *revision* should reconcile the public and private functions of the Supreme Court's adjudication is still very much alive in the German legal community (especially within the Bar and the academia[80]), regarding which also the Constitutional Court has remained quite ambiguous thus far. Fierce criticisms of the new system[81] perhaps caused the *Bundesgerichtshof* to

[75] See T. Domej, *What is an important case? Admissibility of Appeals to the Supreme Courts in the German-speaking Jurisdictions*, (in:) A. Uzelac, C. H. Van Rhee, *Nobody's Perfect*; *Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*, Intersentia, 2014, pp. 275–285, p. 280.

[76] R. H. Stürner, P. L. Murray, *German Civil Justice*, Carolina Academic Press, 2004, p. 386.

[77] *Ibidem*. Compare also Gottwald, *Review appeal to the German Federal Supreme Court after the reform of 2001*, (in:) M. Ortels Ramos, *Los Recursos ante los Tribunales Supremos in Europa*, Valencia: Difusion Juridica, 2008, p. 92.

[78] The decision of the German Federal Court No. XI ZR 71/02 dated 1 October 2002.

[79] Jacobs in: F. Stein, M. Jonas, *Zivilprozessordnung-Kommentar*, 22. Aufl., 2013, Vorbemerkung zu Par. 542–566, No. 8–12, Domej, p. 275, Rosenberg, Schwab, Gottwald, p. 392.

[80] E.g. C. von Mettenheim, *Kant, die Moral und die Reform der Revision*, "Neue Juristische Wochenschrift" 2004, Vol. 57, pp. 1511–1513. Compare Jacobs in Stein, Jonas, 22. Aufl., Vorbemerkung zu Par. 542–566, No. 9, Stürner, Murray, p. 390.

[81] E.g. v. Mettenheim, p. 1511 *et seq.*, for further references see E. Barnert, *Vom Zufall bei der Suche nach Recht, Die Revisionszulassung durch den BGH nach der ZPO-Reform*, (in:) R. M. Kiesow, D. Simon (eds.), *Vorzimmer des Rechts*, Vittorio Klostermann Verlag, 2006, pp. 13–35, p. 19.

come to the conclusion that it is – at least in the most extreme cases – of general importance to correct errors in individual cases. This is achieved in an indirect manner, by making reference to the general interest in safeguarding the uniformity of the case law.[82] Hence, even if the error has no significance beyond the individual case, leave to appeal is granted if it concerns fundamental constitutional guarantees (and it is beyond doubt that the Constitutional Court would quash the judgment if the constitutional complaint were filed[83]) or if the misapplication of the law is so grave and evident that it amounts to judicial arbitrariness (*objektive Willkür*). At least in certain instances (but not all[84]), the so-called *absolute Revisionsgrunde* also form sufficient grounds for granting leave. The *Bundesgerichtshof* allows for such cases to be brought for review since otherwise "the confidence in an efficient court system would be shaken".[85] The most relevant question is how to draw the line between mere obvious errors of law (which is not sufficient for granting leave) and such an error that amounts to arbitrariness (which is a concept developed by the Constitutional Court). A great deal depends on the ability of the Supreme Court's judges to exercise self-restraint; but also on their perception – and the value-laden choice – as to how important the Supreme Court's function of pursuing a just and correct result in the individual case is.

Even if statutory provisions concerning filtering criteria are (almost) identical, the degree to which supreme courts concern themselves with a just or correct decision in an individual case varies considerably between jurisdictions. *Domej* observes that the Austrian *Oberster Gerichtshof* is much more lenient as regards granting such leave in order to dispute errors (without any questions that are relevant beyond the individual case) than the German *Bundesgerichtshof*.[86] On the contrary, an almost identical statutory definition of grounds for leave to appeal have been construed very strictly in Slovenia – even more strictly than in Germany. The legislature openly stated that the main function of the Supreme Court in the new system of revision is public in nature.[87] This is a major paradigm shift: from focusing on the protection of litigants in the individual case, to the promotion of the public interest of ensuring uniform case law and the development of law. This position has been accepted by the Constitutional Court.[88] Certain authors who are sceptical of the shifting of the Supreme Court's function from the individual to the public function, suggested that appeal should also be granted if "*the lower court has clearly erred*" or "*if there are grave consequences for*

[82] Domej, p. 281; Gottwald, P. Gottwald, 2008, pp. 87–116, p. 92 and 105, Stürner, Murray, p. 390.

[83] See eg. BGH, Beschluss v. 1. Oktober 2002 – Az: XI ZR 71/02.

[84] E.g. BGH, Beschluss v. 30. November 2011 – I ZR 26/11.

[85] See Gottwald, 2008, p. 93, Jacobs in Stein, Jonas, 22. Aufl., Par. 543 at 18.

[86] Domej, 2014, p. 281.

[87] See: The Explanatory Memorandum to the draft amendment of the Civil Procedure Act, 2008, p. 156.

[88] Decision of the Slovenian Constitutional Court, U-I-302/09, 12 May 2011.

the applicant" or "*if the applicant's constitutional rights have been violated*".[89] Thus far, however, such views have not been followed by the Supreme Court (and neither have they been endorsed by the Constitutional Court).[90] However, this clear support for a restrictive construction of selection criteria should also be seen against the background that the fundamental importance of the question of law at issue is a general requirement for the selection of an appeal to the Supreme Court where the amount in controversy does not exceed € 40,000 (€ 200,000 in commercial cases).[91] Thus, here another "track" exists for accepting appeals that are, due to the high amount involved, of (presumed) significant importance for the parties.

So, the wording of the German and Austrian ZPO would mislead a reader into believing that an individual error that has no significance beyond the case at hand can never be sufficient for granting leave to appeal. The reader might also be surprised to learn that a (nearly) identical wording of the law can result in significantly different application in practice (Germany, Austria, Slovenia). A similar mistake could be made by simply reading the wording of the Swedish and Finnish laws concerning criteria for granting leave to appeal. Here, although the first criterion is that leave to appeal can only be granted where a point of general interest is involved so the Supreme Court could fulfil its guidance function, the law also provides for additional grounds, such as a "serious violation of procedural law" and (for access to the *Högsta domstolen* in Sweden) a "substantive defect", a "gross oversight or gross mistake"[92] or (in Finland) a "clear misinterpretation of law".[93] This would imply that the individual function of the Supreme Court (coming to expression in the second group of grounds for appeal) is (almost) as important as the public one. But such conclusion would be wrong. The supreme courts in these two countries are very reluctant to grant leave on the basis of these additional criteria and it is clearly emphasised that almost all (in civil matters) cases, where leave to appeal is granted are of a precedential nature.[94]

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[89] See D. Wedam-Lukić, *Ali naj bo dovoljenost revizije v diskreciji Vrhovnega sodišča*, "Pravna praksa" 2007, Vol. 36, p. 86. For similar conclusions, with regard to the situation in the Czech Republic, see: Bobek, 2009, pp. 43 and 48.

[90] For an overview of the case law of the Supreme Court concerning the selection criteria under the new system see M. Orehar-Ivanc, *Institut dopuščene revizije po ZPP-D*, "Pravna praksa" 2009, Vol. 28, p. 22 *et seq*.

[91] A similar situation exists in Switzerland, where the *Bundesgericht* also applies restrictive construction of selection criteria, but these are only relevant in smaller value cases (under CHF 30,000). See Domej, p. 282.

[92] See Svensson, 2000, p. 111.

[93] Haapaniemi, (in:) Ervo, p. 201.

[94] Lindblom, 2000, p. 111, Haapaniemi, (in:) Ervo, p. 201. Probably the same situation exists in Estonia, where the system of the access to the Supreme Court (*Riigikohus*) was introduced under a distinct Finnish and Swedish influence. Therefore it is difficult to conclude merely on the basis of the wording in the law which function of the Supreme Court prevails. The wording of the law reconciles the public ("fundamental importance with respect to guaranteeing legal certainty and

Concerning the "Scandinavian model", it is also interesting to note that very similar statutory provisions defining filtering criteria have been construed differently in the countries applying this model. In Norway, unlike in Sweden and Finland, non-precedential cases were traditionally often accepted for review by the Supreme Court (*Høyesterett*), which was not (in the eyes of the sitting judges) perceived as a "precedent court".[95] This was so in spite of the provision that pursuant to the law, leave could be denied "if the outcome could not be seen to have any impact beyond the actual case".[96] The Supreme Court was, as has been observed, "split in its fulfilment of a private and a public purpose".[97] But since the adoption of a new procedural law in Norway (although with similar wording concerning access to the Supreme Court), it is emphasised that the main function of the Supreme Court is of a precedential nature. Justice in the individual case should be dispensed by the court of appeal.[98]

7. A GENUINE EMBRACE OF THE PREVAILING PUBLIC FUNCTION OF THE SUPREME COURTS OR ONLY A "HALF HEARTED" ONE?

A common characteristic in the civil law jurisdictions is that the reshaping of the role of the supreme courts is not achieved smoothly and without resistance. In Slovenia for example, the new leave to appeal system introduced in 2008 was soon confronted with severe, although often demagogical and populist criticisms.[99] It has been argued that access to justice was unreasonably restricted and that litigants would become exposed to judicial arbitrariness.[100] It is more than

developing a single judicial practice or for the further development of the law") and the private ("evidently applied a provision of substantive law incorrectly or has materially violated a provision of procedural law") function. See the booklet "The Supreme Court of Estonia", Tartu, 2011, available at: http://issuu.com/riigikohus/docs/riigikohus_brozh_eng_veeb (15 May 2014).

[95] Lindblom, 2000, p. 107.

[96] I. L. Backer, *The Norwegian Reform of Civil Procedure*, (in:) Procedural Law, Scandinavian Studies in Law, Vol. 51, Stockholm, 2007, pp. 41–76, p. 55, available at: http://www.domstol.no/upload/DA/Internett/domstol.no/Aktuelt/Backer.pdf (15 May 2014).

[97] Lindblom, 2000, p. 136.

[98] Backer, p. 54.

[99] Typically: P. Feguš, *Revizija in zahteva za varstvo zakonitosti kot izredni pravni sredstvi v teoriji in praksi po novi procesni ureditv*i, "Pravna praksa" 2009, Vol. 47, p. 6: "By introduction of such a system the appellate courts will no longer be subject to a control of the third instance, which leads to arbitrariness and opens gates for an inevitable violation of fundamental rights of the parties".

[100] It is also indicative that some scholars expressed great scepticism as to the separation of the procedure concerning the issue of leave and the issue of merits. They put a question why

evident that a large part of the legal community – especially some practising lawyers, although some academics as well – have difficulty accepting the shift in the supreme court's role from the above-mentioned private purpose to a public one as well as difficulty detaching themselves from the perception that the access to a supreme court is a matter of right, even a constitutionally protected right.[101] A strong resistance of the German bar against the reform of access to the supreme court in also well known.[102] The same resentment towards shifting the role of the supreme court toward the public one was typical for the Czech republic as well.[103]

The legislators in civil law jurisdictions have tackled this opposition in different manners. In some instances the implemented reforms were presented as if they were of a rather technical nature, pursuing merely the goal of saving time and cost and reducing backlogs in supreme courts.[104] It was not openly admitted or perhaps even not considered that the reform might inevitably, at least in practice, shift the prevailing function of the supreme court to the public one. No strategic consideration as to the possible effect of changing ideological paradigm as to the functions of the supreme court was (openly) made. This is perhaps one reason why today it is practically impossible to distinguish clearly between the cassation and the revision model.[105]

As a consequence of a strong opposition to the reform compromises often have to be reached by mixing conditions for admission to the supreme court. In numerous jurisdictions the introduction of the leave to appeal system (focusing solely on

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should the Supreme Court grant leave to appeal against a judgment, which is correct or argued that it was impossible to know if a certain legal question was important unless it was established that the lower court decided on it incorrectly (compare L. Ude, *Reforma revizije in zahteve za varstvo zakonitosti*, "Podjetje in delo" 2007, Vol. 6–7, p. 1085; Wedam-Lukić, 2007, p. 10; V. Rijavec, L. Ude, *Zakon o pravdnem postopku z novelo ZPP-D – Uvodna pojasnila*, Ljubljana: GV Založba, 2008, p. 89). But if one cannot accept that the question whether a particular issue of law has general significance (in the sense of novelty, uniformity in application or complexity) is quite different from the question whether the lower court has decided on it incorrectly in the case at hand, he or she cannot really genuinely embrace the idea that the primary role of the Supreme Court is that of creating precedents.

[101] The same is observed (in general perspective concerning the German legal circle and for central-eastern European countries in transition) by Bobek, 2009, p. 48.

[102] Typically: v. Mettenheim, p. 1511 *et seq.*, who in a striking demagogical manner questions whether the "dark ages" when the "the fate of an individual played no role" were so quickly forgotten in Germany and whether the Supreme Court has no problems in accepting that it is becoming an "instrument against the morality".

[103] See Bobek, 2009, p. 48.

[104] Jolowicz, p. 2074.

[105] The perception that the recourse to the supreme courts can equally serve both the private and the public function and that the only question is how these purposes are best and most economically achieved is wrong. Rather, as Jolowicz (*ibidem*) contends, it should be openly considered which of those purposes, not easily reconciled with one another, should predominate before tackling the detailed methods of implementation of reform.

the public interest purpose of deciding legal issues of fundamental importance, unifying case law, and developing the law) was not implemented in a pure form. The system of the threshold of the value of the claim as an additional filtering mechanism is partially retained in some jurisdictions (e.g. all countries of former Yugoslavia, but also in Spain and Switzerland). If this threshold is reached access to the Supreme Court becomes a matter of right. This should not be confused with the systems which apply the threshold of the amount of controversy but in the opposite way: namely that the access to the supreme court is *never* admissible (regardless of the public interest involved) if the case does not reach a sufficient amount, e.g. in Austria (Par. 502/2 ZPO; € 4,000) and in Lithuania (Art. 341/2 CPA; 5.000 Litas; ca. € 1,400).

The partial retainment of the value of the claim criterion shows that the idea of the paradigm shift from supreme courts pursuing individual interests to pursuing a public purpose has only been embraced in a half-hearted manner. The lower the threshold where the revision becomes a matter of an automatic right is set, the much more important in practice remains the private function of the supreme court. Such is the case e.g. in Switzerland (CHF 30,000; ca. € 24,000[106] and especially in Bosnia where this threshold is set to such a low level (€ 5,000) that realistically this does not really amount to any significant reform concerning shifting the focus of the Supreme Court from a private to a public purpose. On the other hand, in systems with a high threshold (e.g. Slovenia – € 40,000 for ordinary and € 200,000 for commercial litigation, Serbia – € 100,000 for ordinary and € 300,000 for commercial litigation, Spain – € 150,000), the leave to appeal system (based on pursuing the public purpose of judicial decision-making) is the main feature of access to the supreme court and the criterion of the value of the claim has become merely auxiliary. In my opinion it would be much better if the criterion of the amount in dispute were abolished entirely. The existence of two parallel systems – namely, that in principle revision is admissible only if leave to appeal is granted (under the precondition that the case raises issues of general importance), but that in cases with a high amount in dispute revision is admissible *per se* – leaves the impression that the doors of the supreme court are left wide open only for rich parties and large commercial companies (it will usually be their disputes that will reach a high threshold concerning the value of the claim).[107] Furthermore, the partial retainment of the amount in dispute as a criterion for the admissibility of access to the supreme court creates the erroneous impression in public opinion that the essence of the latest reform is merely the raising of the monetary threshold for the admissibility of a revision.[108] Most importantly, if supreme court

[106] About the Swiss system, see Domej, p. 278.

[107] The same is observed, commenting on recent developments in Germany, by Gottwald, 2008, p. 89.

[108] Compare the decision of the Serbian Constitutional Court No. IUz-2/2010 dated 14 March 2013.

judges need to deal with cases which reach them through two entirely separate "tracks" – one pursuing the public purpose and the other pursuing the private interest – this makes it very difficult for them to properly assess what their actual task is. In addition the problem remains how to treat cases of a non-pecuniary nature.

Some legislators who strive to balance private and public functions of the supreme court use a different method. Besides public function oriented criteria for admission (e.g. fundamental legal significance or need to preserve or achieve uniformity of case law) they provide for another basis for access, which is purely private in purpose – such as "clear contradiction with the substantive law" in the Czech Republic.[109] It is claimed that such approach never works as the supreme court is "soon swamped with revision of individual cases and the public purpose becomes submerged".[110] A similar approach prevails in Poland, where the cassation appeal must be accepted in case of a manifest mistake of law or a grave procedural error.[111] The considerations concerning balancing private and public function prompted the Dutch legislator to introduce Section 81 of the Judiciary (Organisation) Act which entitles the *Hoge Raad* to dismiss the case summarily (with simplified reasons) if it finds that the the appeal (1) cannot "result in cassation" (i.e. if there is no violation of substantive or procedural law) and (2) it does not raise any legal issues that need to be addressed in the interest of legal uniformity or the development of the law. Thus only if both conditions – one relating to the goal of ensuring a correct outcome of individual case and the other relating to the public interest – are fulfilled the supreme court may avail itself of this simplified "track" of disposing of the case.

8. THE STANCE OF THE CONSTITUTIONAL COURTS TOWARDS THE PROMOTION OF THE PUBLIC FUNCTION OF THE SUPREME COURTS: WILL THEY SUPPORT OR FRUSTRATE IT?

Sometimes the legislator ultimately succeeds in emphasising the public function of the supreme court. Nevertheless the opponents to the reform sometimes still find strong and powerful allies in the constitutional courts. Especially the Czech and the Hungarian constitutional courts prevented the public function of the supreme court to prevail. The Hungarian constitutional court held that the new system of the final appeal ("revision") in the Hungarian Civil Procedure Act, which introduced public function oriented selection criteria, did not conform

[109] See Bobek, 2009, p. 48.
[110] *Ibidem*.
[111] See Erecinski, 2005, p. 122.

with the constitution.[112] It held that the private purpose of the supreme court must be safeguarded. Therefore in cases of a violation of the law an individual litigant may not face additional "hurdles" (such as examination whether his case has any fundamental importance from an objective point of view) concerning access to the supreme court.[113] In very rigid terms the Constitutional Court held that the regulation where "*the violation of the law is not sufficient for admissibility of the final appeal (revision) is contrary to the rule of law. From the constitutional point of view an assertion of a violation of law should be sufficient for admissibility of any legal remedy*."[114] When such concept was imposed, the legislator had no choice but to abandon public purpose oriented selection criteria. The only available criteria for limiting access to the supreme court (since 2012: *Kúria*) relate to the private function of the supreme court (predominantly the threshold of amount in controversy; currently HUF 3,000,000; ca € 10,000).[115] In this manner the Hungarian system of access to the *Kúria* effectively became a "legal backwater". It is one of the very few civil law systems where the private function is clearly emphasised and no effective instruments are in place that would promote the public function of the supreme court (at least not insofar as individual appeals in pending cases are concerned[116]).

Although in much less rigid terms, but nevertheless almost equally effectively also the Czech Constitutional Court frustrated the attempted legislative reform toward predominantly public function of the supreme court. The issue was not directly whether new criteria for leave to appeal, which are (at least partially) oriented toward public function of the supreme court are admissible *per se*. Rather it was the question whether the supreme court's rulings denying leave should contain full reasons as to why the statutory conditions for the leave were not fulfilled. Usually the introduction of the "leave to appeal" system goes

[112] Decision of the Hungarian Constitutional Court No. 42/2004 (IX.9). Quoted in: M. Kengyel, V. Harsagi, *Civil Justice in Hungary*, Nagoya University Comparative Study of Civil Justice 2009, Vol. 4, p. 173.

[113] Decision of the Hungarian Constitutional Court No. 42/2004 (IX.9): "additional grounds apart from the violation of a legal rule affecting the case on the merits restrict the function of remedy significantly or extinguish it". Quoted in: Kengyel, Harsagi, p. 173.

[114] Decision of the Hungarian Constitutional Court No. 42/2004 (IX.9); quoted by K. Rozsnyai, *Richterliche Unabhängigkeit und die Instrumente zur Wahrung der Rechtseinheit*, Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae – Sectio Iuridica LII: (52), pp. 179–192 (at p. 188), available at: http://www.ajk.elte.hu/file/annales_2011_17_Rozsnyai.pdf (16 May 2014).

[115] There exists also a "negative" list enumerating the causes excluding review whereas in certain types of disputes access to the supreme court is only possible if the first instance and the appellate court's judgments diverge. See e.g. Kengyel, Harsagi, p. 177.

[116] On the contrary the *Kúria* has far reaching powers – and uses them on regular basis – to issue binding interpretational statements (so-called "*uniformity decisions*"), but these are not adopted in the course of a pending individual case. See e.g. the official website of the *Kúria*: http://www.kuria-birosag.hu/en. See also M. Dezső, *Constitutional Law in Hungary*, Kluwer, 2010, p. 79.

"hand in hand" with the rule that for those cases where the application for leave to appeal is dismissed, the court does not need to give substantial reasons for this dismissal. Most of the goals that the leave to appeal system pursues could not be achieved if the court had to provide reasons in its decisions denying leave – neither the goal of reducing backlogs in supreme courts, nor the goal that supreme court judges should fully devote their capacities to deciding and diligently reasoning cases of general importance *pro futuro*, nor the goal that the amount of "output" of the highest courts should be kept relatively low. But the Czech Constitutional Court (just like its counterparts in Armenia[117] and Poland[118]) did exactly that: it imposed the requirement that the decisions of the supreme courts denying leave to appeal need to contain substantive reasons. In addition to invoking arguments concerning prevention from arbitrariness and respect for the right to be heard the Czech Constitutional Court also stated that the omission of reasons in the supreme court's decisions rejecting leave applications negated the private purpose of the appeal to the supreme court.[119] It stated that the individual role cannot be downgraded merely to the position of "a supplier of material to the Supreme Court". In this manner the Czech Constitutional Court most clearly showed that by opposing the omission of reasons in decisions denying leave to appeal it actually opposed the very essence of shifting the role of the supreme court from private to the public one.[120]

It seems that both the Hungarian and the Czech constitutional courts were under influence of the (older) jurisprudence of the German Constitutional Court, which also clearly emphasized the importance of preserving the private function (*Einzelfallgerechtigkeit*) of the *Revision* (final appeal to the Supreme Court).[121] There the German Constitutional Court stressed that the individual function of the Supreme Court is not merely subordinate to its public function. Nevertheless it must be taken into account that this decision related to a specific model applicable in the German ZPO at that time (concerning cases exceeding the threshold of DEM 40,000), where the *Revision* was in principle admissible *per se*, but the Supreme Court was nevertheless *entitled* (but not *obliged*!) to reject it if the case did not have any fundamental significance. This decision did not prevent the German legislator to (at least in practical effect) even more clearly emphasise the public function of the Supreme Court (the 2001 reform – see *supra*, chapter 6).

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[117] The Decision of the Armenian Constitutional Court of 9 April 2007, cited and summarized in the judgment of the ECtHR in the case *Nersesyan v. Armenia*, 15371/07 of 19 January 2010.

[118] The judgment of the Polish Constitutional Court of 31 March 2005 (SK 26/02), cited and summarized, *inter alia*, in the judgment of the ECtHR in the case of *Plechanow v. Poland*, 22279/04 of 7 July 2009. Concerning the emphasising of the public (precedential) role of the Supreme Court in Poland after the 2000 reform see: Erecinski, 2005, p. 125.

[119] Judgment of the Constitutional Court of the Czech Republic of 11 February 2004, Pl. US 1/03, Sb.n.u.US, sv. 32, č. 15, str. 13, summarized and discussed by Bobek, 2009, p. 50.

[120] *Ibidem*.

[121] A plenary decision No. 1PBvU 1/79 dated 11 July 1980 (especially Para. 40–41).

Unlike the Hungarian Constitutional Court the German Constitutional court does not consider such filtering criteria as denying the private function of the Supreme Court.[122] Neither does it prevent the Supreme Court omitting reasons in cases not selected for a full review.[123]

The rule that the Supreme Court does not need to reason a decision rejecting a request for leave to appeal has been the subject of numerous challenges before the Slovenian Constitutional Court. Nevertheless, this court chose to provide a very strong support for the reform. It rejected the view that the omission of reasoning in the Supreme Court's rulings denying leave to appeal amounts to a violation of the right to be heard or the requirement that judicial decisions should not be arbitrary.[124] It obviously does not embrace the ECtHR's understanding of "higher standards of protection."[125] In order to reach this result, the Constitutional Court first thoroughly explained that the goal of the reform was to strengthen the public purpose role of the Supreme Court. Thereby, the Constitutional Court did not shy away from explicitly stating that this role consists in creating precedents.[126] The Constitutional Court also affirmed that the omission of reasoning in decisions rejecting leave to appeal is actually an inherent element of the new system. To require otherwise would thus amount to a frustration of the reform. Therefore the Slovenian Constitutional Court in my opinion correctly concluded: "*The requirement to provide reasoning on the merits of orders rejecting leave to appeal would undermine the purpose of the regulation of the appeal to the Supreme Court and consequently the significance of that Court would be weakened*."[127] Only in this manner can the goal of reducing the workload of supreme court judges be achieved. This is a precondition for fulfilling the expectation that the Supreme Court's judges will fully concentrate their research, discussions, and deliberations and thus create well and thoroughly reasoned judgments in cases

[122] Order No. 1 BvR 864/03 dated 8 January 2004. Available at: http://www.bundesverfassungsgericht.de/entscheidungen/rk20040108_1bvr086403.html.

[123] *Ibidem*.

[124] Decision of the Slovenian Constitutional Court, U-I-302/09, 12 May 2011.

[125] While the ECtHR has acknowledged that the supreme court is not required to give reasons for a decision not to grant leave to appeal (e.g. *Nerva v. UK*, 42295/98, 11 July 2000, Øvlisen v. Denmark, 16469/05, 30 August 2006, *Persson v. Sweden*, 27098/04, 27 March 2008), it nevertheless suggested on a couple of occasions that if national legislation requires otherwise this is an expression of "higher standards of protection" (*Nersesyan v. Armenia*, No. 15371/07, 19 January 2010, *Wnuk v. Poland*, 38308/05, 1 September 2009).

[126] Decision of the Slovenian Constitutional Court, U-I-302/09, 12 May 2011. In summarising the goal of the reform, the Slovenian Constitutional Court went on to establish the following: "When the Supreme Court takes positions on relevant legal issues within the scope of interpretation it has as the supreme authority of the third branch of power, it co-creates the law. It co-shapes the criteria that in similar cases in the future will serve as *ex ante* guidelines for courts and the addressees of legal rules in general. In such a manner it enhances the predictability of legal rules and, by extension, legal certainty."

[127] *Ibidem*.

which they have accepted for review.[128] Furthermore the option of only stating the formal reasoning of orders dismissing leave to appeal is necessary to ensure the precedential dimension of the Supreme Court's mission. What is crucial, as the Constitutional Court reiterates, is that manageability and clarity with regard to the number of cases are inherent to the nature of precedent.[129] Only if the number of cases is manageable and it is possible to maintain an overview in terms of substance is it reasonable to expect that the cases will indeed serve as *ex ante* guidelines. The Constitutional Court further suggested that the omission of reasoning also explicitly shows that a decision of the Supreme Court to deny leave to appeal in a particular case should not be considered of any significance as to the merits of the case.[130]

The quoted decision of the Slovenian Constitutional court clearly demonstrates that a system that allows for the omission of reasoning in supreme court decisions rejecting leave to appeal is not only constitutionally acceptable, but also preferred or even necessary – but only if one is willing to accept that the Supreme Court can (and should) better perform its tasks on the level of creating precedents and thus of pursuing the public purpose of judicial decision-making.[131]

The new system of leave to appeal, based on selection criteria based in the need to ensure uniformity of case law and the development of law in the public interest has been scrutinised also by the constitutional courts in Croatia and in Serbia. The Croatian Constitutional Court declared the implemented reform unconstitutional. However it based its holding on a different reason – not for the reason of promoting private function of the Supreme Court. On the contrary it emphasised the Supreme Court's public function (ensuring uniformity of case law), it just did not consider the implemented reform not sufficiently effective.[132] A decision whether to grant leave for a further appeal on points of law was namely exclusively left to appellate courts and this was, in the view of the Constitutional Court, defective.[133] The Constitutional Court thereby feared that if the Supreme Court does not sufficiently fulfil its function in safeguarding uniformity of case law, this burden would fall upon the Constitutional Court itself. Following the decision of the Constitutional Court the legislator reacted by shifting the power to grant leave to appeal from the appellate courts to the Supreme Court. The Serbian Constitutional Court also backed the reform, oriented toward emphasising more the public role of the Supreme Court. It rejected the view that the access

[128] *Ibidem*.

[129] *Ibidem*. See also the Constitutional Court's decision No. Up-349/11-7 of 14 February 2013.

[130] This idea was developed already long ago by the US Supreme Court in the famous *Missouri v. Jenkins*case; (93-1892) 515 US 70 (1995).

[131] In this sense (and rejecting the opposite views of the Czech Constitutional Court): Bobek, 2009, p. 49 *et seq*.

[132] The decision of the Croatian Constitutional Court No. U-I-1569/2004 dated 20 December 2006.

[133] *Ibidem*.

to the Supreme Court is a matter of constitutionally protected right as well as the view that following the reform the access became excessively restrictive and that litigants will be exposed to judicial arbitrariness.[134]

The concern expressed by the Croatian Constitutional Court that limiting access to the Supreme Court should not result in a bigger caseload falling on the Constitutional Court is perhaps indicative. If a constitutional court itself has no formal filtration device for cases brought before it (including powers to omit reasons in some of its rulings), it would hardly allow the courts below to filter their dockets.[135] If, on the other hand, the constitutional court itself is equipped with similar filtration mechanisms (such as the Slovenian one), its positive attitude toward similar instruments in the Supreme Court is not surprising. But a hesitation of certain constitutional courts to support the changing function of the supreme court is linked also to another – by far more complex – issue. If the constitutional court perceives 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 adjudication.[136] In the pages that follow I therefore turn my attention to the relation between constitutional and supreme courts.

9. HOW "SUPREME" IS "SUPREME"?: THE RELATION BETWEEN CONSTITUTIONAL AND SUPREME COURTS

9.1. LEGISLATIVE CONSTITUTIONAL REVIEW AND CONSTITUTIONAL COMPLAINTS AGAINST JUDGMENTS

There is a wide spectrum of approaches towards legislative constitutional review in civil law jurisdictions. In some civil law jurisdictions there are no constitutional courts. But this comes as a result of two entirely different reasons: either because the legislation cannot be subject to any kind of constitutional review once it comes into force (e.g. in the Netherlands, where the Constitution explicitly

[134] The decision of the Serbian Constitutional Court No. IUz-2/2010 dated 14 March 2013. The reasoning of this decision is somewhat weak though and when it comes to comparative arguments downright erroneous. It is e.g. stated that the threshold of the amount in controversy in the German ZPO is € 20,000 (obviously the Court was not aware of the 2001 ZPO reform in Germany) whereas in the Austrian ZPO supposedly € 5,000 (the Court misunderstood that this is the threshold *under* which the revision in Austria is always inadmissible, not the threshold *above* which it becomes available as a matter of right).

[135] Bobek, 2009, p. 54.

[136] See *ibidem*.

imposes a ban on constitutional review[137]) or because the supreme court itself also functions as the court of constitutional review (e.g. in Estonia[138]). In some countries (e.g. Sweden, Finland) a decentralised system applies and all courts can assume the role of constitutional courts, meaning that they can exercise constitutional review of legislation.[139] There are also systems where the competence to exercise legislative review is split between ordinary courts and the constitutional court.[140] On the other hand, there are also fundamental differences between jurisdictions where constitutional courts do exist. They can exercise either *a priori* review of laws, before they enter into force (this has traditionally been the case with the French *Conseil Constitutionnel*[141]) or *a posteriori* review only concerning laws already enacted (e.g. Austria). Concerning the major issue of *access*, there are two different types of constitutional review: "concrete judicial review", originating from pending individual cases (upon the request of a court), and "abstract judicial review", not linked with any case.[142] As far as "concrete judicial review" is concerned, in some countries only the highest courts are authorised to request such a "preliminary ruling" by the constitutional court (e.g. Greece). On the contrary, in Slovenia[143], for example, every court has to take into consideration all questions of constitutional law and a court is obliged to refer a question to the constitutional court if it deems a law which it should apply to be unconstitutional (Art. 156 of the Constitution). The mere doubt is not sufficient.[144]

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[137] M. Adams, G. van der Schyff, *Constitutional Review by the Judiciary in the Netherlands, A Matter of Politics, Democracy or Compensating Strategy?*, ZaöRV 66 (2006), pp. 399–413 http://www.zaoerv.de/66_2006/66_2006_2_a_399_414.pdf.

[138] About the constitutional review role of the Estonian Supreme Court (*Riigikohus*) see: http://www.riigikohus.ee/?id=186 (14 May 2014).

[139] Lindblom, 2000, p. 92; S. Lind, *Constitutional review of legislation in the Nordic countries: the example of Finland*, Juridica, 2001, Vol. 6, pp. 393–398.

[140] In Portugal, ordinary courts can refuse to apply a law which they deem unconstitutional but this non-application is valid only in the specific case and the law as such remains valid. However, once a law is found unconstitutional three times by the ordinary courts, the public prosecutor's department may request the Constitutional Court to annul the law with general effect. See the *Study on individual access to constitutional justice* – Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e.

[141] But since 2010 the *Conseil Constitutionnel* also exercises the *a posteriori* review upon motion of individual citizens party to a lawuit.

[142] Gabriele Kucsko-Stadlmayer, Constitutional review in Austria, Traditions and New Developments, International Conference dedicated to the 20th anniversary of the Constitutional Court of Romania, http://193.226.121.81/events/conferinta/kucsko.pdf.

[143] Art. 156 of the Slovenian Constitution: "If a court deciding some matter it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision."

[144] See the *Study on individual access to constitutional justice* – Adopted by the Venice Commission at its 85th Plenary Session, *op.cit.*, Par. 62.

There are several sets of problems concerning the relationship between the supreme court and the constitutional court. But in the context of this paper – determining the functions of supreme courts in light of individual appeals – the question of the supreme court's (lack of) powers to carry out legislative review is not significant. By far the most critical point concerns the question of whether individual litigants can have the judgment reached in their case reassessed by the constitutional court. In certain jurisdictions it is possible to file a constitutional complaint (*Verfassungsbeschwerde* in Germany, *recurso de amparo constitucional* in Spain) against individual acts (judgments). The German system has been used as a model for the introduction of this legal instrument in numerous post-communist countries since the early years of transition (e.g. Slovenia, Croatia, the Czech Republic, since 2002 Slovakia[145], and since 2012 Hungary[146]). An individual may (after the exhaustion of all available remedies[147]) appeal against a judgment which (allegedly) violates his fundamental rights.[148] This should be contrasted to systems, such as in Poland, where an individual constitutional complaint is possible, but only against a norm (a legislative act).

9.2. A CONSTITUTIONAL COMPLAINT THAT CHALLENGES A JUDGMENT – AN INEVITABLE SOURCE OF CONFLICT BETWEEN THE CONSTITUTIONAL COURT AND THE SUPREME COURT

The introduction of individual constitutional complaints against the judgments of the regular judiciary has inevitably given rise to questions about the distribution of power at the supreme judicial level.[149] If a constitutional court has the power to review judgments, tension and even conflicts between the ordinary judiciary, in particular the supreme court and the constitutional court, are inevitable. The relation between the constitutional court and the ordinary courts is less conflict-ridden in systems featuring normative constitutional complaints where

[145] Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation*, Leiden: Martinus Nijhoff Publishers, 2011, p. 196.

[146] T. Pásztor, *Constitutional complaints*, The Lawyer Briefing, 28 May 2012, available at: http://www.nt.hu/_userfiles/Constitutional_Complaints_Hungary_2012.pdf.

[147] A doctrine prevails that legal remedies have to be exhausted formally as well as substantively. The latter means that the complainant has to assert a violation of human rights already in the proceedings before the court. See e.g. the ruling of the Slovenian Constitutional Court No. Up-678/09 dated 20 October 2009.

[148] See e.g. K. Prokop, *Polish Constitutional Law*, Bialystock Law Books, 2011, p. 163.

[149] L. Garlicki, *Constitutional courts versus supreme courts*, "International Journal of Constitutional Law" 2007, Vol. 5(1), Oxford University Press, Oxford, p. 45.

the constitutional court does not directly review the application of a normative act by the ordinary court (e.g. Poland).[150]

In theory, there should not really be any significant overlapping between the functions of the constitutional court and the supreme court or tension concerning the delimitation of their respective powers. At least this should not happen to a greater extent than in the countries where constitutional courts exercise merely a normative review of legislation (thus reviewing the abstract content of the statutes themselves). The general idea of delimitation appears relatively simple. Constitutional courts should, when examining constitutional complaints against judgments, restrict their review exlusively to infringements of constitutional rights. Questions concerning mistakes in interpretation and the application of norms which do not amount to violations of the constitution should be left out of the scope of the constitutional court's review. The constitutional court should restrict itself to reviewing the constitutionality of the application of statutes. On the contrary, the application of ordinary legislation should fall within the exclusive province of the ordinary courts.[151] Experience, however, has shown that constitutional courts are unable (or perhaps unwilling) to maintain a firm delimitation between the functions of the constitutional court and those of the supreme court.[152] They are unable to define what is a question of constitutional significance, i.e. to clearly define the scope of their own review.[153] The problem becomes exacerbated due to the "judicialisation of constitutions" (the constitution becomes a legal instrument directly applicable before all courts) and due to the "constitutionalisation" of specific areas of law, typically civil procedure law (meaning that laws are applied and interpreted on the basis of constitutional principles).[154]

The starting point that the constitutional court is only authorised "to assess whether the courts have, by their decisions, violated human rights and fundamental freedoms"[155] does not yet solve the problem. It is equally insufficient to state that the constitutional court should only look into "constitutional matters", leaving the interpretation of ordinary law to the general courts.[156] The question remains how to distinguish between a violation of statutory law on the one hand, and violations of constitutional rights on the other. The dilemma is linked to the phenomenon of the "constitutionalisation of procedural law" which has prompted some

[150] See also the *Study on individual access to constitutional justice* – Adopted by the Venice Commission at its 85th Plenary Session, *op.cit.*, Par. 210.

[151] Garlicki, 2007, p. 46.

[152] Garlicki, 2007, p. 44.

[153] Bobek, 2009, p. 54.

[154] Garlicki, 2007, p. 65.

[155] See e.g. the ruling of the Slovenian Constitutional Court No. Up-670/05-6 dated 22 September 2006.

[156] See the *Study on individual access to constitutional justice* – Adopted by the Venice Commission at its 85th Plenary Session, *op.cit.*, Par. 211.

authors to state that "virtually everything can be a constitutional question"[157] or that the identification of constitutional matters can be difficult "where any procedural violation by the ordinary courts could be seen as a violation of the right to a fair trial."[158]

But the latter views cannot be maintained. The constitutional court's relation to the supreme court has to be determined in clear and predictable terms. The ordinary courts and the supreme court as their highest proponent must be entrusted with the "final word" on binding interpretation of non-constitutional law; the Constitutional Court should not be able to intervene here. It should not become a "super-supreme court" (*Superrevisionsgericht*) or "a fourth instance" within the regular judiciary. But certainly the problem remains how to define the limit between a violation of constitutional law and of ordinary law.

9.3. THE SCHUMANN FORMULA – A RELIABLE DELIMITATION BETWEEN THE FUNCTIONS OF THE CONSTITUTIONAL COURT AND THE SUPREME COURT

Undoubtedly, it is a difficult task to establish the proper scope of the constitutional court's review in the framework of constitutional complaints against the judgments of the ordinary judiciary. Nevertheless, reliable methods for clearly separating questions of "specific constitutional law" (which fall within the scope of the constitutional court's review) from questions concerning the application of ordinary legislation (where the "final word" is reserved for the supreme court) do exist. The so-called *Schumann formula* offers a solution that is at the same time logically consistent and reliable. When an ordinary court adopts an interpretation of a statutory law, and the judgment based on that interpretation is challenged in the constitutional court, the constitutional court judges should ask themselves the following question: If the decision (the interpretation of legislation) of the ordinary court that is challenged before the constitutional court could be explicitly transformed into a piece of legislation and this legislation would be in conformity with the constitution, then the decision of the ordinary court is also in conformity with the constitution. If not, the decision of the ordinary court violates the constitution.[159] It is hence irrelevant whether the inter-

[157] See Bobek, 2009, p. 54 (quoting a personal interview with a member of the Czech Constitutional Court).

[158] See the *Study on individual access to constitutional justice* – Adopted by the Venice Commission at its 85th Plenary Session, *op.cit.*, Par. 210.

[159] R. Arnold, *The decisions of the German Federal Constitutional Court and their binding force for ordinary courts*, paper presented at a Conference "Interrelations between the constitutional court and ordinary courts", Baku, Azerbaijan, 9–10 November 2006 by the Venice Commission, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2006)047-e.

pretation of legislation adopted by a regular court is correct (i.e. in conformity with the law), it is decisive only whether the interpretation is in conformity with the constitution. And if the legislature could also adopt such interpretation and transform it into a specific legislative rule without violating the constitution, the same is true for the judge as well. The formula is logical. It basically says that the judge can do (insofar as the constitutional guarantees are concerned) what also the legislature could do; the constitutional court may not interfere in the ordinary judiciary's interpretation of laws if this interpretation remains within the limits of what is constitutionally admissible. The formula is coherent; the method of review of the constitutional court remains essentially the same irrespective of whether it is a piece of legislation that is challenged or the manner the legislation was interpreted by the ordinary courts. The formula acknowledges that a constitutional complaint against a judgment is inherently linked to the original jurisdiction of the constitutional court that relates to the review of the constitutionality of the legislation. It is not sufficient if the piece of legislation as such is in conformity with the constitution if it is interpreted in a manner that makes it unconstitutional in practice The results reached pursuant to this formula are predictable – at least to the same extent as the normative legislative review of the constitutional court is predictable. Moreover, the formula to the greatest extent possible maintains a clear separation between the scope of the constitutional court's review and the domain reserved for appellate review within the ordinary judiciary. The constitutional court is only entitled to review whether the ordinary court, via the interpretation, "filled" the legislation with content not in conformity with the constitution. On the contrary, the question whether the courts applied the legislation correctly falls within the exclusive province of the appellate courts and the supreme court.

The jurisprudence of the German Constitutional Court tacitly[160] and the Slovenian Constitutional Court explicitly[161] accept the Schumann formula as the standard method of limiting the scope of their review of judgments. When deciding on a constitutional complaint, the Slovenian Constitutional Court limits itself to examining whether the challenged decision is based on some legal standpoint that is unacceptable from the point of view of the protection of human rights, i.e. whether in the course of interpretation of ("ordinary") law the significance of a fundamental right has been misjudged. In constitutional complaint proceedings, the Constitutional Court does not review whether the court has established the factual situation correctly, or whether it has correctly applied procedural and

[160] Garlicki, 2007, p. 52.

[161] The Slovenian Constitutional Court (No. Up-1292/08-17 dated 10 September 2009) explains the Schumann formula by stating that a human right is violated if the judicial decision is based on a position due to which the Constitutional Court would annul a statute with the same substance. Thereby the Constitutional Court uses the same method as in the event of a review of the conformity of legislation with the Constitution.

substantive law. Also the German Constitutional Court merely performs control over constitutional justifiability[162], examining whether "a specific constitutional law" has been violated.[163]

9.4. AN ADDITIONAL POSSIBILITY FOR THE CONSTITUTIONAL COURT TO INTERVENE: JUDGMENTS FLAWED BY ARBITRARINESS OR OTHERWISE MANIFESTLY UNREASONABLE

Although it is reliable and logically coherent, the Schumann formula has failed to find consistent implementation in the practice of the constitutional courts. The German Constitutional Court seems to delineate the limits of review mostly on a case-by-case basis and uses more vague, flexible terms to indicate the limit between violation of law and of the constitution.[164] In principle, the Slovenian Constitutional Court adheres to the Schumann formula as the method of review more strictly. But the main problem is that all constitutional courts have "invented" other ways to exercise broader review of judgments. It is especially the "doctrine of arbitrary judgments" that has caused the most uncertainty concerning the delimitation between the constitutional and supreme courts. As explained above, the constitutional court's hands are tied when a decision is otherwise erroneous, however still within the limits of results that are admissible from the viewpoint of the constitution. But the situation changes if the challenged judgment is "*so evidently erroneous and without sound legal reasoning that it can be considered arbitrary.*"[165] This is an additional method of review, besides the one based on the Schumann formula. It enables the constitutional court to venture deeply into the sphere of the correct application of "ordinary" law, provided that the degree of error is grave. If the application of the law is obviously incorrect then the court decision could be reproached for judicial arbitrariness and consequently lead to an unfair trial. This additional "track" for the review of judgments has been implemented by all constitutional courts vested with the power to exercise a review of judgments (e.g. the German,[166]

[162] O. Klein, *The Federal Constitutional Court's relation to the German ordinary courts, paper presented at conference Interrelations between the constitutional court and ordinary courts*, Baku, Azerbaijan, 9–10 November 2006, European Commission for Democracy Through Law (Venice Commission); available at: ehttp://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2006)045-e (15 May 2014).

[163] Arnold, 2006, p. 4.

[164] *Ibidem*.

[165] See e.g. the decision of the Slovenian Constitutional Court No. Up-13/99-24 dated 8 March 2001.

[166] See e.g. judgment No. 1 BvR 735/09 dated 12 October 2009. The judgment is arbitrary if it is not legally justifiable under any conceivable aspect and therefore imposes the conclusion that it is based on irrelevant considerations. Erroneous application of law alone does not make a court's decision arbitrary. Arbitrariness occurs if an evident legal provision was overlooked or if the court

Slovenian,[167] Croatian[168], and Czech[169] courts). The concept of arbitrariness has been increasingly applied also by the European Court of Human Rights.[170]

There can be no reliable formula as to how to differentiate between cases where the challenged judgment is objectively defective under the standards of ordinary law (this alone does not constitute grounds for the constitutional court to intervene) and cases where the law was applied manifestly ("flagrantly", "evidently", "incomprehensibly") incorrectly or a judgment is based on an "objectively untenable and therefore arbitrary interpretation the law"[171] (or even the finding of facts[172]) which enables the constitutional court to intervene under the rubric of "arbitrariness". Hence, this inevitably creates a broad area of uncertainty for the litigants and an equally broad area of possible conflict between the constitutional court and the ordinary courts (especially the supreme court). At the end of the day, it all depends on whether the constitutional court's judges have enough sense of necessary self-restraint. Otherwise the delimitation between the role of the constitutional court and the supreme court becomes totally blurred and the limits of the constitutional court's constitutional role are transgressed.

In this regard there are considerable differences between constitutional courts. The German Constitutional Court seems to exercise a sufficient degree of self-restraint and merely exceptionally quashes judgments for reason of arbitrariness (*objektive Willkür*).[173] On the other side of the spectrum, the Czech Constitutional Court has become "famous" for venturing deeply into the domain of the ordinary judiciary.[174] The Slovenian Constitutional Court, somewhere in the middle, in general exercises an adequate degree of self-restraint. For example, it holds that

misunderstood the norm in a flagrant way or applied it in a manner that cannot be considered legally justifiable pursuant to any conceivable aspect.

[167] See e.g. the decision No. Up-270/01 dated 19 February 2004.

[168] See e.g. the decision No. U-III-4611/2008 dated 12 May 2011. See also D. Ljubić, *Granice ustavnog sudovanja iniciranog ustavnom tužbom*, "Zbornik radova Pravnog fakulteta u Splitu" 2013, No. 1, pp. 159–176.

[169] See e.g. judgment No. II. ÚS 1009/08 dated 8 January 2009: "*it is not every violation of the norms of ordinary law, in their application or interpretation, which entails a violation of an individual's fundamental rights. Nevertheless, the violation of certain of the norms of ordinary law in consequence of arbitrary conduct (carried out, for ex., by the failure to respect a peremptory norm) or in consequence of interpretation which is in extreme conflict with the principle of justice, might be capable of encroaching upon an individual's fundamental rights or freedoms*."

[170] See e.g. Ebahattin Evcimen v. Turkey, Application No. 31792/06 dated 23 February 2010 and M. and S. against Italy and the United Kingdom, 2584/11 dated 13 March 2012.

[171] Compare e.g. Stürner, Murray, p. 411.

[172] See e.g. the decision of the Slovenian Constitutional Court No. Up-747/09-9 dated 30 November 2010.

[173] See e.g. the judgment of the Federal Constitutional Court, 2 BvR 1290/99 dated 12 December 2000.

[174] Already the notion of arbitrariness is defined in broad terms: "a failure to respect a mandatory norm" or "an interpretation that is extremely inconsistent with the principles of justice". See e.g. the judgment of the Czech Constitutional court No. I. ÚS 22/10 dated 4 July 2010.

if, in view of the established methods of interpretation, a law can be interpreted in one or several ways, the matter only concerns which interpretation is (more) correct, which is not for the Constitutional Court to assess. However, an obviously untenable interpretation that cannot be determined in terms of any legal aspect or cannot "stand logical evaluation" can be evaluated as evidently erroneous.[175] But there are cases where the Constitutional Court drew the limits of evident errors (too) broadly. Probably the most blatant example concerns the case where the Constitutional Court concluded that in an arbitrary or unreasonable manner the Supreme Court applied the criteria for distinguishing between questions of law and questions of fact. The Supreme Court decided that the interpretation of "declarations of will", such as contracts, is a question of law and therefore within the scope of a final appeal on points of law. On the contrary, the Constitutional Court (in the constitutional complaint proceedings) held that this constitutes a question of fact. Therefore, it quashed the Supreme Court's judgment, declaring it "manifestly erroneous" and thus arbitrary.[176] Here the Constitutional Court ventured into a typical sphere of "ordinary" law, which has no "constitutional dimension" and where the "final word" should be reserved for the Supreme Court. At the same time, it is well known that differentiation between questions of fact and questions of law in the sphere of the interpretation of contracts is one of the most disputed dilemmas that have long occupied the legal science. And yet the Constitutional Court was confident enough to denounce the standpoint adopted by the Supreme Court as "manifestly erroneous". The question, however, could be whether the decision of the Supreme Court was erroneous at all.[177] But what is most important is that if such a broad concept of what constitutes "arbitrariness" prevails and if the Constitutional Court may step so deeply into the shoes of the final adjudicator as to complex questions regarding the interpretation of legislation, it does practically become a "super-supreme court." Another critical point – in addition to the concept of arbitrariness – where there is an inherent danger that the delimitation between the constitutional court and the ordinary judiciary can become entirely blurred is the procedural guarantee that the judgment must contain sufficient reasons. The delimitation between "insufficient" reasons (which may constitute a violation of the right to be heard) and "erroneous" reasons (which is a question of ordinary law) is not easy and the constitutional court might be tempted to invoke a broad construction of the procedural

[175] See e.g. the decision of the Slovenian Constitutional Court No. Up-270/01 dated 19 February 2004.

[176] Decision of the Constitutional Court No. Up-232/00 dated 10 May 2001.

[177] E.g. for the Netherlands it is reported that the approach has changed and that the interpretation of "declarations of will" is currently regarded as not only consisting of the determination of the subjective will of the persons involved, but also of the objective meaning of their declaration. Therefore, the interpretation of declarations of will is brought within the scope of cassation. Van Rhee, 1999, chapter 3.1, see also Jolowicz, p. 2050.

standard of "insufficient reasons".[178] The same danger that the constitutional court could unduly interfere with ordinary courts (especially the supreme court) exists in the sphere of ensuring the uniformity of case law. If there are conflicting interpretations of "ordinary" law within the ordinary judiciary, but they are all within the limits of what is constitutionally acceptable, it is not the task of the constitutional court to determine which of these interpretations should prevail. This task must remain reserved for the supreme court, along with the task of developing "ordinary" law through case law.

9.5. THE CONSTITUTIONAL COURTS AND JUDICIAL SELF-RESTRAINT

Constitutional courts' uneasiness in accepting the Schumann formula as the only criterion of the scope of review in constitutional complaint proceedings demonstrates that these courts are sometimes tempted to assume the role of a "forth instance" court. Perhaps additional criteria, such as a standard of arbitrariness, are indeed necessary, but they should remain applicable solely for the most severe cases of *prima facie* errors. The only reliable answer here is that constitutional courts should exercise a sufficient degree of self-restraint. But the question is whether they really want to act in this manner.

Cohabitation with supreme courts appears to be calmer in Germany than in some other countries.[179] Especially the distrust of the Czech Constitutional Court toward the Supreme Court is well known, at least in earlier years.[180] Similar tensions have also become apparent in other post-communist countries.[181] This is especially so if constitutional courts are (still) perceived – as they are vested with the power to challenge court rulings by means of a constitutional complaint – as a tool of legal transition in post-communist societies (just like they were perceived as such a tool in Germany and Spain in the early years of democratic transition).[182] This was based on the assumption that "following a period of authoritarian rule, the existing courts were unable to offer adequate guarantees

[178] See e.g. the decision of the Slovenian Constitutional Court No. Up-53/02 dated 2 December 2004.

[179] Garlicki, 2007, p. 53; O. Klein, 2006.

[180] Bobek, 2009, p. 64. This prompted the Czech Supreme Court to openly revolt against the Constitutional court's decisions and its openly activist approach. J. Priban, *Judicial Power vs. Democratic Representation*, (in:) W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, "Law and Philosophy Library" 2003, Vol. 62. The Hague: Kluwer Law International, pp. 373–394, p. 380.

[181] Concerning "wars between courts", when constitutional courts are placed in the position of "super-appellate courts" see also W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist states of Central and Eastern Europe*, Springer, Wien 2005, p. 25.

[182] Bobek, 2009, p. 58.

of structural independence and intellectual assertiveness."[183] This should be seen against the background that in the period of transition to democracy, the creation of post-communist constitutional courts was in large part fuelled by the distrust of the judiciary inherited from the communist regime.[184] Such (self)perception of constitutional courts and of their almost "missionary role" inevitably led to their accentuated activism instead of adequate self-restraint. Such activism often amounted to an undisguised wish to "downgrade" supreme courts and it was applauded by one part of the legal (and political) community.[185] It is hence not surprising that these "new important players" on the legal scene tended towards a broad scope of scrutiny of the judgments of the ordinary judiciary in constitutional complaints proceedings.[186]

In my opinion, however, when the initial period of democratic transition is over, a high degree of judicial self-restraint by the constitutional court is essential. Judicial self-restraint is not only a tool for combating the judiciary's own overburdening.[187] It is foremost necessary because otherwise the constitutional court would turn into a court of fourth instance or a super-supreme court, which is not its constitutional role. The delimitation between the jurisdiction of the constitutional court and the ordinary courts should not become completely blurred and supreme courts should not be degraded to mere appellate courts. Also for the benefit of individual litigants, clear and predictable rules governing where their litigation ends are necessary. This is also a question of the quality of adjudication. The supreme court's judges are expected to be better qualified than the Constitutional Court's judges when it comes to the interpretation of ordinary statutory law – i.e. the law that does not interfere with the constitutional level.

[183] See Garlicki, 2007, p. 45.

[184] See e.g. R. Uitz, *Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?*, "Juridica International", Tartu, 2007, Vol. XIII, pp. 47–59; Z. Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, American Journal of Comparative Law 2004 (52), pp. 531–567, Garlicki, 2007, pp. 44–45.

[185] Typically: Kühn, p. 175 *et seq*. In his view in the Constitutional court "we can find outstanding figures able to give the Court's reasoning appropriate direction toward sophisticated western style adjudication". On the other hand, he claims that the "textual positivism continues to govern the post-communist legal and judicial discourse" (of the ordinary judiciary).

[186] See Kühn, p. 230 citing the member of the Czech Constitutional Court Mrs. Vagnerova who stated "that there were only fifteen people at the Constitutional Court fighting the remainder of the professional legal community." For the critic of such approach see: J. Komárek, J., *The struggle for legal reform after communism*, Law Society and Economy Working Paper Series, WP10/2014, London School of Economics and Political Science, London, p. 17, available at: http://eprints.lse.ac.uk/55833/1/WPS2014-10_Komarek.pdf (15 May 2014).

[187] See also the *Study on individual access to constitutional justice* – Adopted by the Venice Commission at its 85th Plenary Session, *op.cit*., Par. 211.

10. CONCLUSION

The divide between the cassation, revision, and appeal models is not a reliable basis for defining the functions of supreme courts in civil law jurisdictions. What matters is whether the supreme court serves predominantly its public function or private function. Regarding such, official proclamations, historical origins, and programmatic rules are of little importance. It all depends on the (non-)existence of adequate filtering mechanisms (including the question of whether the supreme court can omit reasons in cases not selected for a full review) and how these are applied in practice. A kind of "identity crisis" concerning the function of the supreme court still preoccupies the debate in several civil law jurisdictions. Some courts are split between the private function of safeguarding individual justice and the public function of – to put it in the simplest possible manner – creating precedents. Nevertheless, experience shows that the choice has to be made since it is not possible for the supreme court to adequately fulfil these functions that are not easily reconciled with one another. If the supreme court must decide a large number of cases (in order to safeguard individual justice), this inevitably affects the nature of the decisions and their impact on future litigants and also results in the inability of the supreme court to maintain the coherence of its own case law. In fact, it seems that the majority of civil law jurisdictions have – through reforms implemented in the last couple of decades – already shifted the balance of the private and public functions of the supreme court clearly toward the benefit of the latter. The major difference that remains is that some of them are willing to openly recognise that giving preference to the public function of the supreme court is a deliberate and value-laden choice, whereas the others still present it as merely a pragmatic way to reduce backlogs at the supreme court. Just like some jurisdictions have openly admitted that selection mechanisms for access to the supreme court must exist, whereas the others have invented different – concealed – ways to regulate their docket. But, as Professor *Lindblom* puts it, the predominantly public function of supreme courts must be recognised and accepted openly.[188] Equally openly, it must be admitted that the concept of a supreme court which takes as many appeals as possible and thus to the greatest possible extent ensures individual justice is merely a myth. As explained in part 4 of this paper, such an approach inevitably produces results that are exactly the opposite of those that it aimed to achieve.

Especially in the societies that have endured communist rule until recently, advocating the prevalence of the "public interest" over the "private purpose" inevitably raises suspicion. Resentment toward the era when the benefit of an individual was sacrificed for some higher goals is natural. But it is a serious

[188] Lindblom, 2000, pp. 105 and 136.

misperception not to recognise that the "public interest" and the "public function" of supreme courts have an entirely different meaning and are promoted in an entirely different context. Here in fact, the public interest concerns private parties as well – only not the (two) private parties in the litigation at hand but (all) prospective private parties in the future. It is foremost for their benefit that precedents are created and that the supreme court provides guidance. In this manner, the right to equality before the law as well as legal certainty and effective access to justice are strengthened, as is the overall quality of judicial decision-making – not only in the supreme court itself, but as a result of the supreme court's guidance in the lower courts as well. Such a reform therefore does not mean that the legislative goal of pursuing substantive justice for the benefit of the individual has been relinquished. Since the above findings concerning the public purpose of judicial decision-making apply only to the supreme court and not to courts of first and second instance, the reform also does not mean that that the protection of individual rights is no longer the main goal of civil procedure. Precisely in order to effectively protect individual rights, it is better for the parties to know what they can expect already from the lower courts (or to avoid litigation altogether), following the guidance of the supreme court, rather than having to go through three levels of proceedings.

In addition, open recognition of the precedential value of the supreme court's decision-making is the most powerful tool of judicial empowerment. And precisely judicial empowerment vis-à-vis the other two branches of state government is an essential element of any democratic transition. It is not a coincidence that in the communist era the role and the esteem of supreme courts was deliberately kept low and the case law was denied any real significance. It fit well in that concept that the supreme court's judges had to (often in a bureaucratic manner) hear thousands of cases, without any added value for anyone except the parties to the litigation in question. Therefore, although it might look different on the face of it, at least in the practically relevant results, the model that focuses on the public function of the supreme court is much more compatible with the liberal concept of society than the one that (presumably) pursues its private function.

In this paper I have deliberately avoided the issue of so-called "binding interpretational statements", whereby the supreme courts clarify important legal issues, but irrespective of any real life and pending cases (which was typical in the communist systems). I am convinced that this is not a proper way to promote the public function of supreme courts. Judges are here to decide real cases, brought on appeal in pending cases and based on the arguments of the parties before them. They should not be dragged into assuming a role that is half academic and half legislative.

A treatise on the functions of supreme courts cannot avoid mentioning also constitutional courts. Firstly, because constitutional courts can either provide powerful support to legislative reforms promoting the public function of the supreme

court, or frustrate such altogether. Secondly, the possibility to challenge judgments with a constitutional complaint is an inevitable source of conflict between the constitutional court and the supreme courts. Concerning the latter, if constitutional court judges are not willing to exercise judicial self-restraint when reviewing the judgments of the ordinary judiciary, and if they cannot comprehend the role of the supreme court in the constitutional framework, then it is probably better to abolish the instrument of the constitutional complaint.

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A CIVIL LAW PERSPECTIVE ON THE SUPREME COURT AND ITS FUNCTIONS

Summary

The text presents the issue of the Supreme Court's functions from the perspective of civil law countries. The author argues that the division into cassation, revision and appeal is not an adequate point of reference enabling to define those functions. The author asserts that the most important criterion is whether the Supreme Court acts overwhelmingly in public or private interest. The assessment of that criterion should be made on the basis of the methods of selection of cases by the Supreme Court. What is essential is whether the selection is based on public aims or whether it simply aims at solving a given case accurately. It may be argued that as a result of reforms introduced in the last few years, the majorityof civil law countries have focusedon the implementation of the public rather than private functions. The author concludes that the public function of supreme courts is of a completely different significance than in the times of socialism. The public interest is combined with private interest as it refers to the situation of parties – not parties to the specific proceedings, but all parties which are going to engage in litigation in the future.

KEYWORDS

Supreme Court, public interest, private interest, functions of the Supreme Court

SŁOWA KLUCZOWE

Sąd Najwyższy, interes publiczny, interes prywatny, funkcje Sądu Najwyższego