ACCESS FILTERS AND THE INSTITUTIONAL PERFORMANCE OF THE SUPREME COURTS

Leandro J. Giannini*

Abstract

This article comparatively analyses the so-called "access filters": admission devices that allow supreme courts to decide which cases to decide according to highly flexible or even explicitly discretional criteria related to the quality or relevance of the legal issues brought in the appeal (their "public importance", "transcendence", "general repercussion", "cassational interest", "constitutional meaning", etc.). These qualitative case selection mechanisms are considered fundamental (although not sufficient) vehicles to improve the performance of the supreme courts of different legal traditions, with diverse backgrounds, dissimilar structure and not necessarily consistent institutional goals. After examining the four most significant dimensions of these devices, the author concludes that the general assertion that selection filters are only conceivable in "precedent oriented" supreme courts should be revised. It is more accurate to say that access criteria established for selection purposes vary according to the institutional mission assigned to a supreme court (or, more broadly, to any court of appeal) at a given time and jurisdiction.

L'article analyse de manière comparée ce que l'on appelle les « filtres d'accès » : des dispositifs d'admission qui permettent aux cours suprêmes de décider des affaires à juger en fonction de critères très souples, voire discrétionnaires, liés à la qualité ou à la pertinence des questions juridiques soulevées dans le recours (leur « importance publique », leur « transcendance », leur « répercussion générale », leur « intérêt eu égard la cassation », leur « signification constitutionnelle », etc.). Ces mécanismes de sélection qualitative des affaires sont considérés comme des véhicules fondamentaux (bien que non suffisants) pour améliorer les performances des cours suprêmes de traditions juridiques différentes, avec des origines diverses, une structure dissemblable et des objectifs institutionnels qui ne sont pas nécessairement cohérents. Après avoir examiné les quatre dimensions les

* Chair Professor of Procedural Law, Head of the Procedural Law Institute, University of La Plata, Argentina.

plus significatives de ces outils, l'auteur conclut que l'affirmation générale selon laquelle les filtres de sélection ne sont concevables que dans les cours suprêmes « orientées vers les précédents », doit être révisée. Il est plus exact d'affirmer que les critères d'accès établis à des fins de sélection varient en fonction de la mission institutionnelle assignée à une cour suprême (ou, plus largement, à toute cour d'appel) à un moment et une juridiction donnés.

Der Aufsatz bietet eine vergleichende Analyse der so genannten „Zugangsfilter", d. h. der Zulassungsinstrumente, die es den obersten Gerichten ermöglichen, die zu entscheidenden Fälle nach sehr flexiblen oder sogar ausdrücklich diskretionären Kriterien zu bestimmen, die mit der Qualität oder Relevanz der in der Beschwerde vorgebrachten Rechtsfragen zusammenhängen (ihre „öffentliche Bedeutung", „Würde", „allgemeine Auswirkung", „kassatorisches Interesse", „verfassungsrechtliche Bedeutung" usw.). Diese qualitativen Mechanismen zur Auswahl von Fällen werden als grundlegende (wenn auch nicht ausreichende) Instrumente angesehen, welche die Leistung der obersten Gerichte mit verschiedenen Rechtstraditionen, unterschiedlichem Hintergrund, unterschiedlicher Struktur und nicht unbedingt einheitlichen institutionellen Zielen verbessern können. Nach der Prüfung der vier wichtigsten Parameter dieser Instrumente kommt der Autor zu der Schlussfolgerung, dass die allgemeine Behauptung, dass Auswahlfilter nur in „präzedenzfallorientierten" Höchstgerichten denkbar seien, revidiert werden muss. Treffender wäre es zu behaupten, dass die zu Auswahlzwecken aufgestellten Zugangskriterien je nach der institutionellen Aufgabe, die einem obersten Gericht (oder im weiteren Sinne jeder Rechtsmittelinstanz) zu einem bestimmten Zeitpunkt und in einer bestimmten Rechtsordnung zugewiesen wird, variieren.

L'articolo analizza comparativamente i cosiddetti "filtri di accesso": dispositivi di ammissione che consentono ai corti supremi di decidere quali casi decidere secondo criteri altamente flessibili o anche esplicitamente discrezionali legati alla qualità o alla rilevanza delle questioni legali poste in ricorso (le loro "importanza pubblica", "trascendenza", "ripercussione generale", "interesse cassazionale", "significato costituzionale", ecc.). Questi meccanismi qualitativi di selezione dei casi sono considerati veicoli fondamentali (sebbene non sufficienti) per migliorare le prestazioni delle corti supreme di diverse tradizioni giuridiche, con background diversi, struttura dissimile e obiettivi istituzionali non necessariamente coerenti. Dopo aver esaminato le quattro dimensioni più significative di questi dispositivi, l'autore conclude che l'affermazione generale secondo cui i filtri di selezione sono concepibili solo nelle corti "di precedenti", dovrebbe essere rivista. È più corretto affermare che i criteri di accesso stabiliti ai fini della selezione, variano a seconda della missione istituzionale assegnata alla corte suprema (o, più in generale, a qualsiasi corte d'appello) in un determinato momento e giurisdizione.

El artículo analiza en clave comparada los llamados "filtros de acceso": dispositivos de admisión que permiten a las cortes supremas decidir en qué casos intervenir de

acuerdo con criterios altamente flexibles -y en ocasiones, explícitamente discrecionales- vinculados con la calidad o relevancia de las cuestiones legales traídas en el recurso (su "importancia pública", "trascendencia", "repercusión general", "interes casatorio", "significado constitucional", etc.). Estos mecanismos cualitativos de selección de casos son considerados instrumentos fundamentales (aunque no suficientes) para mejorar la producción de las cortes supremas de diferentes tradiciones lelaes, con diversos antecedentes, diferentes estructuras y no necesariamente consistentes finalidades. Luego de examinar las cuatro dimensiones más significativas de estos dispositivos, el autor concluye que debe ser revisada la afirmación general según la cual los filtros de selección solo pueden concebirse en cortes supremas "orientadas al precedente". Es más preciso sostener que tales criterios de acceso establecidos con finalidades de selección varían de acuerdo con la misión institucional asignada a determinada corte suprema (o, más ampliamente, a toda corte de apelación).

Keywords: supreme court; appeals; cassation; writ of certiorari; case selection; filters

Mots-clefs: cour suprême; appel; cassation; déclaration de certiorari; sélection des affaires; filtres

Stichwörter: Oberstes Gericht; Berufung; Kassation; Kassationsbeschwerde; Fallauswahl; Filter

Parole chiave: corte suprema; appello; cassazione; certiorari; selezione ricorsi; filtri

Palabras clave: corte suprema; apelaciones; casación; writ of certiorari; selección de casos; filtros

Contents

I. INTRODUCTION: "CRISIS" OR "CRISES" OF THE SUPREME COURTS?

In this article I share some ideas about the importance qualitative case selection mechanisms as fundamental (although not sufficient), vehicles to improve the performance of the supreme courts of different legal traditions, with diverse backgrounds, dissimilar structure and not necessarily consistent institutional goals.

I defend the idea that, as agenda-setting devices, this type of filter plays a role that goes beyond mere decongestion of apex courts, by advancing their institutional performance, no matter whether they are precedent-oriented courts with a minimalist case-selection trend, cassation courts designed to unify the law through a continuing control of the correct interpretation and application of the law by the inferior courts, or last instance revision courts with a less abstract approach to legal harmonisation.

Jolowicz, quoted and followed by Carpi, argued decades ago that many of the existing supreme courts in comparative law "have really two things in common: they are supreme in the sense that no recourse against their decision is available to any other court and they are, themselves, courts".[1] "Actually, not so much!", adds Carpi.[2] Differences, of course, are important, but should not be overstated. In fact, those disparities have not discouraged important comparative essays on which I will rely later in this article. But, even recognising the indubitable virtue of those modelling attempts, it is true that sometimes dissimilar supreme courts face similar dilemmas, and similar supreme courts confront dissimilar dilemmas. That is why

1 Jolowicz, T. (1997). The role of the Supreme Courts at the National and International Level. *Coloquio de la Asociación Internacional de Derecho Procesal.* Tesalónica, cited in Carpi, F. (2011). El acceso a la Corte de Casación. In E. Oteiza, *Cortes Supremas. Funciones y recursos extraordinarios.* Santa Fe: Rubinzal-Culzoni, pp. 19–20.

2 Carpi, ibid., p. 20.

it is useful to try to systematise those problems or crises, in order to be aware of the challenges that filters or qualitative case selection mechanisms should help the courts to face.

In this first section, I will initially try to show that: (1) there are two types of crises that supreme courts generally face in different latitudes: a quantitative crisis and a qualitative crisis; and (2) although there is a close relationship between the two, it is useful to analyse them independently, because: (a) it is possible that one occurs without the other ("close" doesn't mean "necessary" relation); and (b) the instruments to deal with them differ, although they can be used jointly when both problems arise in a given jurisdiction.

A. QUANTITATIVE CRISIS

The concern about the overload of the courts of last resort in comparative law is not new. In his prologue to the classic book by Frankfurter and Landis on the history of the US Supreme Court, Richard Stevens cleverly stated that "the effort to keep the Court's workload manageable is a little like 'cutting off the heads of a Hydra'",[3] a metaphor that many will probably agree with.

The most obvious reason for this concern regarding the supreme courts' workload responds to the position that they have in the judicial structure. Being institutionally located at the top of the justice system, they are subject to the constant risk that they will be led to develop an impracticable revision of the judicial decisions of a state, country or region. Deliberately taking things to the absurd, if the higher courts' jurisdiction was not subject to adequate limits in the legislation (including laws, constitutions, international conventions, etc.), those bodies could be in a position to review every decision of every lower court, for any injustice alleged by the parties in any case brought before them.

Such an arrangement would probably be constitutionally unacceptable in many countries. But most importantly, it would also be useless (it would serve no acceptable purpose) and impracticable (it would be materially impossible to perform). That is why limits of all kinds were historically designed to try to avoid the exposure of the higher courts to an unbearable workload and useless diversion of institutional goals. Some classic restraints tried (and try) to manage litigation before the supreme courts, seeking to find clearly determined and reasonably predictable criteria. In this sense, there are limits widely found in comparative law, such as those relating to the *type of decision subject to an extraordinary appeal* (e.g., the limit based on the concept of

[3] Stevens, R. G. (2007). Introduction. In F. Frankfurter and J. Landis, *The business of the Supreme Court. A study in the Federal Judicial System*. New Jersey: Transaction Publishers, p. xxvii.

"final judgment" emanating from the "court of last resort", or similar formulas); *the elements of the judgment that can be reviewed* (e.g., the always controversial limitation of the appellate jurisdiction of supreme courts to reviewing "points of law" and the consequent lack of jurisdiction to review questions of fact, such as the evaluation of evidence); *the amount of the damage* caused by the error in the judgment (as happens with the different systems of civil or criminal *suma gravaminis*); or other punitive-oriented mechanisms aimed at deterring the promotion of unfounded extraordinary appeals (such as the requirement to deposit a sum of money that will be returned to the appellant only if the decision is reversed).

However, all these restrictions have been overcome in real life, and often by the very supreme courts whose case overload was to be prevented by those traditional restrictions. In fact, most of these restrictions are subject to exceptions that, rather than confirming the rules, threaten to destroy them. In Argentina, for example: (a) there are different forms of "matching" the final judgment rule (e.g., when an interlocutory decision causes an injury that is "very difficult" or "impossible" to repair in the future); (b) a supreme court doctrine greatly reduces the effectiveness of *suma gravaminis* (required in numerous local jurisdictions to limit access to their own supreme courts) by requiring them to review every case in which a "federal question" is involved;[4] (c) the powerful doctrine of "arbitrariness" affects the distinction between questions of fact and questions of law (or between questions of "federal" or "constitutional" law, and points of non-federal civil, commercial, criminal, labour, local, procedural, etc., law), allowing parties to ask the supreme court to review egregious errors or decisions with inadequate motivation;[5] (d) the "institutional gravity doctrine" grants exceptional access to the supreme courts when the issue to be decided goes far beyond the interest of the parties and projects itself to

4 Corte Suprema de Justicia de la Nación. (s.f.). *Fallos completos (1994–2020)*. http://sjconsulta.csjn.gov.ar/sjconsulta/fallos/consulta.html: 308:490 *Strada* (1986); 311:2478 *Di Mascio* (1988).

5 This, of course, is not just a local problem. Widely known phenomena in different apex courts in comparative law, such as the constitutional (or conventional) control of the sufficient motivation of judgments, or of the adequate application of indeterminate legal concepts to the specific (although undisputed) facts of the case, contribute to seriously relativise the effectiveness of the limitation of the jurisdiction of these courts to matters of law (see Taruffo, M. (2006). *El vértice ambiguo. Ensayos sobre la casación civil* (1° (primera reimpresión) ed.). Lima: Palestra, pp. 167–189; Arruda Alvim, T. (2021). Cuestión de hecho y cuestión de derecho en los recursos ante los tribunales superiores. In J. Nieva Fenoll and R. Cavani, *La casación hoy, cien años después de Calamandrei*. Madrid: Marcial Pons, pp. 127–154; Fabiani, E. (2003). *Clausole generali e sindacato della cassazione*. Turin: Utet; Passanante, L. (2021). El Tribunal Supremo Italiano a Cien Años de la "Cassazione Civil" de Calamandrei. In J. Nieva Fenoll and R. Cavani, *La casación hoy, 100 años después de Calamandrei*. Madrid: Marcial Pons, pp. 40–60; Giannini, L. (2016). La doctrina del absurdo en la experiencia de la Suprema Corte de la Provincia de Buenos Aires. *Anales de la Facultad de Ciencias Jurídicas y Sociales* (46), pp. 466–417).

the community as a whole, even if the appeal suffers from all kinds of imperfection or would otherwise be inadmissible. And so on.

This is not the place to detail the ways in which this phenomenon has taken place in the past or in recent history, in Argentina or elsewhere. It is enough to say that, through these jurisprudential creations, supposedly rigid barriers designed by the legislature to – among other reasons – prevent the collapse of the superior courts, seem to be, in the best scenario, perforated dams: they stop much of the litigious stream, but a flow which the "downstream" population cannot tolerate passes through the holes. Although this approach allows a supreme court to speak in virtually any case that sparks its interest, it also can be seen as a self-immolation strategy. In other words, in return for not closing its eyes to notorious injustices or for preserving a starring role in any discussion that it believes to be of institutional interest, the supreme court ends up reaffirming the basis of its own collapse, giving lawyers flexible *prima facie* arguments to knock at its door.

And so we return constantly to the initial dilemma: (a) the place reserved to the supreme courts in the judicial structure exposes them to the risk of having to carry out an impracticable error control; and (b) the traditional limits, alleged to be reasonably determined and predictable, have been insufficient to prevent this crisis.

As a consequence, in many countries, the environment at the top of the judicature remains the same: one marked by the exposure of the superior courts to the need to decide more cases than they can reasonably face with their material and human resources.

B. QUALITATIVE CRISIS

Apart from (although related to) the sustained quantitative crisis, there is a phenomenon that is more difficult to verify, define and categorise, but which can also be observed at different latitudes. This is what might be called the "qualitative" crisis of the supreme courts, derived from the profound dilemmas that occur within these courts, when it comes to defining and respecting the institutional role that they are called upon to play in a particular legal system.

In Argentina, for example, the same institutional roles that the superior courts have assumed show a strong heterogeneity and risk of inconsistency. Is it possible for the highest judicial body to be at one and the same time the constitutional court of last resort and the court commissioned to develop a "unifying role" to prevent inconsistencies in the case law of inferior courts (on civil, criminal, labour, administrative or federal law, as the case may be)? Can this body also be the final inspector of flagrant errors or arbitrariness and, at the same time, assume the responsibility to represent the judiciary in its dialogue with the other departments of the state, when judicial improvement is at stake? Can some administrative

roles be added, like planning, budget design, administration of infrastructure and human resources applied to the judiciary, etc? Is it possible for such a court to avoid experiencing a "personality crisis" when attempting to play so many roles at the same time?

And if, on the other hand, the roles assumed by the supreme court in a given model are neither too many nor too heterogeneous, but too reduced or too focused on "Olympic" or "high political impact" problems, does the court fulfil the role for which it was designed? Is it possible to guide the interpretation and development of (common, federal, constitutional, conventional, etc.) law, by focusing only on cases of high political or institutional impact?

Sometimes it is said that the "qualitative" crisis is a mere derivative of the "quantitative" crisis. In this line of thought, Nieva Fenoll considers that the distinction previously made between the "qualitative" crisis and "quantitative" crisis is, indeed, a euphemism that conceals an indisputable fact: that the first one is a product of the second one.[6] In other words, that the debate on the institutional role of the supreme courts is born and dies in the discussion about their excessive caseload. Without this last phenomenon, it is proposed, no one would speak about the first. I do not fully share this point of view.

It is true that when a particular legal system decides to alleviate the quantitative crisis of its superior court with an "overproduction" mechanism (e.g., increasing the number of judges and dividing the court into several chambers, dividing the chambers into smaller sections or even allowing one judge to decide the case in some situations), there is a demonstrably clear risk of inconsistency in its precedents. This has consequent effects on one of the main missions of any supreme court, which is guidance on the interpretation and development of the law and management of precedents in a particular jurisdiction.

Although I will refer to this issue in greater detail in the following section, I must agree with those who consider that there is a *close* relationship between the "quantitative" and "qualitative" crises of apex courts. However, this relationship is neither absolute nor necessary, since the qualitative crisis is not exclusively visible in courts that are near collapse. Even in courts with a total of no more than 60–80 rulings per year (the US Supreme Court, for example) it is possible to find deep

6 Nieva Fenoll ((2011). El modelo anglosajón en las cortes supremas: ¿solución o elusión del problema de la casación? In E. Oteiza, *Cortes Supremas. Funciones y recursos extraordinarios*. Santa Fe: Rubinzal Culzoni, pp. 69–90, esp. pp. 69–70), who states: "All the past controversies about *Cassation* seem to have been cornered in a single discussion: how to remove the overload of appeals? Usually this issue is disguised somewhat through another seemingly more technical one: what is the genuine function of cassation? But what actually it is trying to address even in this euphemistic way, is the overload of cases. In fact, I believe nobody would call into question currently the significance of cassation if it were not for the existence, precisely, of the problem of the excessive workload of the Supreme Courts" [author's translation].

discrepancies and public debates on the role that the courts play (or should play) in their respective jurisdictions, and in the way in which they exercise that role. Those debates, which often take the form of sharp criticism on the case-selection criteria, on the decision-making process (or the "no decision" techniques), on the ideological influence of its composition over the interpretation of the law or over the overruling of precedents, and so on, allow us to affirm that the existence of a qualitative crisis in a supreme court is not *necessarily* caused by their case overload.

In short, it is true that, in general, the overproduction of decisions derived from the case overload of supreme courts makes it very difficult for these courts to play their institutional roles adequately. In this sense there is a close relationship between the quantitative and qualitative crises. However, I do not believe that there is a necessary relationship between the two, whereby the second (qualitative crisis) is just an elegant creation to complicate the analysis of the first (quantitative crisis). Qualitative crises (the dilemmas or conflicts on the definition and exercise of the institutional role of the supreme courts) can also occur in a court with a numerically manageable caseload and, therefore, is a phenomenon that can be (and deserves to be) treated with relative independence from the quantitative crisis.

C. MECHANISMS TO ADDRESS THE CRISES (OVERVIEW)

This reality has been attacked from various angles in comparative law. A very general – and deliberately simplified – systematisation of the paths followed to alleviate the "quantitative" crisis of supreme courts (the exposure of such courts to a volume of cases that goes beyond their material ability to respond) distinguishes two categories of instruments: "overproduction" mechanisms and case-reduction or case-selection mechanisms.

1. "Overproduction" Mechanisms

The first strategy is to avoid collapse by hearing more and more cases to keep "up to date". Examples of this can include: (a) increasing the number of judges and dividing the court into chambers, possibly followed later by dividing those chambers into smaller sections, and even allocating decision-making powers to individual judges within the court; (b) reducing the number of oral hearings and debates, and instead concentrating the discussion on the consecutive reading of written arguments prepared by the parties; (c) enlarging delegation in the decision-making process, entrusting different types of advisers, such as clerks, with aspects of the decision-making process, for example legal research, screening

of the case records or even opinion-drafting; (d) reducing the duty to provide reasons. Experience has shown that trying to remedy the threatened collapse of the supreme courts in this way, apart from being something similar to "cutting off the heads of a hydra" (remembering Stevens again), usually ends up affecting the strength and consistency of supreme court precedents and, thus, weakens their main institutional role.

In a comparative perspective, it is easy to find examples of supreme courts with more than 200 judges (divided into chambers and sections) that deliver around 15,000 or 20,000 judgments per year (e.g., the French *Cour de cassation*); or courts such as the Brazilian *Supremo Tribunal Federal* with 11 members – each member having individual powers to decide many issues (which is widely exercised in practice[7]) – with an outcome of more than 100,000 cases per year. This reality dramatically increases the risk of inconsistencies and affects the ability to understand and manage the court's precedents. Thus, the "omnipresent" court puts at risk its own authority and deviates from its most important role, transforming its case law into – using Chiarloni and Taruffo's metaphor – a sort of supermarket where everyone can find what they are looking for … and the opposite too.[8]

2. Case-Selection Mechanisms

Regarding the second category of instruments, multiple case-selection mechanisms are gaining momentum in different legal traditions. Through such mechanisms, an attempt is made to face the said crises through the reverse strategy: to reduce the agenda of the superior courts in order to try to focus their resources on deciding only the issues that enable them to satisfy or improve their institutional role.

---

7 From 2011 to 2014, an average of 86% of the decisions of the Federal Supreme Court were taken individually by one of its judges, leaving 14% remaining as collegiate court decisions (see full statistics in Giannini, above n. 5, pp. 560–563).

8 See Chiarloni, S. (2008). Las tareas fundamentales de la corte suprema de casación, la heterogeneidad de los fines surgida de la garantía constitucional del derecho al recurso y las recientes reformas. In O. R. coordinación, *Los recursos ante los Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe* (J. J. Palacios, Trad.). Madrid: Difusión, p. 61 and Chiarloni, S. (2002). Ruolo della giurisprudenza e attivita' creative di nuovo diritto. *Rivista Trimestrale de Diritto e Procedura Civile,* 56(1), pp. 11–16, metaphorically stressing that the jurisprudence of the Italian *Corte di Cassazione* resembles a "supermarket in which clients –litigants– [are] able to easily find the product they are looking for", and that those "defeated in the judgment on the merit[s] can also find favorable precedents". See also Taruffo, above n. 5, p. 757 and Taruffo, M. (2007). Precedente y jurisprudencia. *Precedente. Anuario jurídico*, p. 90.

Once the traditional limitations referring to the type of decision that can be appealed (e.g., *sentencia definitiva*,[9] *disposition définitive*,[10] finality requirement,[11] etc.) or to the subject matter (e.g., the limitation to "issues of law" or to "federal" or "constitutional" questions), have been overcome (or overwhelmed, as we have seen), there are two main forms of selective reduction of the agenda of apex courts:

- *quantitative* or *economic oriented* devices, like the introduction of minimum (monetary or non-monetary) values to reach this instance (*suma gravaminis*) or the imposition of economic sanctions on those who are unsuccessful in their appeal, seeking to discourage the promotion of frivolous appeals, and
- *qualitative* devices, like the provision of selection filters based on flexible or even explicitly discretional standards whose evaluation – in general, although not always – is carried out by the supreme court itself.

Both alternatives are sometimes combined, setting, for example, a minimum value from which review is recognised as mandatory (a "right" of the appellant), but accepting that cases that do not reach that threshold can be admitted if they present decisive qualitative interest (e.g., cassational or constitutional interest, fundamental significance, general public importance, overall impact, transcendence, presence of a fundamental right issue, suitability of the case to settle an interpretative conflict or to form a precedent on a novel or relevant matter, etc.).

The second category of devices (qualitative selection filters) have been progressively expanding in supreme courts of different legal traditions, as is the case in the US Supreme Court with its traditional *writ of certiorari*; in the Supreme Court of the United Kingdom with "permission to appeal"; in the Spanish *Tribunal Supremo* and *Tribunal Constitucional* with their case-selection mechanisms, respectively based on the "cassational interest" (*interés casacional*) and the "special constitutional transcendence" (*especial trascendencia constitucional*) of the case; with "fundamental significance" in the German Federal Supreme Court (*Bundesgerichtshof*) or the requirement that the matter be "constitutionally significant" as a condition to open the original jurisdiction of the Federal Constitutional Court (*Bundesverfassungsgericht*);

---

9 Expression used in Argentina to limit the type of resolutions that can be appealed before the Supreme Court (art. 14, Act 48) or before various superior provincial courts (e.g., art. 278, Code of Civil Procedure of the Province of Buenos Aires).

10 Criterion provided in France to determine the type of judgment appealable before the *Cour de Cassation* (Boré, J., and Boré, L. (2008). *La cassation en matiére civile* (4° ed.). Paris: Dalloz, pp. 106–116).

11 Criterion also provided in the US to determine the type of judgment appealable before the Supreme Court (Gressman, E., Geller, K., Shapiro, S., Bishop, T., and Hartnett, E. (2007). *Supreme Court Practice* (9° ed.). Arlington: BNA Books, pp. 152–175; Chemerinsky, E. (1994). *Federal Jurisdiction* (2° ed.). Boston: Little Brown & Co, pp. 594–613; Wright, C. A. (1983). *Law of Federal Courts* (4° ed.). Saint Paul: West Publishing, pp. 739–743).

with "general impact" (*repercussão geral*) as an admissibility requirement to stand before the *Supremo Tribunal Federal* of Brazil; or, in Argentina, with the power to dismiss any appeal that presents "irrelevant" questions (*cuestiones intrascendentes*), based only on the "sound discretion" (*sana discreción*) of the Supreme Court and without giving reasons (art. 280, National Code of Civil Procedure – at a federal level; art. 31 bis, Act 5827 – Buenos Aires Province).

In addition to the ordinary filters, other instruments can be included in the category of mechanisms of agenda rationalisation of the higher courts. For example, it is possible to include here the "repetitive claims mechanisms" adopted in Brazil, which seeks to prevent the entry of a multiplicity of cases that carry similar issues of law, holding them at lower levels and enabling just one or a few paradigmatic cases to reach the highest court. The principle of law adopted in these "test cases" should be subsequently applied by the inferior courts, to resolve every other case where proceedings were suspended pending the ruling of the first case.

Another example of a case-reduction technique is the restrictive interpretation that supreme courts may develop regarding the extent of their own jurisdiction. This is a quite unsophisticated mechanism of agenda rationalisation, based on the restrictive interpretation of access tracks to the highest court. In Argentina, for example, apart from the incorporation of the "transcendence" filter mentioned above (ironically called the *certiorari criollo*) in 1990, the Federal Supreme Court approached the subject of case overload from different angles. Thus, in addition to propagating the use of this device to get rid of irrelevant issues, the court cut back, through its own interpretations, most of its "mandatory" jurisdiction. Following this trend, through its own case law and based on reasons of "institutional significance" the Argentine Supreme Court reexamined every mandatory method to access to the court, seeking to rationalise its agenda. This led to: (a) a restrictive interpretation of its jurisdiction in cases in which a local State (Province) is a party;[12] (b) the invalidation (i.e., unconstitutionality declared by the Supreme Court) of the ordinary mandatory appeal established in cases in which the federal government is a party (art. 24, inc. 6), ap. a), Dec. Ley 1285/58.[13]

---

12 *CSN*, above n. 4: 329:759, *Barreto* (2006).

13 *CSN*, above n. 4: 338:724, *Anadon* (2015). In this precedent, the Supreme Court departed expressly from its historical jurisprudence which considered legitimate this formal path to its courtrooms. Using a "dynamic" interpretation, it went on to consider that the subsistence of this mandatory appeal (only subjected to the classical quantitative admissibility requirement *suma gravaminis*) constitutes an unreasonable exercise of the powers of Parliament to legislate on the jurisdiction of the Supreme Court (art. 117, *Constitución Nacional Argentina*). The concepts used to question the reasonableness of *suma gravaminis* are quite eloquent: "The Supreme Court must decide all matters in which some constitutional principle may be involved, issues that cannot be measured by the amount of money at stake, because a case in which a large amount of money is in [*lege*: at] stake can be resolved on [*lege*: based on] local or common legislation, and a problem of a few cents can affect the property clause as a [w]hole and even the [w]hole constitutional system. Thus, quantitative-based criteria can never be taken into account, as it should be the qualitative one [*lege*: as it should be the qualitative criteria alone]."

II. GENERAL ADVANTAGES AND DISADVANTAGES OF EACH SYSTEM

Later in this article I will go into a little more detail about the different models of selective access to the supreme courts. But first, let's briefly look at the advantages and disadvantages of each of the general devices.

Quantitative or *economic oriented* devices such as the "case value" (*suma gravaminis*) have a long history in comparative law. They seek to reduce the agenda of the superior courts by applying a criterion of relative security or predictability, such as the economic amount at stake in civil cases or the gravity of the conviction imposed in criminal cases.

However, such predictability (and the additional facility that it provides to control, internally and externally, the selection of cases by a supreme court), is practically the only merit that can be assigned to it. When judging the suitability of the *suma gravaminis* to ensure that the courts concentrate their efforts on issues consistent with their institutional role (i.e., the relationship between objectives and instruments mentioned above), the balance of the requirement is truly poor, especially in those models in which the superior courts are designed to guide the interpretation and development of law.

The reason for this is obvious: the case-value requirement means that the agenda of a supreme court prioritises the impact that the mistake presumably committed by the inferior court has on the litigant's pocket. It is a limitation typically focused on *jus litigatoris*, prioritising the personal or economic interests of the parties above the legal quality of the issue discussed. In other words, instead of focusing on the impact that the decision will have on the clarification, coherence, or modernisation of the legal system (and, in this sense, over the institutional performance of the supreme court), this access device focuses on a parameter that interests the appellant only: the amount of the damage caused by the appealed ruling.

Something similar can be said about sanctioning or dissuasive mechanisms, in which access to the superior court is conditional on the payment of a sum of money that will only be returned to the appellant if the appeal is successful. In Argentina, for example, when the lower court dismisses the extraordinary appeal before the Supreme Court, the appellant can go directly to the Supreme Court and challenge the dismissal, arguing that the case deserves final revision in this instance (*recurso de queja*). In order to file this appeal, the party must deposit a sum of money that will only be returned if the appeal is admitted (art. 286, National Code of Civil Procedure). The sole reason for this type of requirement is the deterrence of trivial, unfounded or delaying appeals, which it is hoped will be achieved by financially sanctioning those who "annoy" a supreme court. Before entering an appeal, parties are supposed to consider seriously whether their challenge has a real prospect of success, because if the supreme court finds it inadmissible they will lose their monetary deposit.

This is a fairly archaic form of behaviour modification, which – like the case-value requirement – focuses too much on the personal interest of the appellants and is not suitable for defining the agenda of cases that a court of last resort should attend.

There are more refined ways to control the tendency towards the promotion of appeals which are primarily intended to cause delay, such as, for example, to establish the non-suspensive effect of appeals before the apex courts or to require the party to provide a financial guarantee, deposit the amount of the compensation (as happens in Buenos Aires Province, Argentina, with regard to employers' appeals in labour cases) or comply with the decision as a condition of bringing the case to the Supreme Court or to continue the proceedings before it (as is the case with the *radiation du rôle* system in the French cassation[14]).

On the other hand, the "penalty" imposed on the appellant does not seem proportionate where the repayment of the deposit takes place only if the appeal is successful. What the legislator should prevent is not the entering of appeals which in the end prove to be unsuccessful, but rather the promotion of appeals that are unlikely to succeed from the beginning. This kind of mechanism does not measure the original "prospects of success" of the appeal, but its final success. To burden the party with a conditional deposit, whose return will depend on the ultimate outcome of the appeal, constitutes a disproportionate measure because it exceeds the purpose of the requirement, which is meant to stimulate a serious approach to the decision to bring a case before a supreme court, but not to require the final victory of the attempt. To do the first, it is enough to use a "real prospect of success" test, which requires the court that evaluates the admissibility of a last resort appeal to verify whether the reasons for the challenge are plausible or have a reasonable chance of succeeding.

In general terms, quantitative reduction mechanisms are partially effective in their mission to reduce the burden on the superior courts. However, in their practical effects, the application of these devices ends up concentrating the agenda of the supreme courts in predominantly private purposes, since the contours of their action are defined according to guidelines in which the interest of the litigants prevails, either by relying on the economic impact of the error that is intended to be reviewed (the value of the litigation), or by introducing a deterrent stimulus in case of failure (conditional deposit). Such orientation is inconsistent with the general reasons why a last instance of review is considered advantageous.

---

[14] I have comparatively analysed the French *radiation du rôle* in Giannini, L. (2016). *El certiorari. La jurisdicción discrecional de las Cortes Supremas.* La Plata: Platense, t. I, pp. 436–437. For a French reference to this institution, see Le Puil, S. (2014). *La radiation du rôle de la Cour de Cassation.* http://memoire.jm.u-psud.fr/affiche_memoire.php?fich=3927&diff=public; Boré and Boré, above n. 10, pp. 590–591.

On the other hand, *qualitative filters*, based on the use of flexible selection criteria related to the relevance of the issues brought in the appeal (their "public importance", "transcendence", "general repercussion", "cassational interest", "constitutional meaning", etc.), become strong where the quantitative ones are weak and vice versa. Indeed, by assigning to the courts themselves the *possibility of deciding which cases to decide according to the quality of the legal issues involved*, the agenda of these courts can be oriented much more efficiently towards the achievement of their "public" institutional missions, such as the promotion of unity and coherence in the interpretation and evolution of the law. There is an obvious advantage at this point over quantitative reduction mechanisms, which – as mentioned above – achieve the reverse effect.

On the other hand, the only notable aspect of the quantitative devices (their relative predictability), is the most serious deficit of the qualitative ones. By using formulas of great indeterminacy or, sometimes, an explicitly discretional nature, the selection process becomes particularly unpredictable and is subject to a constant risk of arbitrariness. The lack of transparency and motivation that often accompanies the exercise of this gatekeeping power aggravates the picture described.

III. QUALITATIVE SELECTION FILTERS: FOUR RELEVANT DIMENSIONS FOR COMPARATIVE PURPOSES

As discussed in the previous section, qualitative case selection filters give the supreme courts the power to decide which cases to decide, based on the evaluation of flexible, indeterminate and possibly even explicitly discretionary criteria. These parameters are not identical, nor are they applied in the same way by the different supreme courts that have this kind of power to model their own agenda. Therefore, a comparison exercise seems to be useful.

As it usually happens with most legal institutions, there is more than one way to approach a comparative analysis of qualitative selection filters. One method requires the examination of the implementation of this type of mechanism in the different higher courts, taken into consideration as relevant to a line of research. It is an analytical strategy, in which the design of each filter is studied individually, along with the operation, historical background and institutional role of the supreme court in which it operates. I have carried out this type of analysis elsewhere.[15]

[15] Giannini, above n. 14, passim.

A second option available in this type of study is the construction of models that can be described as "neutral maps",[16] in which the main features of each system are grouped together to create typologies which provide useful comparisions. The two main challenges of this last type of enterprise are: (a) the definition of categories or dimensions of the analysed phenomenon that will be considered relevant in the comparison (which often depends on the intention of the research itself); and (b) the identification of the experiences of each system whose analogy allows to define the models. In the space available here it will only be possible to reflect on a few but important dimensions related to the design and implementation of supreme courts' access filters in comparative law.

A. FIRST DIMENSION: THE INTEREST PREDOMINANTLY INVOLVED

According to the interest predominantly used to define the guidelines for admission to the superior courts, two main groups of filters can be found: (a) those in which concern for the interest of the parties prevails; and (b) those in which the interest of the community predominates, often associated with the need to provide coherence and unity to the interpretation and evolution of the law.

Those in the first category are concerned with factors such as the intensity of the damage caused to the appellant. The system based on the value of the litigation, which may be the economic amount of the tort (in civil cases) or the amount of the penalty (in criminal matters), is a well-known manifestation of this type of selection strategy.

Designs in which admission to the superior courts is conditioned to the presence of a *relevant injury* to the rights of the parties can also be included in this category, for example the criterion for admission of individual petitions before the European Court of Human Rights (art. 35.3.b), European Convention on Human Rights[17]) or with the

---

16 I borrow the terminology from Damaska's classic *The Faces of Justice and State Authority*, in which he explains the reasons why – in these cases – it is more fruitful to create typologies that distinguish the main features of the analysed systems, even though they do not coincide exactly. with the countries or regions of the globe with which the models in question are usually identified (Damaska, M. R. (2000). *Las caras de la Justicia y el poder del Estado. Análisis comparado del proceso legal.* (A. Morales Vidal, Trad.) Santiago: Ed. Jurídica de Chile, pp. 13–17).

17 Art. 35.3 of the European Convention on Human Rights amended by Protocol No. 14 of 2004 (in force since 2010), provides that: "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or b) the applicant has not suffered a *significant disadvantage*, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".
For further analysis of this provision: Chacón Armayor, C. (2016). La cláusula "de mínimis" en la jurisprudencia del Tribunal Europeo de Derechos Humanos. Oviedo. http://digibuo.uniovi.es/dspace/bitstream/10651/34806/6/TFM_ChaconArmayor%2CC.pdf; Sánchez Patrón, J. M. (2011).

standard of the severity of the damage suffered by the appellant which is required as a condition to access *per saltum* at the German Constitutional Court (§90.2, Act on the Federal Constitutional Court – LTFC).[18]

This group of qualitative selection criteria based on *jus litigatoris* also includes those models that focus on the *magnitude of the error*, which is different from the severity of the damage mentioned in the previous paragraph. Examples of this approach are the regimes of access to the supreme courts of the Nordic countries (Sweden, Denmark, Norway and Finland), in which, in addition to allowing appeals that have the capacity to serve as a precedent (an example of general interest parameter, as discussed later in this article), access can be enabled when there are "special reasons" to review the decision, such as – as Sunde explains – when injustices such as a so-called "miscarriage of justice" occur.[19] As can be seen, the last two cases involve qualitative versions of selection, but focused predominantly on the interest of the parties (the serious non-monetary damage suffered or the egregiousness of the judgment's mistake).

The second group of selection devices focuses not so much on the depth of the injury to be remedied or on the seriousness of the error committed, but on the quality of the legal issues involved. These methods concentrate, in general, on verifying whether a judgment on the appeal would allow the supreme court to solve interpretative conflicts, to guide the conduct of the community, or to lead the improvement or evolution of the law. Examples falling in this category are selection mechanisms based on notions such as the significance or public importance of the case (or, more precisely, of the matters discussed in the appeal), the cassational

---

El recurso individual ante el Tribunal Europeo de Derechos Humanos. Evolución y perspectiva. *Revista Europea de Derechos Fundamentales,* 2(18), pp. 177–180. Approaching the delimitation of what the European Court of Human Rights takes into consideration to determine the magnitude of the damage suffered by the complainant, Sánchez Patrón points out two preliminary considerations of interest: "a) this condition seeks to filter the number of lawsuits filed to deal only with those that deserve to be considered by an 'international jurisdiction'; b) said condition is in itself relative, so its interpretation must combine the subjective perception of the plaintiff and the objective circumstances of the case." The author goes on to state that, based on these premises, "the ECHR has determined that the '(significant) damage is based on criteria such as the monetary impact of the subject matter of the litigation or the importance that it has for the plaintiff'. This means that the ECHR will examine – and may do so *ex officio* – whether the plaintiff's allegations, although they may constitute, prima facie, a violation of the ECHR, do not cause a considerable monetary impact, or are not particularly relevant. Both criteria will be interpreted in light of the circumstances of the case, as well as the perception of the plaintiff" (Sánchez Patrón, ibid., p. 178).

18 This standard of "serious" and "unavoidable" damage, is predominantly focused – as explained in the text – on the interest of the parties, although it is integrated with a second independent parameter that may grant access *per saltum* to the highest German constitutional court, when the case has "general importance". This second parameter is framed in the models of the second group that we list below (qualitative opening valves based on the interest of the community) (Giannini, above n. 14, pp. 332–333).

19 Sunde, J. Ø. (2017). From Courts of Appeal to Courts of Precedent – Acces to the Highest Courts in the Nordic Countries. In C. H. van Rhee and Y. Fu, *Supreme Courts in Transition in China and the West*. Cham: Springer, p. 64.

interest of the case or its fundamental meaning. (These criteria are further analysed in Section III.D.2)

The distinction discussed above is important not only to distinguish the different types of filter established in comparative law for admission to higher courts, but also to explain the operation of these mechanisms in systems that use different access filters depending on the instance of appeal in question. For example, in the United Kingdom or in Nordic countries such as Finland or Sweden, the different functions assigned to a first court of appeal (review of the correctness of the decision and protection against possible injustices) and to a supreme court (to deal with conflicts of interpretation or to set precedents on controversial or novel issues) can justify the use of different types of "permissions to appeal" in each instance.

The "ordinary" filters applied as a condition for access before a court of second instance or first appeal will pay attention to the correctness of the decision, requiring the appellant to demonstrate "real prospects of success" in the challenge, with "sufficient" or "compelling reasons" to justify a re-examination of the dispute or to doubt the justice of the first instance ruling. In contrast, filters designed to rationalise access to supreme courts in these systems will require that the interest at stake goes beyond the parties in conflict, taking into account factors such as whether the matter may set a precedent on the legal issue debated.[20]

B. SECOND DIMENSION: "POSITIVE" AND "NEGATIVE" SELECTION DEVICES

According to the effects produced by their application, selection mechanisms can be distinguished into "negative" and "positive" mechanisms.

---

[20] Sippo explains how in Sweden and Finland, the design of these filters is the product of a clear separation between the functions of the two review instances: the appellate courts (second instance) are recognised as having the power to filter appeals taking evaluating the *prima facie* correctness of the decision, requiring the appellant to demonstrate that there are reasons that justify a re-examination of the dispute, basically proving grounds to doubt the outcome of the first instance ruling. On the other hand, access to the Supreme Court generally depends on the demonstration of the legal quality of the dispute and the possibility of establishing a relevant precedent in the case to guide the interpretation and development of the law. The demarcation, however, is not absolute, because, according to the author, in the first case (ordinary filters), it is possible to access to the court of appeal, demonstrating that the case has impact beyond the specific case and, in the second (supreme court filters), "weighty reasons" can be alleged that justify the opening of the appeal in cases of serious decision-making deviations (Sippo, J. (06.11.2018). *Filtering the Appeals to the Supreme Court: The Finnish Approach*. https://korkeinoikeus.fi/en/index/lausunnot/justicejukkasippofilteringtheappealstothesupremecourtthefinnishapproach.html). Similar appreciations can be found for the British system (Le Seur, A. (2004). Panning for gold: Choosing Cases for Top-level Courts. In A. Le Seur, *Building the UK's New Supreme Court. National and Comparative Perspectives*. New York: Oxford University Press, p. 272; Giannini, above n. 14, p. 316).

Negative selection devices (qualitative filters) are those that, when they are applyied in a given case, the appeal ends up being rejected as inadmissible.

This happens, for example, with the access filters provided for the Italian Cassation Court (*Corte di Cassazione*) or the French Court of last resort in Administrative Law matters (the *Counseil d'Etat*). Those express rejection mechanisms, based in the "manifest unfoundability" or the "lack of seriousness" of the grounds for extraordinary appeal, result in the denial of appeals that meet all other admissibility standard requirements.

The Brazilian model also operates as a rejection filter, by requiring that the issues discussed before the STF (*Supremo Tribunal Federal*) have a general impact (*repercussão geral*) as a condition of admissibility of extraordinary appeals. Recently, a Constitutional reform (2022) expanded the use of this kind of mechanism in Brazil, requiring special appeals that reach the second most important Brazilian Supreme Court (the Superior Court of Justice – STJ[21]) to have "relevancy".[22] Likewise, Argentinean "certiorari" (art. 280 of the National Code of Civil Procedure – CPCN) is another example of a negative device, by which the Supreme Court can reject extraordinary appeals that do not carry sufficient federal grounds or when the issues raised are insubstantial or irrelevant (*intrascendentes*). A similar negative filtering mechanism is present at State level in the Province of Buenos Aires (Argentina), in which, according to art. 31 bis of Act 5827, at any stage of the proceedings the Supreme Court of Buenos Aires may reject extraordinary appeals when they do not meet essential requirements, have been insufficiently founded, raise arguments dismissed by the same Court in similar cases, or relate to insubstantial or irrelevant issues.

In these and many other negative selection devices, access to the supreme courts seems to depart from a general rule of admissibility, transforming the filtering mechanism into an exception to that principle for certain hypotheses expressly contemplated in the norm (e.g., insignificance, irrelevance, insubstantiality, technical insufficiency, manifestly unfounded, etc.).

Positive selection devices operate in exactly the opposite way, making admissible certain appeals that, following the traditional or standard requirements of admissibility (time limit, appealable judgment, technical quality and extrinsic formalities of the

21 Apart from the *Supremo Tribunal Federal* (the Brazilian Constitutional Supreme Court), there are four superior courts commissioned to promote uniformity and coherence in their respective areas of specialisation. The most important of these last is the Superior Tribunal of Justice (STJ) a general court of last instance for almost every legal matter. For specific legal matters, there are: the Superior Labor Court, the Superior Electoral Court and the Superior Military Court.

22 Constitutional Amendment nº 125, June 14 2022, available at: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc125.htm#art1. For the full up to date text of the Brazilian Federal Constitution: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

appeal, value of the dispute, etc.), could not be heard before the Supreme Court. Metaphorically, rather than as filters, they function as "opening valves".

This is the case, for example, with the American *writ of certiorari*, the British permission to appeal, the Spanish "casacional interest" and the Argentine "institutional gravity" doctrine. The Argentine "institutional gravity" doctrine allows the Supreme Court to overcome the absence of various admissibility requirements of the extraordinary federal appeal when the matter involves the interest of the community as a whole.[23] Something similar happens in the Province of Buenos Aires (Argentina), which since 2008 has allowed its Supreme Court to admit appeals that do not comply with the case-value requisite (art. 31 bis, 4th paragraph, Act 5827).

The phrasing of this classification can be misleading about the generosity of each kind of selection device, however. The positive or negative character of the mechanism says nothing about its openness or restrictiveness. Thus, for example, by starting from a rule of inadmissibility and opening the gateway to an appeal only by way of exception, "positive" mechanisms tend to be more exceptional and rigorous than the "negative" ones, in which the principle is admissibility and the exception is rejection, so that the rejection decision is the one that requires the "effort" of the court. Therefore, the emotional influence that these terms may exert in this field should be disregarded, in order to concentrate on the effects produced by the application of each type of device.

C. THIRD DIMENSION: WHO DECIDES ON THE APPLICATION OF THE CASE SELECTION DEVICE?

Depending on who decides (competence to determine which appeals will be dealt on the merits), two alternatives can be presented: (a) the inferior court is in charge of selection or it is at least is carried out with the intervention of the inferior court; and (b) selection is an exclusive power of the higher court.

The first alternative is seen less frequently, since it implies that the agenda setting of a supreme court will depend on the evaluation carried out by a different (inferior) court.

---

23 On the "institutional gravity" doctrine in Argentina, see: Barrancos y Vedia, F. (1991). *Recurso extraordinario y "gravedad institucional"* (2º ed.). Buenos Aires: Abeledo Perrot; Sagüés, N. P. (2002). *Derecho Procesal Constitucional. Recurso extraordinario* (4° ed.). Buenos Aires: Astrea, pp. 279–306; Palacio, L. E. (2001). *Recurso extraordinario federal* (3° ed.). Buenos Aires: Abeledo Perrot, pp. 267–290; Lugones, N. (2002). *Recurso extraordinario* (2° ed.). Buenos Aires: Lexis Nexis, pp. 311–338; Morello, A. M. (1999). *El recurso extraordinario* (2° (con la colaboración de Ramiro Rosales Cuello) ed.). La Plata: Platense, pp. 395–419; Sagüés, S. (2005). Recurso extraordinario federal y gravedad institucional. In P. Manili, *Derecho Procesal Constitucional*. Buenos Aires: Razón y Fe, pp. 385–422. On the difference between "transcendence" and "institutional gravity", see: Giannini, above n. 14, t. II, pp. 173 et seq.

This can obviously be seen as a restriction of a fundamental device that supreme courts should be able to use to fulfil their institutional roles.

However, the system has the advantage of giving prominence in the selection of cases to courts that may – sometimes – be better positioned to verify whether the legal issues require the supreme court's attention, for reasons of coherence and unity in the interpretation and evolution of the law.

In the United Kingdom, for example, a request for permission to appeal is submitted to the court that issued the decision. If the inferior court denies such a licence, the aggrieved party may appear before the UK Supreme Court seeking review of the denial. In Germany, the inferior courts have a greater role in the application of the filter established to moderate the admission of appeals to be decided on the merits by the Federal Court of Justice (*Bundesgerichtshof* – BGH). In this regime, when the inferior tribunal grants the appeal on the grounds that the case has "fundamental significance", meaning that it provides for the development of the law or the coherence of the case law, the decision is binding on the BGH. In the reverse scenario (i.e., when the appeal is dismissed by the lower court, on the basis that the conditions established in §543 of the Zivilprozessordnung (ZPO) are not met), the BGH does have the power to reverse the denial and admit the appeal (§544, ZPO).[24]

The second model (exclusive selection by the Supreme Court) predominates in comparative law. There are, however, some variations that can be mentioned within this system.

In some regimes, the selection of cases is left to the same court (or, where appropriate, the same chamber or section) that will decide on the merits. In others, there are specialised chambers that are responsible for verifying whether the conditions that allow admission, determine inadmissibility or provide for a differentiated treatment of appeals, are present in each case.

An example of these specialised chambers can be found in the regime of art. 360 bis of the Italian Code of Civil Procedure (CPC) since the 2009 reform. This reform, in addition to incorporating a "filter" of limited selective operation, adapted the organisation of the Cassation Court and the procedure necessary to put into operation this tool to avoid congestion. A new section was thus created in the *Corte di Cassazione*, legally called the "*apposita sezione*" and baptised by the doctrine as "*sezione-filtro*".[25] Until the 2021 Reform is implemented (see below), this division

[24] On the 2001 reform and its impact over this issue, see Pérez Ragone, Á. (2006). La reforma del proceso civil alemán. Principios rectores, primera instancia y recursos. In L. G. Marinoni, *Estudios de Direito Processual Civil*. Sao Paulo: Revista Dos Tribunais, p. 751.

[25] The Court of Cassation itself adopts this terminology when synthesising the organisation of the civil sections of that court and referring to the frequent description of the Sixth Section as a "filtering section" (*sezione filtro*). See: https://www.cortedicassazione.it/corte-di-cassazione/it/amm_area_civile.page.

is responsible for examining all appeals in cassation, except those that fall within the jurisdiction of the "united sections" (*sezioni unite*), which are cases dealing with questions of law of special importance or that have been decided inconsistently by the "simple" divisions of the Court.[26] This "filtering section" is made up of magistrates from various chambers of the Court of Cassation, to give greater pluralism to a design that can be described as *concentrated*.

A different approach to special divisions for deciding admissibility is the French Cassation model, in which that role is assigned to a "restricted formation" (*formation restreinte* or *formation "a trois"*) of the same section of the court that – when the case has overcome this initial barrier – will decide the merits of the case.[27] A recent reform in Italy adopted this method,[28] by eliminating the "Filter Section" of the Court and placing those powers under the charge of the section of the court that will deal with the merits of the case.

In systems based on selection by the full court (e.g., US, Brazil, Argentina), there are some variations with respect to the majority required to rule on these special conditions of admission.

In Brazil, for example, the decision declaring an appeal inadmissible for lack of "general repercussion" requires a qualified majority of two-thirds (2/3) of the members of the *Supremo Tribunal Federal* (art. 102 §3º, *in fine*, Federal Constitution), that is, eight of its justices.[29] In the United States, on the other hand, there is quite a well-known practice called the "rule of four", by which a case will be admitted if four of the nine Supreme Court justices vote to grant "certiorari".

---

26 Passanante explains that after the 2016 reform on proceedings before the Cassation Court (Act n° 197, 25 October 2016), once the initial phase is over, the cassation appeals have three tracks, depending on the quality of the questions to be decided. At the lowest "relevance" first level, issues that do not require a "nomophylactic" intervention of the court (error control performance focused on *ius litigatoris*) will be decided by a simple division with no public debate hearing. At a second intermediate level, matters of special importance that still do not qualify to the United Sections, are decided by a simple division with public hearing. The author brings some examples of what could constitute relevant matters of this intermediate level, like first instance interpretative conflicts, cases with socio-economic general impact. And finally, at the first level, the United Sections (*Sezioni unite*) deal with interpretative conflicts between the Court sections or to the definition of maxims of special importance (Passanante, above n. 5, pp. 64–65; see also for the 2015 reform: Menchini, S. (2015). Il disegno di legge delega per l'efficienza del processo civile: osservazioni a prima lettura sulle proposte di riforma del giudizio ordinario di cognizione. *Giustizia Civile* (2), pp. 335–392, esp. pp. 380–392).

27 See for the Italian *Sezione Filtro*: Silvestri, E. (2010). La novità in tema di guidizio di cassazione. In M. Taruffo, *Il processo civile riformato.* Bologna: Zanichelli, p. 425; for the French *formation restreinte*: Weber, J. F. (2006). *La Cour de cassation.* Paris: La documentation française, pp. 37–39.

28 Legge n° 206/2021, available in: https://www.gazzettaufficiale.it/eli/gu/2021/12/09/292/sg/pdf. For a general analysis of this reform (still not in force at the time of this writing), see: Passanante, above n. 5, esp. pp. 997–999.

29 With the constitutional amendment of 2022, the 2/3 special majority also applies to decide the "legal relevance" of the special appeals brought before the *Supremo Tribunal de Justicia* (STJ) (see above n. 22).

This implies an exception to the principle of the absolute majority that governs – in general – in the collegiate courts, by which the concordant opinion of five justices of nine would be needed. A greater or less qualified minority (four of nine in the US Supreme Court, three of 11 in the Brazilian STF) is sufficient to guarantee that an appeal will be initially admitted. Solutions such as these seek to avoid the trivialisation of admission analysis, mitigating its use as a mere valve to avoid congestion or as a political-ideological tactic (not just the majority but also a qualified minority of the court may influence the agenda setting). On the other hand, the special majority required to dismiss an appeal (an effect that is achieved in both the Brazilian and US systems) seeks to compensate for the significant power attributed to the supreme courts through these mechanisms.[30]

In other courts, the rules referring to the quorum and majorities that will decide on the application of these opening or closing gateways are the same as those that govern the ruling on the merit. This is the case, for example, in Argentina with the so-called certiorari at the federal or provincial level (see respectively, arts. 280, CPCCN; 31 bis, Act 5827, Province of Buenos Aires).

D. FOURTH DIMENSION: SELECTION CRITERIA

The most challenging area in which to elaborate useful comparative typologies in this field is, without a doubt, the selection criteria. The solutions in this regard are multiple and it is particularly difficult to build adequate models homologating significant differences. However, this is the main problem with filters, so it is necessary to make extreme efforts to try to properly systematise this phenomenon.

Selection guidelines can be analysed from three fundamental perspectives. First, it is interesting to distinguish systems based on the exclusive use of qualitative parameters from those that exhibit a combination of qualitative and quantitative filters. Second, it is important to distinguish selection filters in the strict sense (I will call these "proper" filters), from those that only aim to speed up the treatment of appeals when they can be readily identified as doomed to failure (I will call these "improper" filters). Third, it is essential to distinguish the degree of flexibility or discretion of the qualitative selection arrangements themselves. These perspectives will be developed further below.

[30] In this sense, Renquist points out that the "rule of four" practice, which dates back to the Judge's Bill (1925) was a moderate response to the wide degree of discretion that the rule conferred on the Court (Renquist, W. H. (2001). *The Supreme Court* (2º ed.). New York: Vintage Books, p. 233).

1. Pure Qualitative vs. Mixed (Quantitative-Qualitative) Systems

The option of qualitative or quantitative filters is not necessarily binary. There are several jurisdictions in which access to the highest court is determined by a combination of both kinds of parameters.

In general, these mixed models are based on the determination of minimum values, above which the party has the right to go before the Supreme Court. Otherwise, access to the Supreme Court depends on the evaluation of more flexible conditions, like the importance, general interest or legal quality of the issues involved.

This is the case, for example, in the Spanish civil cassation since the 2001 reform of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*), which provides that when the case exceeds 600,000 euros the final judgment will be subject to cassation. And where this condition is not met, the appeal will be equally admissible if it presents "cassational interest", for presenting novel or conflicting issues of law, as discussed in the next section. This mixed modality is also present in Germanic countries such as Switzerland and Austria, which also provide for a minimum value above which the final appeal is a right of the parties (in Switzerland, between 15,000 and 30,000 Swiss francs; in Austria, 30,000 euros); below this level, the presence of issues of law of significant importance must be verified (in Switzerland, fundamental issues of law or violation of constitutional rights; in Austria, issues of law of significant importance[31]). Among the Nordic countries, Iceland maintains this mixed modality,[32] determining a minimum amount in civil cases of around 5,600 euros, although enabling access to the Supreme Court (which in that country is a court of second instance)[33] when the case, even if it does not exceed that amount, is important to promote the unity of the law.

In the Model European Rules of Civil Procedure (ERCP)[34] these mixed (quanti-qualitative) systems were only introduced for "first" appeals (ordinary appeals

---

31 See Domej, T. (2017). Squaring the Circle: Individual Rights and the General Interest Before the Suprema Courts of the German-Speaking Countries. In C.-H. van Rhee and Y. Fu, *Supreme Courts in Transition in China and the West. Adjudication at the Service of Public Goals*. Cham: Springer, pp. 139–142. In the case of Austria, I have simplified in the text the relationship between the right to appeal and the value in dispute, since the relationship has, in truth, three levels: (1) below 5,000 euros, the appeal is always inadmissible; (2) between 5,000 and 30,000 euros admissibility depends on permission to appeal referred; (3) above 30,000 euros there is the right to appeal to the Supreme Court (Domej, ibid.).

32 Sunde emphasises that the other Nordic countries (Sweden, Denmark, Finland and Norway) historically had quantitative criteria based on the case-value requirement, beyond which the appeal was a "right" for the party. However, today, with the exception of Iceland, these quantitative filters have been completely replaced by exclusively qualitative criteria (Sunde, above n. 19, p. 63).

33 See Sunde, above n. 19, pp. 58, 62.

34 Available at: https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules (European Law Institute / UNIDROIT, 2020). For a comparative analysis of the regime of appeals in the ERCP, I refer to: Giannini, L. (2021). Los recursos en las Reglas Modelo Europeas de Proceso Civil (ELI / UNIDROIT). International Journal of Procedural Law, 11(1), pp. 64–84.

before a second instance).[35] In this regime, the appeal against a first instance judgment is a right for the litigants above a certain pecuniary amount and, below it, can still be permitted, taking into consideration factors such as the "fundamental significance" of the questions involved, the need for uniformity in adjudication or for the development of law, or the presence of violations of fundamental procedural requirements. Instead, in second appeals (i.e., appeals before supreme courts), the ERCP do not incorporate a monetary case-value floor to grant access. Instead, they directly establish access parameters based on factors such as the need to correct violations of fundamental rights, to provide for the uniformity of development of the law, or to decide a fundamental question which is not limited to the case at issue (art. 172, ERCP).

The relationship between quantitative filters (such as the case value) and qualitative filters (such as the "importance" of the case) may vary slightly from jurisdiction to jurisdiction. An example of this can be found in the Province of Buenos Aires (Argentina), in which the association between the *suma gravamnis* and the "transcendence" selection filter (art. 31 bis, Act 5827) is diverse. Unlike the models previously referred, in this State the fulfilment of the case-value requirement does not guarantee access to the extraordinary appeal process. Even if the value in dispute is higher than the threshold established by the legislator (2,712,500 Argentine pesos – about 20,000 euros as of September 2022 – or 10 years' conviction in criminal cases), the Supreme Court could still dismiss the appeal on the grounds that the issues are (legally) irrelevant. In the reverse case, the standard of relevance works in the same way as in the rest of the systems used as examples: when the case can serve to set a precedent, the Buenos Aires Supreme Court can admit the appeal even if the value in dispute is lower than the established threshold.

2. Proper vs. Improper Filters: Case Selection vs. Case Streamlining

By their content, filters can be distinguished according to whether they authorise the Supreme Court to select cases in a strict sense ("proper filters") or they only provide

---

35 Rule 166 of the ERCP states the following:

"Right to appeal
(1) A party has a right to appeal against a first instance judgment if (a) the value of the appealed claim exceeds [the value of the appealed claim as determined by applicable law, for instance twice the average monthly wage in the forum State] or (b) the appeal court grants permission to appeal based on the contents of the notice and reasons for appeal.
(2) In deciding whether to grant permission to appeal, the appeal court shall take the following into account (a) whether the legal issue in dispute is of fundamental significance, or (b) the further development of the law, or the public interest in securing uniform adjudication require an appellate decision, or (c) fundamental procedural requirements have been violated.
(3) The appeal court shall, on its own motion, assess whether the requirements of Rules 166(1) and (2) have been met".

a tool to expedite the process to uphold evidently well-founded appeals or to deny others with no real prospect of success ("improper filters").

The clearest expressions of so-called *proper filters* are selection mechanisms based on notions such as general public importance, general impact, fundamental significance, transcendence or similar legal categories. Through them, the court has the ability to *decide which cases to decide*, depending on whether they carry issues relevant to the fulfilment of the court's institutional functions. As we have seen, this type of filter has been adopted in countries with different legal traditions, such as the United States, Brazil, Germany, United Kingdom, Nordic countries and Argentina. The modalities of each regulation will allow more precise sub-classifications of these kind of filters, according to the degree of discretion given the superior court (see below, Section D.3).

Improper filters, instead, suppose the recognition of a more limited power of supreme courts. Unlike proper filters, these streamlining tools do not modify the final result of the appeal: they only anticipate the response that would also be given to the case if they were not applied. They do this by reducing or eliminating the procedural phases required for a final decision. For example, they may eliminate the oral debate hearing or not allow the intervention of official bodies with a qualified voice in this instance (such as the public ministry); they may alter the formation of the court that will rule on the case; and they may limit the deliberation and motivation in the decision-making process. In other words, these filters work as an expediting or streamlining mechanism, than as a proper selection tool.

This is the case with filters based on the technical insufficiency of the application, the manifest inadmissibility or lack of grounds of the appeal, or the raising of issues previously decided in analogous cases. Examples of this can be found in different jurisdictions, like the Italian filter (art. 360 bis of the CPC It.[36]) or the criterion of "manifest fundability or unfoundability" which allows the German Constitutional Court (§24 and §93.c.1], LTFC), to reject or to uphold presentations whose adverse or favourable outcome is evident from the beginning.

Also in Argentina, the insufficiency (lack of proper grounds) or insubstantiality (questions previously decided to the contrary by the Court in similar cases) are situations in which art. 280 of the CPCN (negative filter) can be applied. In a similar sense, art. 31 bis of Act 5827 (Province of Buenos Aires, Argentina), allows the State Supreme Court to deny from the outset technically insufficient appeals or to decide

[36] Art. 360 bis of the Italian Code of Civil Procedure provides the following: "The [cassation] appeal is inadmissible: 1) when the contested decision has decided the questions of law in accordance with the jurisprudence of the Court and the examination of the grounds does not offer elements to confirm or modify the orientation of the latter: 2) when the challenge concerning the violation of the principles governing due process is manifestly unfounded".

directly on merits appeals that bring arguments that have been decided in previous analogous cases.

Furthermore, the regime of unsubstantiated dismissal established in 1988 in art. 81 of the Netherlands Law on Judicial Organization shares this characteristic, by allowing the Dutch Supreme Court (a court of cassation heavily influenced by its French counterpart) to reject complaints "if they cannot lead to cassation"; this allusion is sufficient as a justification for the decision.[37]

The difference has an obvious practical impact. Using improper filters, cases are only sorted out as suitable to be decided by fast track. In other terms, the application of the device does not change the final result of the case. If a supreme court does not have this type of mechanism available to detect and preliminarily dismiss a manifestly insufficient or unfounded appeal, the application would still ultimately be dismissed, for that very reason. The same applies to appeals that raise issues already decided by the court in similar cases, if there is no justification as to why that precedent should be overruled. Here, too, without the improper filtering device, the court would dismiss or accept the appeal on the merits, relying on those precedents. So applying the filter merely speeds up the decision of a matter whose fate (favourable or adverse) can be evaluated in advance. That is why this kind of criteria has been called "outcome oriented".[38]

On the contrary, the application of proper selection mechanisms (typically, filters based on the importance of the issues to be decided), can radically vary the final result of the case. A judgment can be clearly wrong or unfair, but this injustice may not imply an important issue which would justify the involvement of a supreme court in the case.[39] Therefore, if there was no filter and the appeal fulfilled the classic requirements

---

37 See: van Rhee, C. H. (2006). The Supreme Court of the Netherlands: Efficient Engeneer for the Unity and the Development of the Law. In C. H. van Rhee and Y. Fu, *Supreme Courts in Transition in China and the West*. Cham: Springer, pp. 90–91.

38 See Le Seur, above n. 20, p. 272.

39 This is especially true for Supreme Courts that do not believe error correction to be part of their institutional role. The US Supreme Court is probably the best known example of this approach. Fred Vinson, a former US Chief Justice, has famously declared that: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case … If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved" (Vinson, F. (September 1949). Work of the federal courts, address to the American Bar Association, cited by numerous authors, like: Gressman, Geller, Shapiro, Bishop and Hartnett, above n. 11, p. 236; Shapiro, C. (2006). The limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court. *Washington & Lee Law Review* (63), 271 et seq., pp. 283–284, note 49; Perry Jr., H. W. (1991). *Deciding to decide: agenda setting in the United States Supreme Court.* Cambridge: Harvard University Press, pp. 35–36.

to be admitted (depending on the system, this may be standing, appealability, final judgment rule, case value, timeline and other formalities) it should be admitted and may be even successful due to an error in the inferior court's judgment. But, as the case selection device exists and the interest in the review resides exclusively on the parties to the dispute, the questions raised are irrelevant and the appeal will probably be dismissed. Therefore, the application of a proper filter in such cases may alter the outcome of the case.

3. The Degree of Discretion or Flexibility

Third, it is essential to analyse the degree of flexibility or discretion allowed to qualitative filters. The four features that are the most important when measuring this amplitude in the strength of selection powers can be distinguished: (a) the precision of the language used to define the filter's scope of action and the existence of general guidelines provided by the legislature (*lato sensu*) or by the Supreme Court itself, to determine the importance of a matter; (b) the possibility of discretional departures from those guidelines; (c) the burden of motivation required to apply the filter device, or, in other words, the degree of justification required to decide which cases to decide based on the importance of the issues involved; and (d) the provision of transparency mechanisms that, regardless of the degree of motivation required to apply the filter, may enable a wider community to monitor the selection process.

a. The Degree of Indeterminacy of the Selection Criteria

The vagueness of the language used to indicate the general parameters that should guide the case selection decision-making process, is practically a defining characteristic of proper qualitative case selection filters. Looking at the wording used to refer to the different selection mechanisms in force in different legal traditions corroborates this common trend.

Expressions such as "general public importance", "fundamental significance", "constitutional transcendence", "institutional impact", "general repercussion", "cassational interest" and "legal relevance" are qualified by a noteworthy amount of vagueness, indeterminacy and open texture. This defining feature gives supreme courts a wide degree of discretion, that in some countries (as in the United States or Argentina, as we shall see later), turns out to be explicit.

It is interesting to note that, in several systems, the legislator or the supreme court itself are concerned with mitigating (never definitively remedying) the fear produced by the recognition of such a power to decide which cases to decide. Indeed, in distinguishable regimes such as those of the United States, Spain or Brazil, the generic ability to select cases by evaluating their general, public or cassational interest, has been accompanied by some parameters or regulations intended to guide the application of the filter. Sometimes, those guidelines suffer from similar

indeterminacy as the general criterion that they sought to specify. Other times, they are just illustrative: they do not control the court's discretion, but they guide the community on what will be normally considered important when granting access to the highest court. In any case, provisions specifying parameters always allow a more predictable, although never infallible, approach to what is considered relevant in the apex court.

In the United States, through Rule 10 of the Supreme Court Rules[40] ("Considerations governing review on writ of certiorari"), the Court itself has drawn up a general list of parameters to be taken into account in judging whether a question is of enough importance to grant access to its appellate jurisdiction. In general, these criteria rest fundamentally on the relevance of the issues to be decided on the merits and on the general impact that a pronouncement of the Court will have on the resolution of interpretative conflicts and on the development of American law, rather than on the mistakes in the ruling of the inferior court. These parameters, as the same Rule 10 clarifies, are illustrative. They do not exhaust or constrain the Court's broad discretion to define its agenda. This feature places the American model among those with the greatest discretion in comparative law (see below, at Section III.D.3.b).

Now, even if Rule 10 does not establish exhaustive compendium[41] it constitutes a "north" that parties can use to navigate in this final instance, but without fully relying on the absolute accuracy of the compass. Some general characteristics of the aforementioned guidelines can be mentioned: (a) access to the Court by certiorari is exceptional, especially since the 1995 reform that introduced certain qualifiers into the Rule, aimed at aggravating the importance of the issues required for a case to be selectable; (b) the criteria adopted in Rule 10 shows a predominant interest in unity and coherence of federal law, prioritising access in situations of interpretative conflicts between federal courts or between federal and state courts, regarding that branch of law; (c) there is a markedly exceptional possibility provided in Rule 10 to grant certiorari for error correction purposes in which party interest predominates, although the Rule itself warns that admission on this ground is unlikely ("rare").[42]

---

40 Available at: https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf (Supreme Court of the United States, 2019, pp. 5–6). Rule 10 standards complement §1257 of the US Code (28 USC §1257), which regulates the US Supreme Court's appealed jurisdiction over cases coming from of state superior courts. For a more detailed comparative analysis of the American writ of certiorari functioning and, in particular, the standards provided in Rule 10, I refer to: Giannini, above n. 14, t. I, pp. 213–291, esp. 253–259, and the sources there cited.

41 More critically, the definitions in Rule 10 have been considered to be "tautological" (Perry Jr., above n. 39, pp. 34–221). However, Gressman and co-authors of his classic work dedicated to the US Supreme Court understand that an attempt to give these criteria greater precision would be in some way reckless (Gressman, Geller, Shapiro, Bishop and Hartnett, above n. 11, p. 239).

42 As Perry states, the primary criterion used to judge admission in these markedly exceptional cases is the *egregiousness* of the mistake committed (see Perry Jr., above n. 39, pp. 265–268).

In Brazil, Act n° 11.418 (2006), amended the Brazilian CPC[43] (prior to the last reform of 2015), incorporating a series of provisions aimed at regulating §3 of art. 102 of the Federal Constitution, which refers to the "general repercussion" required for extraordinary appeals at the *Supremo Tribunal Federal* (its highest constitutional court). Art. 543-A §1 of the aforementioned law incorporated a broad definition of this requirement in this terms: "§1° For the purposes of general repercussion, it will be taken into account the existence, or not, of *relevant issues from the economic, social or legal point of view*, that exceed the subjective interests of the case" (emphasis added). The same provision was introduced in art. 1035, §1° of the new Brazilian CPC (2015). Regardless of this general definition, there are three specific "mandatory" situations of general repercussion established in art. 1035, §3 of the new CPC of Brazil (2015): (a) where a judgment "contrary to a *binding sumula*[44] or dominant case law of the Court" is challenged; (b) resolution of repetitive claims; (c) when the inferior court's judgment has declared unconstitutional an international treaty or a federal statute. In those cases, the legislator considers that the case brings a question of general impact, without the need to specifically verify compliance with the generic parameters outlined above. It is, as can be seen, a kind of *iure et de jure* presumption of case relevance.[45]

Recently, as anticipated, a Constitutional reform of July 2022 also introduced a filter device for special appeals before the Brazilian Superior Court of Justice (STJ[46]). From now on, every appellant has to demonstrate the relevancy of the legal

---

43 Despite the systematic location of the norm (included in the Code of Civil Procedure – *Código de Processo Civil*), its scope should be extended to all the prosecution systems (eg, in criminal proceedings), by means of interpretation, since the "general repercussion" of a case is a constitutional requirement to access the Constitutional Supreme Court (*Supremo Tribunal Federal*). This is highlighted by Dantas, who criticises the modification that Parliament made of the original bill, in which the regulation of the "general repercussion" was adopted through a special law, independent of the various procedural bodies (Dantas, B. (2008). *Repercussão geral. Perspectivas histórica e de direito comparado.* São Paulo: Revista Dos Tribunais, pp. 276–277).

44 As defined by Oliveira and Garoupa, the *súmula vinculante* is a "one-sentence-pronouncement issued by the Brazilian Supreme Court, with binding effect to all other courts, which states clearly the interpretation that the Brazilian Supreme Court gave to a constitutional issue after repeated decisions on the same matter" (Oliveira, M. A. and Garoupa, N. (2012). Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach. *Emory International Law Review*, 16(2), n. 1). For a more detailed analysis of the Brazilian system of precedents, see: Marinoni, L. (2010). *Precedentes Obrigatorios.* São Paulo: Revista dos Tribunais; Mitidiero, D. (2017). *Precedentes* (2º ed.). São Paulo: Revista dos Tribunais; Zanetti Jr., H. (2016). *O valor vinculante dos precedentes. Teoria dos precedente normativos formalmente vinculantes* (2º ed.). Salvador: JusPodivm.

45 For a more detailed analysis of the "general repercussion" requirement in Brazil, see: Dantas, above n. 43; Marinoni, L. G. and Mitidiero, D. (2013). *Repercussão geral no recurso extraordinário* (3° ed.). São Paulo: Revista Dos Tribunais; Arruda Alvim Wambier, T. (2008). *Recurso especial, recurso extraordinário e ação rescisória.* São Paulo: Revista Dos Tribunais, pp. 290–304; Marinoni, L. G. (2022). *Da Repercussão Geral. O uso virtuoso do poder de não decidir.* São Paulo: Thompson Reuters). I refer for a comparative examination to: Giannini, above n. 14, t. I, pp. 525–565.

46 See above n. 21.

(infra-constitutional) questions presented. In addition to cases that exceed a certain sum of money (500 minimum salaries), relevancy is considered present in criminal cases, governmental corruption cases (*ações de improbidade administrativa*), cases that may produce disqualification to run for election (*inelegibilidade*), or when the appealed judgment has deviated from established STJ case law (*jurisprudência dominante*). The constitutional amendment allows the legislature to add other situations of legal relevancy.[47]

In Spain, art. 477 Inc. 3) of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) contemplates three fundamental situation in which the "cassational interest" is necessarily configured for the admission of final appeals that do not comply with the case-value requirement (above Section I.D.1): (a) when the appealed judgment ignored the jurisprudential doctrine of the *Tribunal Supremo* (the Spanish Supreme Court for cassational – non-constitutional – purposes); (b) when the appealed judgment ruled on points and questions on which there is contradictory jurisprudence of the Provincial Courts (*Audiencias provinciales*); (c) when the appealed judgment applied regulations that have not been in force for more than five years, provided that there is no case law of the Supreme Court relating to previous regulations of the same or similar content.

A comprehensive examination of these parameters shows a tendency to reinforce the role of the "legal doctrine" (case law) of the Supreme Court. Interpretative coherence is also preferred in Spain, given that cases are more suitable for entering the highest judicial instance (invoking "cassation interest") when it is necessary to lay down jurisprudential doctrine on a conflicting (subdivision (b) of the paragraph above) or novel (subdivision (c)) point of law, or when there is a need to preserve the authority of unobserved but already established case law (subdivision (a)). It should also be pointed out that the previous enunciation is considered exhaustive,[48] so the Supreme Court cannot take into account other elements to define whether a matter has sufficient "cassational importance". Discretion, therefore, is more limited.[49]

---

47 For an analysis of this recent reform, see: Mitidiero, D. (2022). *Relevância no recurso especial.* Sao Paulo: Revista Dos Tribunais.

48 See: Blascó Gascó, F. d. (2002). *El interés casacional. Infracción o inexistencia de doctrina jurisprudencial en el recurso de casación.* Cizur Menor: Aranzadi, p. 37; Reverón Palenzuela, B. (2005). Interés casacional y Tribunal Constitucional. La convalidación constitucional de un acuerdo de dudosa constitucionalidad. *Aranzadi Civil*. doi:Wstlaw.es: BIB 2005/842, p. 6; Puga Gómez, S. (2005). El interés casacional; Auto del Tribunal Supremo de 20 de julio de 2004. *Actualidad jurídica Aranzadi*. doi:Westlaw.es: BIB 2005/1202, p. 5.

49 The Supreme Court has regulated the aforementioned cases of application of the "cassational interest" typified in art. 477.3 LEC, in the "Agreement on criteria for admission of cassation and extraordinary appeals for procedural infringement" (2011), which details some conditions that must be met to satisfy said requirement. For a comparative analysis of that regulation, see: Giannini, above n. 14, t. I, pp. 512–513.

b. Explicitly Strong Discretionary Systems

The degree of flexibility of case selection mechanisms reaches its maximum expression when the court itself is recognised as having the legal ability to self-determine the parameters of selection (or, similarly, of discretionally departing from the pre-established guidelines).

The US *writ of certiorari* regime is the best known example of this type of approach. As seen in the previous section, the US Supreme Court considers itself discretionally empowered to deviate from the guidelines established by itself in Rule 10. By stating in the very heading of the rule that "review by writ of certiorari it is not a matter of law, but of judicial discretion" and that the parameters set forth therein "do not fully control or measure the discretion of the Court", the highest US court enjoys the maximum degree of discretion in defining its agenda. The design resembles the famous parody attributed to Groucho Marx on the fallibility of principles: these are my parameters to select, but if necessary I can discretionally deviate from them.

The American model is not the only one that can be qualified as "full-discretional". The so-called "Argentine certiorari" (art. 280, CPCN), also recognises the discretional character of the Supreme Court case selection evaluation, based on the "transcendence" (*trascendencia*) of the matters involved.[50]

I have explained elsewhere that Argentine Supreme Court has a double level of discretion,[51] involving a first weak-discretional test, followed by a second strong-discretional test. The reading that I, together with other authors, make of art. 280 of the CPCN implies a double admission examination of every appeal: (a) the Court must assess whether the issues raised on appeal are important (transcendent), which requires the Court to define, interpret and apply a particularly indeterminate concept, but the Court does not to have full discretion (the Supreme Court *must* admit appeals that include transcendental matters); and (b) the Court must conduct a purely optional or discretional selection: if the issues are irrelevant, the Supreme

50 Art. 280, CPCN stipulates that: "The Court, according to its sound discretion, and with the sole invocation of this rule, may reject the extraordinary appeal, for lack of sufficient federal grounds or when the raised issues are insubstantial or lacking in transcendence".
I realise that in plain English, "transcendence" is an expression mostly used to describe experiences that goes past normal limits, like, for example, in "spiritual transcendence" or "creative transcendence". However, transcendent as "more important" is an official meaning to the word (see: https://dictionary.cambridge.org/es-LA/dictionary/english/transcendent), so it can be used here to grasp the closest translation to the Spanish original expression. That said, whenever I refer to "transcendence" or "transcendent" in this work, it should be read as synonymous with importance (important) or relevance (relevant).

51 Giannini, above n. 14, t. II, pp. 152–194; Giannini, L. (2021). Case Selection and Writ of Certiorari in Argentina: "Transcendence" as a Case-Selection Parameter at the Federal Supreme Court. In P. -V. Bravo Hurtado, *Supreme Courts Under Pressure: Controlling Caseload in the Administration of Civil Justice*. Cham: Springer, pp. 211–233.

Court *can* still admit the appeal, self-determining the ratio underlying the decision, without giving reasons and without any statutory guidance, with the only limit being a paradoxical non-motivated reasonableness (it must apply a sound discretion – "*sana discreción*").

c. The Burden of Justification Required to Decide on the Application of the Case Selection Device

Another quality that helps to graduate the amount of flexibility or discretion in case selection mechanisms is the degree of motivation required to apply them.

At this point, models are equally variable, although the tendency towards a reducing justification can be considered universal. This propensity is often manifested in the use of stereotyped formulas or, more intensely, with the practical suppression of any public record of the reasons adopted to evaluate the importance or insignificance of a case.

The trend is paradoxical, if one takes into account that a generally recognised principle regarding the exercise of discretionary powers by the State is that its legitimacy depends on justifying the decision. In other words: as a general principle, the greater the discretion recognised in decision-making, the greater the duty of justification.[52] However, filters have resisted this challenge in general, because it is implicitly understood that transferring this logic to this area would end up conspiring against the very rationale of the institution. That is, the time and effort required for a thorough explanation of the reasons for the selection would often be similar to that required to resolve the case on merit (which is precisely what tends to be avoided with the installation of the filter). Therefore, the basis for such decisions is often eliminated or reduced to the mere introduction of brief legal citations, sometimes accompanied by very important references.

The relatively well-known American "discuss list" method may serve as an example. This internal procedure is used in the United States to screen, analyse and decide in which cases certiorari will be granted in a given period. Once the memorandums have been prepared and circulated by the different members of the Supreme Court (individually or in a pool[53]), the Chief Justice prepares a list of the

[52] In Argentina, the Supreme Court has indicated on more than one occasion that "the exercise of discretionary powers by the administration does not allow the absence of motivation to be waived, but rather, on the contrary, to demand stricter compliance with that duty" (CS, above n. 4: 331:735, "Schnaiderman" [2008]). This is so, given that "in the scope of the Administration's discretionary powers is where the motivation of the act becomes more necessary" (CS, above n. 4: 324:1860, "Lema" [2001]).

[53] Regarding the practice of certiorari pool, intended to combine efforts in the analysis of the cases brought to this instance, sharing the initial study and drafting of the respective memoranda, see: Giannini, above n. 14, t. I, pp. 270–275 and especially the sources cited there.

cases that will be discussed in conference. That list is sent to every justice, each one being able to incorporate cases they deem appropriate when, in their opinion, a matter worthy of admission has not been listed by the Chief Justice. The importance of including a case on the list is decisive: any certiorari petition articulated in a case not included in the list is automatically declared inadmissible, without any need to be discussed or decided in conference. However, the inclusion of a case in the list does not guarantee the granting of certiorari, but only places it in a position to be considered in conference. The Court does not provide any reasons for both kinds of decision (the decision to include a case on the list, as well as the decision to subsequently grant or deny certiorari).

Also in Argentina, art. 280 of the Code of Civil Procedure allows the Supreme Court to dismiss extraordinary appeals that present irrelevant issues "with the sole invocation of that rule". The Court has taken very seriously the legal authority to reject cases without providing reasons. The brief formula, frequently applied by the Court to deny appeals, is practically identical in all cases: "Buenos Aires … [Id. of the case]. Considering: That the extraordinary appeal is inadmissible (art. 280 of the Civil and Commercial Procedure Code). Therefore, the extraordinary appeal filed is dismissed". As can be seen, the absence of motivation is absolute in Argentina, since the decision only provides the legal citation of the statute that authorises the Supreme Court to dismiss without further consideration.[54]

Many other examples could be added, like those of the United Kingdom[55] or the Netherlands.[56] All of them represent the phenomenon described: the tendency to reduce or eliminate motivation in this kind of qualitative decision-making (or, which has the same effect, the use of stereotyped formulas).

---

54 On more than one occasion, parties have challenged the constitutionality of art. 280 of the CPCN, for authorising this type of decision. However, these attempts have only served to encourage the Supreme Court to reinforce its position, establishing that the norm does not require any justification, without any relevant consideration to the constitutional problem raised by the parties: "Art. 280 of the Code of Civil and Commercial Procedure mentions the reasons that authorize the Supreme Court to dismiss the complaint by application of the rule. So when the Court makes use of that power *it does so according to its 'sound discretion' and does not have the duty to motivate the decision*" (*CSN*, causa M.2059.XLII, "Mohana", 12-06-2007) (emphasis added).

55 See Andrews, N. (2017). The Supreme Court of the United Kingdom: A Selective Tribunal with the Final Say on Most Matters. In C. H. van Rhee and Y. Fu, *Supreme Courts in Transition in China and the West*. Cham: Springer, p. 41 (alluding to merely "formulary" reasons for granting or denying permission to appeal).

56 According to Section 81 of the Judiciary (Organization) Act: "If the Supreme Court considers that a complaint that has been filed cannot result in cassation and does not necessitate the answering of questions of law in the interests of the uniform application of the law or the development of the law, *it may confine itself to this consideration when stating the grounds for its decision*" (the Dutch Judiciary Act, valid from 2020, is available in English at: https://www.rechtspraak.nl/SiteCollectionDocuments/Wet-op-de-Rechterlijke-Organisatie_EN.pdf). On the subject, see: van Rhee, above n. 37, pp. 90–91.

d. Transparency and Access to Public Information

A final aspect, often confused with that addressed in the previous section (motivation), is transparency in the exercise of this power by the superior courts. I believe that confusion over lack of motivation and lack of transparency in the use of filters should be avoided, and the proper distinction of both requirements underlies the possibility of improving that tool's performance, without overloading supreme courts.

The line of argument used to justify the limitation of the duty to motivate case-selection decisions by the supreme courts should only be acceptable to the extent that it is subjected to more intense scrutiny.

It may be true that supreme courts lack sufficient structure or resources to be able to thoroughly explain, in each case, the reasons why every appeal is rejected (e.g., to fully develop the reasons why it is considered irrelevant, improper with respect to its institutional roles, insufficiently grounded, insubstantial, insignificant, etc.). It could also be possible to recognise that the imposition of a rigorous duty of motivation in this area would conspire against the very purpose for which this kind of filter is established. However, this rationale obviously fails to support the dismissal of appeals without even examining them to verify whether they actually carry relevant issues. In other words, only *motivation* or formal externalisation of the decision grounds is attenuated or suppressed, not the seriousness of the *judgment*.[57]

Now, in order to allow the parties or the community to exercise some form of control over the seriousness and fairness of admissibility judgments based on the application of this type of device, it is possible to provide mechanisms to promote transparency in selection that do not necessarily include the duty to provide reasons in each case. Although there is an obvious relationship between motivation and transparency, that connection is not necessary in this field. The duty to provide reasons in judicial decisions is strongly linked to judicial transparency. But transparency plays a broader role in the development of judicial activity, which goes beyond the sole burden of justifying decisions.

That is why, even if the duty to justify this kind of decisions is substantially limited, one can think of other instruments that, without unreasonably aggravating the workload of a supreme court, can guarantee public access to relevant information on the background that was taken into account when selecting cases worthy of a pronouncement of merit. In other words: it is possible (and desirable) to promote transparency, while maintaining the extreme limitation of the duty to provide reasons.

A *first instrument* to provide transparency in this field is the general enunciation of the parameters that will be taken into account to judge the importance of the

[57] On the possibility of distinguishing "judgment" from "motivation", which is very useful for the idea developed in the text, I refer to Taruffo, M. (1975). *La motivazione della sentenza civile.* Padova: Cedam, pp. 144, 213 et seq., and Taruffo, above n. 5, pp. 180–181, 191–200.

issues brought before the supreme court. Different alternatives can be adopted for that purpose by the supreme courts themselves, such as the approval of regulations adopted by them (when available), the issuance of rules of "self-limitation", or the adoption of a precedent to be referred in the future. I have evaluated some of these options previously (see above, Section I.D.3.a).

Progress in transparency promotion can be made even without legislative reform. Indeed, the court could publicly report on the relevant background of cases submitted to the selection process, without the need to do so through a reasoned judgment. Not many countries can exhibit this type of transparency device, through which it would be possible, for example, to access to the relevant background of each admitted or dismissed case, in order to infer and compare the implicit reasons underlying the unmotivated admission decision. Some attempts in this domain are worth noting.

In Brazil, for example, the *Supremo Tribunal Federal* has introduced in its internal regulations a provision according to which the Presidency of the Court "will promote a broad and specific disclosure of on general impact (*repercussão geral*) decisions, as well as the creation and updating of an electronic database in its regard".[58] This provision, it is worth noting, has been respected by the STF,[59] which disseminates with an effective systematisation on its website[60] the list of cases admitted or rejected in accordance with the selection parameter, along with with a transcript of the respective decision, a brief list of the issues present in the case, and the grounds adopted to when making the decision.

In France, the decision to apply the "non-admission" filter for lack of seriousness of the grounds of cassation (in force in the civil cassation between 2001 and 2014[61]

---

58 For a comparative analysis of this interesting mechanism I refer to Giannini, above n. 14, t. I, pp. 558–565.

59 See Wambier, L. R. and Vasconcelos, R. (2009). Sobre a repercussão geral e seus reflexos nos processos coletivos. *Revista dos Tribunais* 882.

60 Supremo Tribunal Federal (Brasil): http://portal.stf.jus.br/repercussaogeral.

61 In 2001 a reform of the French Code of Judicial Organization allowed a reduced three-judge division (*formation restreinte*) of the *Cour de Cassation* to reject appeals that did not bring "serious cassational grounds" (art. L. 131-6, *Code de l'organisation judiciaire*). In 2008 (Décret n° 2008-522 du 2 juin 2008 – art. 9), the "*moyens non-seriex*" criterion was introduced in art. 1014 of the French Code of Civil Procedure: "*Après le dépôt des mémoires, cette formation déclare non admis les pourvois irrecevables ou non fondés sur un moyen sérieux de cassation*". In December 2014, the text was revised, changing the standard based on the "seriousness of the cassational grounds" to a more conservative "manifestly unfounded" test, allowing expedited dismissal in cases with "*moyens qui ne sont manifestement pas de nature à entraîner la cassation*". For a more extensive comparative analysis and sources, I refer to: Giannini, above n. 14, t. I, p. 437–460.

Debate is always open. In March 2018, the President of the French Court of Cassation announced the submission of a bill to incorporate a new access filter system to the court, based on the seriousness of the grounds for cassation, the need to guarantee the uniformity of jurisprudence, the development of the law or the presence of injuries to fundamental rights (Louvel, B. (20.03.2018). *La réforme du traitement des pourvois.* https://www.courdecassation.fr/institution_1/reforme_cour_7109/reformes_mouvement_8181/reforme_traitement_pourvois_8640/pourvois_tribune_38817.html), which caused

and before the Council of State since 1989 until today[62]), was born substantially deprived of justification. It limits itself to formulaic mentions of the style "the ground of cassation brought is not one of those that by its nature allows the admission of the appeal".[63] However, an annex with the arguments of the dismissed appeal is incorporated on the website of the Court of Cassation, thus allowing access to information on the characteristics of the decided case.[64]

Also in the United Kingdom, where the absence of motivation prevails as a rule,[65] the public can access a summary of the background of each case submitted to permission to appeal. So, even in a scenario with total lack of grounds, information is available to infer the criteria used by the UK Supreme Court in each case.[66]

In short, the tendency to treat motivation and transparency problems as the same thing should be reviewed. Since the absence of justification has resisted the constitutional and conventional attacks directed at it, it is important to find second best alternatives to improve transparency in this field, without the need to increase the workload of the justices of the superior courts.

---

voices of concern among those who consider that the appeal should continue to be considered a right of the litigants and that the incorporation of this class of devices affects the classic "democratic" approach to access to all levels of justice. Among the voices critical of this reform proposal, the following can be cited: Lokiec, P. (24.04.2018). *Pourvoi en cassation: un droit bientôt supprimé?*. https://www.fnasfo.fr/wp-content/uploads/2018/05/pourvoi-en-cassation-un-droit-bientot-supprime.pdf; Le Bars, T. (2018). *Menaces sur la cassation à la française : des propositions de réforme consternantes*. https://www.fnasfo.fr/wp-content/uploads/2018/05/pourvoi-en-cassation-un-droit-bientot-supprime.pdf; and Cassia, P. (22.03.2018). *Contre le filtrage des pourvois par la Cour de cassation.* https://blogs.mediapart.fr/paul-cassia/blog/220318/contre-le-filtrage-des-pourvois-par-la-cour-de-cassation.

62 For a more thorough comparative analysis of the "lack of cassational-seriousness filter" and its impact on the classic French cassation model, I refer to: Giannini, above n. 14, t. I, pp. 437–459, and its citations.

63 See: Cadiet, L. (2008). El sistema de la casación francesa. In M. Ortells Ramos, *Los recursos ante los Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe*. Madrid: Difusión, p. 34; Boré and Boré, above n. 10, p. 661; Jobard-Bachellier, M. and Noëlle-Bachellier, X. (2006). *La technique de cassation. Pourvois et arrêts en matière civile* (6° ed.). Paris: Dalloz, p. 14.

64 See examples in Giannini, above n. 14, t. I, p. 453.

65 The absence of motivation has also been questioned in the United Kingdom. Due to its clarity and universality, it is interesting to bring up Brice Dickinson's criticism, cited by Le Seur: "The reasons for the decision are never made public, not even summarily. This is undoubtedly unfortunate, even though the European Commission of Human Rights, no less, has said that, in appropriate circumstances, it sees nothing wrong with this practice. If the reasons were made public, it would help lawyers to know what legal issues might be the ones the Lords might want to examine in the future" (Le Seur, above n. 20, pp. 285–287). It should also be noted that the rule is relaxed when a question of community law is raised, as provided in §42.1 Supreme Court Rules (2009): "Where it is contended on an application for permission to appeal that it raises a question of Community law which should be the subject of a reference under Article 234 of the Treaty establishing the European Community and permission to appeal is refused, the panel of Justices will give brief reasons for its decision" (the provision is still in force: https://www.supremecourt.uk/docs/uksc_rules_2009.pdf). That norm finds its origins on the European Court of Human Rights' case law (see: Giannini, above n. 14, t. I, p. 322, n. 320).

66 The information can be accessed on the Supreme Court webpage (see: United Kingdom Supreme Court: https://www.supremecourt.uk/current-cases/ and, particularly: https://www.supremecourt.uk/news/permission-to-appeal.html).

IV. CONCLUDING REMARKS

Access filters or qualitative and even discretional case-selection devices are a keystone for any debate on improving the functioning and institutional performance of the supreme courts.

However, improvement does not depend exclusively in the study or the actual implementation of filtering mechanisms. Although the overload suffered by these bodies constitutes a pathology that seriously corrodes their functioning and directly affects the prestige that they are called to have in any justice system, the truth is that limiting any attempt to correct this situation to the installation of discretionary selection devices is a naivety that should be avoided. The implementation of this kind of filter in the highest courts is in most cases a necessary but not sufficient step to improve the tasks that they are ment to perform.

Selection filters must be conceived as instruments that facilitate the achievement of purposes that go beyond mere avoidance of congestion. These higher ends that subordinate their use must be adequately specified so that superior courts do not fall into the type of mistake that would be made by those who, suddenly endowed with a set of tools, begin to hammer, drill, erect and demolish walls, without having projected the end to which these tasks must be oriented, or – which is equally reprehensible – being inconsistent with the design already created for that purpose.[67]

So, when a supreme court decides to apply qualitative admissibility criteria to rationalise its agenda, it must intensively explore its institutional roles, in order to guarantee society that in that activity of "deciding which cases to decide", the selection process will be adjusted through parameters and practices that will help it to perform its institutional purposes in a more effective way.[68] The apex court must, then, reasonably determine those guidelines, make them explicit to the public, and respect them in the future.

I believe this teleological approach to be a central pillar to the study and implementation of filters or case-selection devices, since it not only improves the

---

67 Criticising the Argentine experience, Oteiza highlights the importance of coherence between the application of selective mechanisms, and the reasons why supreme courts are granted this type of power: "it is reasonable to demand a Superior Court that postpones the protection of certain cases that the result of its work be consistent with the freedom claimed" (Oteiza, E. (1998). El certiorari o el uso de la discrecionalidad por la Corte Suprema de Justicia de la Nación sin un rumbo preciso. *Revista Jurídica de la Universidad de Palermo* (1), p. 73).

68 The close relationship that should exist between the design and application of case selection devices and the institutional performance of Supreme Courts has been emphasised by Taruffo: "*Un fattore che riveste grandissima importanza nella definizione delle funzioni svolte da una corte suprema consiste nella presenza o nell'assenza di poteri che consentano alla corte di selezionare i casi che intende decidere nel merito. E' con l'esercizio di questi poteri, quando essi esistono, che la corte suprema definisce sostanzialmente il proprio ruolo nel sistema giuridico*" (Taruffo, M. (2018). Un vértice giudiziario astratto. *Anuario de la Facultad de Derecho de Madrid (AFDUAM)* (22), p. 95).

design of the tool, but also has a fruitful impact on the dynamics of selection carried out by the superior courts that already have this power recognised. Here too, as in so many other institutions, it can be said with Seneca that *favourable winds never blow for those who don't know where they are going*.[69]

This line of thought demands that the problem of the functioning of the superior courts must be faced from the viewpoint of three questions, which are much easier to present than to answer: (a) what is the role that the supreme courts *actually play* in a certain legal system; (b) what is the role that they *should be* playing; and (c) in the case of discrepancy between these answers: how to get the courts to concentrate on the latter instead of the former?

Qualitative selection filters play a fundamental role in the third of the questions presented. By allowing effective control over the apex court's agenda, they contribute to orienting the efforts of the court on the decision of matters that allows them to deploy their predominant institutional purpose.

The general assertion that selection filters are only conceivable in systems in which the supreme court is absolutely disinterested in error correction and focused solely on building precedents, should be revised.[70] I believe it is more accurate to say that the access criteria established for selection purposes vary according to the institutional mission assigned to a supreme court (or, more broadly, to any court of appeal) at a given time and jurisdiction.

In legal systems in which error control is important (or at least, where it is not ruled out), it is reasonable to authorise (or guarantee, as the case may be) access to the superior court for the supervision of interpretative mistakes in the judgments of inferior courts, but preventing overload. This challenge is often compatible with quantitative monetary filters (like the case-value requirement), quantitative non-monetary ones (based on the importance of the damage or injury suffered by

---

69 *Ignoranti quem portum petat, nullus suus ventus est* (Séneca. (1986). *Epístolas morales a Lucilio* (Vol. I). (I. Roca Meliá, Trad.) Madrid: Gredós, p. 405).

70 Between the multiple authors who distinguished two main Supreme Court models and focused on the influence of that systematisation in selection filters, see Taruffo, above n. 5, pp. 222–236, esp. p. 235 (distinguishing "third instance" versus "supreme court" models of apex courts and considering the former [cassational third instance models] dificult to reconcile with case-selection devices, unlike supreme court ones, in which selection of appeals based on the general importance of the matters involved to be "coherent and functional"). See also, for an interesting attempt to define the characteristics of two fundamental vertex court models (superior courts and supreme courts *stricto sensu*), including case selection ("special conditions to decide on admission"): Mitidiero, D. (2016). Dos modelos de cortes de vértice. Cortes superiores y cortes surpemas (Cavani, R., trad.). In M. Taruffo, L. G. Marinoni and D. Mitidiero, *La misión de los tribunales supremos*. Madrid: Marcial Pons, p. 82. In similar sense, on the two model divide and its influence on access to last instance appeals, see: Bravo Hurtado, P. (2014). Two ways to uniformity: recourse to the Supreme Courts in the Civil Law and the Common Law world. In A. Uzelac and C. H. van Rhee, *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*. Cambridge: Intersentia, pp. 319–335.

the parties), and qualitative "improper" devices, as I have previously called them (i.e., those intended to expedite the treatment of appeals whose favourable or unfavourable fate does not require further analysis). Selection mechanisms based on the *prima facie* evaluation of the appeal's "real prospects of success" or similar standards (like the "sufficient reasons" to re-examine the case, or the presence of "well-founded reasons to doubt the correctness of the sentence attacked"), may also fit these institutional setting. In other words, supreme courts that are designed to take account of (or at least, not to ignore) the interest of the parties may use filters that concentrate on the magnitude of the injury to the parties, or in the quality of the reasons provided by the parties to justify a third instance re-evaluation of the case.

On the other hand, in systems in which a third instance is conceived as valuable only to the extent that it serves to produce or revise precedents, providing coherence to the interpretation of the law or guiding its evolution, "proper filters" will (and actually do) predominate. Qualitative case selection mechanisms which give the superior court a broad, flexible and even explicitly discretionary power to decide which cases to decide, without rigid ties, are the second best choice, taking into consideration the difficulty of providing the same outcome with stricter legal parameters. However, those parameters, no matter how open textured they are, should be present to guide the legal community, allow external control and provide for a more transparent selection practice.

Finally, for supreme courts that maintain an ambiguous position on their institutional role, the use of "mixed" filtering devices is a suitable strategy. In fact, they are present in multiple jurisdictions. If it is considered valuable (and possible) for a supreme court to monitor (broadly or narrowly, as the case may be) the legitimacy of the decisions of inferior courts and, at the same time, contribute to coherence, unity and evolution of the law, it is possible (and probably necessary) to introduce a range of selection criteria (quantitative, qualitative, proper and improper filters) that allow the highest court to fulfil such ambition. Or, at least, to try.