

SUPREME COURT OF JUSTICE – COMPETENCES AND STRUCTURE ACROSS EUROPE

Summary

The article provides comprehensive overview of the diverse landscape of supreme courts across Europe, offering insights into varying structures and functions they embody across different countries. It analyses supreme courts as the only supreme judicial institution or as a part of a broader supreme court system alongside supreme administrative court and/or constitutional courts.

The article highlights the diversity in organization of supreme justice and offers a glimpse into a larger project on comparative supreme justice, indicating in-depth analysis of various factors such as the position of supreme courts in different states, recruitment process and the courts' competencies on the European scale. The article provides valuable insights into the complex and multifaceted nature of supreme courts in Europe. Its approach to presenting specific examples enables a deeper understanding of the topic, making it a useful resource for readers interested in comparative legal systems and judicial structures in different countries.

The paper identifies impact of filter model on a Supreme Court's workload and efficiency of the Court, as well as on the structure. Furthermore, it refers to possible shortcomings of filter model and the jurisprudence of the European Court of Human Rights in that regard.

Keywords: Supreme Court, comparative jurisdictions, unification of case law, filter, and admissibility criteria.

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VRHOVNI SUD – NADLEŽNOSTI I STRUKTURA U EVROPSKIM DRŽAVAMA

Sažetak

Rad pruža sveobuhvatan pregled raznolikih formi vrhovnih sudova širom Evrope, nudeći uvid u različite strukture i funkcije koje oni predstavljaju u različitim zemljama. Analizirani su vrhovni sudovi kao jedina vrhovna sudska institucija ili kao deo šireg sistema vrhovnih sudova pored vrhovnog upravnog suda i/ili ustavnih sudova.

Rad naglašava raznolikost u organizaciji vrhovnog pravosuđa i nudi uvid u širi projekat uporednog vrhovnog pravosuđa, ukazujući na dubinsku analizu različitih faktora kao što su položaj vrhovnih sudova u različitim državama, proces izbora sudija i nadležnosti sudova u evropskim razmerama. Predstavljen je uvid u složenu i višestruku prirodu vrhovnih sudova u Evropi. Predstavljanje konkretnih primera omogućava dublje razumevanje teme, čineći je korisnim izvorom za čitaoce zainteresovane za uporedne pravne sisteme i pravosudne strukture u različitim zemljama.

U radu je identifikovan uticaj modela filtera na obim posla i efikasnost suda, kao i na strukturu vrhovnog suda. Nadalje, upućuje se na moguće nedostatke modela filtera i jurisprudenciju Evropskog suda za ljudska prava u tom pogledu.

Ključne reči: vrhovni sud, uporedne jurisdikcije, ujedinjavanje sudske prakse, filter i kriterijumi prihvatljivosti.

1. Introduction

There is no international standard governing the organization and competence of a supreme court, as the highest judicial authority within a country's legal system (Bravo-Hurtado, van Rhee, 2021, p. 4). Efforts are being made on the regional level to address this issue. The Consultative Council of European Judges (CCJE) recognized that the primary role of the supreme court is to resolve conflicts in case law and to ensure consistent and uniform applications of law.¹ The same approach is confirmed in the jurisprudence of the European Court of Human Rights (ECtHR) that has recognized that supreme court must ensure

¹ CCJE Opinion, No. 20 on the role of courts with respect to uniform application of the law, 2017.

uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system.² Furthermore, the ECtHR in the *Hutchinson* case recalls that progressive interpretation of the law through judicial interpretation is embedded in the European legal tradition (Feteris, 2017, p. 156).³ In some countries of a civil law tradition, certain judgments of the supreme court, usually sitting as a grand chamber, are binding for all courts or for all panels of the supreme court.

The practice in Europe regarding organization and competences of supreme courts varies. It includes supreme courts as last instance courts which are established as Cassation, revision, or appeal model⁴ (Bobek, 2009, p. 36), in some countries a supreme court acts as a constitutional court (i.e., Estonia). In several jurisdictions the additional role of the supreme court is to perform role of the judicial council (i.e., first instance disciplinary proceeding) and is responsible for administration of justice (i.e., Estonia) or acting as judicial training institution (i.e., Cyprus).⁵

The article deliberately excludes various functions that supreme courts can fill, such as rendering advisory opinions in the legislative process, issuing preliminary rulings, deciding cases initiated by public bodies for the development of law, and focus on appeals filed by individuals (Galič, 2019, p. 45). This function of the supreme court is linked with the discussion of public and private purposes of the supreme court. An appeal filed to the supreme court serves both private interest of individuals seeking case reconsideration and public interest to the oversight of lower courts and unification of case law as part of the rule of law requirements. To foster the rule of law, there is a need for guarantees that similar cases are judged based on consistent legal criteria (Lindblom, 2000, p. 333).

Comparator jurisdictions are selected based on several criteria, such as the size of country and competence of the supreme court, with the focus on civil law countries. Additionally, countries included in the analysis are those which passed transition and became members of the EU (i.e., Estonia) as well as countries with longer democratic tradition (i.e., France, Italy, Finland, Sweden). Scandinavian countries

² *Albu and others v. Romania*, Application No. 34796/09, 12 May 2012.

³ *Hutchinson v. United Kingdom*, Application No. 57592/08, 17 January 2017, para 24.

⁴ Cassation model, represented by the French Court of Cassation, reviews lower court decisions for legal errors, ensuring correct application of the law. The revision model, applicable in Germany and Austria, involves comprehensive review of law, allowing the Supreme Court to reassess the case in its entirety. Reforms over the last few decades allow assessment of facts in both revision and cassation model. Appeal model, present in common law countries, is also found in the Scandinavian type of procedure, represents third appeal, and enables review of factual issues.

⁵ See https://e-justice.europa.eu/406/EN/judiciary_training_providers

are also included in the analysis, although the supreme courts there through the reforms have been transformed almost to the precedent courts similar to those in common law countries (Ghavanini, Grendstad, & Schaffer, 2023, p. 790).

2. Competences of Supreme Courts across Europe

Supreme courts, as courts situated at the top of the judicial hierarchy issuing final decisions at the domestic level, serve various purposes (Muller & Richards, 2010, p. 5). The vital role of supreme courts is in upholding the rule of law standards, specifically in ensuring the equal application of the law to all individuals. Supreme courts should ideally provide guidance in interpreting the law, addressing ambiguities and loopholes. Furthermore, they are expected to adapt legal criteria to contemporary circumstances, thereby contributing to the evolution of legal principles (Feteris, 2017, p. 157). The significance of supreme court rulings is in enhancing legal certainty. By providing clear interoperation and resolutions, supreme courts contribute to a well-functioning justice system, maintaining consistency and predictability in legal proceedings, and thus fostering a sense of fairness and justice, reinforcing the rule of law within a society.

Appeals to the supreme court are intended to focus on erroneous decisions made by lower courts. However, it highlights a common tendency among litigants to view unfavorable judgments as mistakes that should be rectified on appeal. Consequently, supreme courts might experience an increase in their caseload if there are no appropriate filters in place to manage access to the court. An example of this is the Court of Cassation in France, which during the 1990s was overloaded with cases, receiving more than 20,000 cases. To overcome the challenge, a new access filter was introduced in 2001 and cassation complain should raise a serious point of law to be admissible (Jeuland, 2021, p. 25). Similar challenges in the increasing of workload are recognized in Serbia. The Serbian Supreme Court was faced with the high demand and trend of increasing number of incoming cases over the last five years, from 13,838 cases in 2018 to 34,381 cases in 2022, which resulted in the increasing of pending stock (24,401 pending cases at the end of 2022).⁶

In a comparative perspective, supreme courts with more than 100 judges that deliver several thousands of judgments, can provide control over the decision of lower judges, but increase dramatically the risk of inconsistencies and

⁶ Supreme Court of Serbia (2023) Annual Report on the Work of the Courts in the Republic of Serbia for 2022, p. 18, 23. See https://www.vk.sud.rs/sites/default/files/attachments/ANNUAL%20REPORT%20ON%20THE%20WORK%20OF%20THE%20COURTS%20IN%20THE%20REPUBLIC%20OF%20SERBIA%20FOR%202022_0.pdf (5. 2. 2024)

eliminate the ability to manage unification of case law (Bravo-Hurtado, 2014, p. 328). That situation is in Italy, where the high volume of cases at the Court of Cassation (around 90,000 over the last decade) makes difficult to ensure legal consistency (Espositio, Lanau & Pompe, 2014, p. 7). Thus, The Court has acted more like a court of third instance, than as a judicial institution responsible for uniform interpretation of the law (Ferraris, 2021, p. 39).

By strategically selecting cases to rule on, supreme courts can influence the development of a consistent and predictable legal framework within their jurisdiction. The intentional setting of standards contributes significantly to the evolution and interpretation of the law in civil law countries. Therefore, in these cases, already one judgment of a supreme court, when it was reached with intention to set a precedent, can count as an authoritative case law.⁷

Venice Commission recognizes that the cassation procedure has as one of its main goals to guarantee and bring about uniformity of case law.⁸ Although there is internal judicial independence, the lower courts in civil law countries often adhere to principles established by higher courts to avoid having their decisions overturned on appeal. The Venice Commission suggests that while ensuring the uniformity of case law is crucial, the admissibility criterion should not be extended to empower supreme court to provide general recommendations and/or explanations on the application of legislation to lower courts.

The fundamental role of supreme courts as cassation courts is to supervise the legality and correct application of the law in decisions made by lower courts. In this function, the supreme courts do not assess the merits of the case, but invalidate decisions made by lower courts. From the perspective of the European Court of Human Rights, the supreme courts need to exercise effective control over the decisions of the lower courts. The effective control refers to the efficiency and efficacy of the control mechanism, aligning with the standards set by the European Convention on Human Rights. Requirement to exhausting national judicial avenues before resorting to the European Court of Human Rights (Art. 35 of the European Convention on Human Rights) ensures that cases brought have already undergone a thorough review within the domestic legal system, promoting the principle of subsidiarity and allowing national courts, including supreme courts, to address human rights issues in the first instance.

⁷ CCJE Opinion, No. 20 on the role of courts with respect to uniform application of the law, 2017, para. 14.

⁸ CDL-AD (2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, paras. 33, 34.

3. Admissibility Criteria in Comparator Jurisdictions

To achieve the role of supreme court to serve public purposes it is necessary to focus on several issues and take a balanced approach that includes increasing the capacities of the supreme court to ensure unification of court practice and reducing the number of cases (Jolowicz, 2000, p. 328). In comparative legal studies the significant attention has been put on access filters, especially concerning the reduction of cases brought before supreme courts. Access filters refer to mechanisms and criteria put in place to ensure that only the most pertinent and significant cases are heard.

Access filters often involve specific criteria that determine which cases can reach the supreme court. These criteria are designed to prioritize cases with legal significance, complex issues, or matters of public importance. These criteria serve as gatekeepers, allowing only cases meeting specific criteria to reach the supreme court, ensuring that the court's attention is focused on matters of significant legal importance. The criteria should be designed to aid the supreme court in fulfilling its role of promoting a consistent and uniform interpretation of the law.⁹ Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes. Spanish authorities tried to limit burden to the Supreme Court by introducing threshold in 1984, and increasing it in 1992, however the number of cassation appeals doubled despite these measures (de Benito, 2021, p. 56). Similarly, in Serbia the threshold for the revision is set to 40,000 euro (100,000 euro for commercial cases),¹⁰ however that limitation did not prevent increase of the Supreme Court workload. The proposed amendments to the Civil Procedure Code envisaged removal of threshold and increased focus on legal certainty and unification of case law through 'special revision' (Pavlović & Ignjatović, 2023, p. 7). If the proposed amendments are to be adopted, it will significantly limit competence of the Supreme Court of Serbia and have influence on the Court workload.

The procedure through which cases are filtered involves reviewing cases to determine their suitability for Supreme Court review. The method of filtering can vary and may include assessments of legal merit, relevance, or potential impact on legal precedents. In relation to the competent authority, access filters can be

⁹ See Recommendation No. R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Art. 7 (c)): "Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law, or which would contribute to the uniform interpretation of the law."

¹⁰ Arts. 403 and 485, Civil Procedure Code, *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], Nos. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, 18/2020, 10/2023.

implemented by either the lower court that issued the judgment, the supreme court itself, or both courts collaboratively. In Italy, the screening of all petitions is carried out by the specialized Filter Chamber (Art. 67 bis of the Law on Judiciary).¹¹ The choice of screening authority can influence the effectiveness and consistency of the filtering process.

Alternative solutions to reduce the caseload of the supreme courts include increasing court fees, regulating which lawyers are authorized to represent clients before the supreme court, implementing provisional enforcement of lower court judgments, eliminating oral hearing for certain cases, or creating different tracks for different types of cases. These measures aim to streamline the legal process and manage the workload more effectively. For example, in Germany, in line with Art. 78(1)(3) ZPO (Civil Procedure Law) the parties must be represented by an attorney admitted to practice before the Federal Supreme Court. Currently, only 42 attorneys are admitted (Stürner, 2021, p. 78).

The three primary models of the filtering mechanism are applied in Europe: the leave to appeal system, no judicial filtration and mixed model. These models determine how cases are selected and admitted to supreme courts in various European countries.

In the leave to appeal system, cases are pre-selected based on specific criteria before they are allowed to proceed to the supreme court. The selection criteria often include factors like matters of general importance or interests of justice. Countries like the United Kingdom, Ireland, Norway, Denmark, and Sweden follow the leave to appeal system. The decision to grant permission to appeal is at the discretion of the Supreme Court, and sometimes with lower courts of appeal, which may consider the significance of the case in terms of legal principles or public interest. In Denmark, for example, cases are selected by an Appeals Permission Board comprising judges, lawyers, and legal scholars (Tamm, 2011, p. 6). Notably, there is usually no mandatory requirement for legal representation before the supreme court under this system. Additionally, the supreme court can address both questions of law and facts, and selection criteria are often similar for criminal and civil cases, with the likely unlawfulness of the appealed decision not playing a significant role in the selection process.

The leave to appeal system allows the supreme court significant discretion in choosing cases, focusing on those with broader legal importance or implications, contributing to the court's role in shaping legal principles and ensuring uniformity in interpretation.

In the no judicial filtration model there is no pre-screening of case before they reach the higher court. Cases can be directly appealed to the supreme court

¹¹ Law No. 197 of 25 October 2016.

without prior selection or approval. Examples of this model are applied in France, Belgium, the Netherlands, Greece, and Italy. This approach allows a broader range of cases to be considered by the higher court without filtering based on specific criteria. Some countries may opt for this system to ensure unrestricted access to justice and avoid potential biases in the case selection process. Within this model, two basic approaches could be distinguished: private, extra judicial, and disguised leave to appeal. In the private, extra judicial filtration, cassation appeals to the supreme court in specific categories of cases can only be filed by a specific lawyer assigned to the supreme court or a lawyer meeting certain experience requirement (van Rhee, 2004, p. 7). The disguised leave to appeal approach functions similarly to a leave to appeal system but is not a filter in the true sense. Under this regime, the supreme court assesses the merits of the case after it has entered the legal process. The court can dismiss specific categories of appeals, such as those deemed manifestly ill-founded, using a simplified procedure.

The mixed model combines elements of both the leave to appeal system and the no judicial filtration approach. Certain cases may be subject to pre-selection based on specific criteria, while others are allowed to proceed without prior screening. This hybrid approach aims to balance the need for filtering important cases with the desire to maintain accessible justice for wider range of legal matters. The mixed system can vary in its implementation, with different variations present in different jurisdictions: appeals to the supreme court are required to be filed by sworn advocate or specialized lawyers, adversarial selection procedure, authority to grant leave to appeal rests with an appellate court, the legislator defines specific grounds that appeals must comply with to be admitted for a full examination and adjudication by the supreme court. In Germany, for example, the Court of Appeal selects cases to be sent to the Supreme Court (Stürner, 2021, p. 75).

There are countries where the motion to grant leave to appeal and the filing of appeal are treated as separate processes. This separation underscores a crucial point: the criteria for granting leave to appeal can be different from the question of whether the judgment being appealed is correct or not on points of law. In this context, the process of granting leave to appeal involves a preliminary assessment by the court to determine whether the case meets specific criteria defined by the law. On the other hand, filing the appeal involves the actual submission of the case to the higher court for a detailed examination of the legal points raised. During this stage, the higher court assesses the merits of the case, considering the specific legal arguments and whether the lower court judgment was correct or erroneous based on the applicable points of law (Galič, 2014, p. 292).

Typically, once an appeal is deemed inadmissible by the supreme court, the decision is final and cannot be further appealed.

3.1. Access to Court and Filtration Model

In a legal system where the constitution holds supreme authority, granting anyone the right to have their case heard and adjudicated by the supreme court becomes a constitutional guarantee. Attempting to limit or restrict this right by introducing filters or mechanisms to control appeals could lead to complications and face opposition, especially if it conflicts with constitutional guarantees. Furthermore, the challenges are posed by the national Constitutional Court or the European Court of Human Rights. These institutions often use test of proportionality. The principle of proportionality requires that any restrictions placed on these rights must be reasonable and in proportion to the aim sought to be achieved (Trykhlí, 2020, p. 128). Assessing limitations in this manner ensures that the fundamental rights and freedoms of individuals are protected, even in the face of attempts to introduce filters of restrictions on the right to appeal to the supreme court.

The right to appeal to the supreme court is sometimes recognized as a constitutional right. Some constitutions specify this right in general terms without specifying a particular court level, while other, like Estonia, expressly state the right to appeal judgments of court of first instance to a higher court. Also, the Italian Constitution, Art. 111(7), states that the final appeal against judgments is always admitted. In certain countries, like Belgium, Sweden, Austria and Estonia, the legislator is responsible for defining the scope of appeals to the supreme court. The extent of this right is determined through legislative measures rather than constitutional provisions. Constitutional courts in various countries, including Hungary, Czech Republic, Poland, and Armenia, have played a crucial role in interpreting, and safeguarding the constitutional right to appeal. These courts have declared certain rules related to the functioning of the supreme court unconstitutional, particularly those limiting the right to appeal or imposing specific criteria for case selection.

The intensity of addressing and regulating the right to appeal to the supreme court in the constitutional text does not necessarily correlate with the dynamic interventions of constitutional courts. Some countries recognize the right to appeal in their constitutions without specifying details.

There are differences in the approach to the right to appeal to the supreme court in European countries, particularly in comparison to the United States. Unlike the US Supreme Court, where there is not an inherent right to appeal, European countries generally recognize the right to appeal, which is considered a fundamental aspect of the right to a fair trial and access to justice. Rules governing the filtering of appeals to the supreme court in countries like the United Kingdom, Ireland,

Sweden, Norway, and Denmark share some similarities with the discretionally system of the US. In European countries, the discourse on the right to appeal to the supreme court is framed as a matter of personal right, emphasizing the importance of substantiating any additional restriction on the right.

According to Art. 6 para. 1 of the European Convention on Human Rights, individuals have a fundamental right to access to the courts, including supreme courts.¹² While limitations on this right are permissible,¹³ they must be proportionate and pursue a legitimate aim.¹⁴ The condition that determines whether an appeal is admissible, such as the legal requirements for lodging an appeal or the grounds on which it can be accepted, are regarded as a matter of domestic regulations.¹⁵ States enjoy a certain margin of appreciation in setting and applying these conditions. Namely, individual states have some discretion in determining the specific rules and requirements for appeals within their legal systems. These restrictions should not impair the essence of the right. The case *Henrioud v. France*,¹⁶ where the European Court of Human Rights found that the applicant had been deprived of the right of access to a tribunal because the Court of Cassation of France had been excessively formalistic in declaring the appeal on points of law inadmissible. This case illustrates the importance of ensuring that formalities do not obstruct the fundamental right to appeal and access justice. Considering the fundamental nature of the right to appeal, such discretionary systems may face scrutiny considering principles outlined in the European Convention on Human Rights.

The complexity and nuances surrounding the exhaustion of domestic remedies, specifically concerning appeals on points of law and the discretion of supreme courts have been interpreted by the European Court of Human Rights. The ECtHR recognizes that an appeal on points of law, for which leave is granted at the discretion of the supreme court, might not be considered an effective remedy that needs to be exhausted before approaching the ECtHR.¹⁷ This recognition suggests that applicants might not be obliged to pursue such discretionary appeals before the domestic supreme court before lodging a complaint with the ECtHR.

It should be emphasized that ECtHR has recognized that its role is not to assess whether the applicant should have been granted leave to appeal. This role is primarily a matter of national law and domestic courts. Instead, the ECtHR's

¹² *Platakou v. Greece*, Application No. 38460/97, 11 January 2001, para. 35.

¹³ *Golder v. the United Kingdom*, Application No. 4451/70, 21 February 1975, para. 38.

¹⁴ *Ashingdane v. the United Kingdom*, Application No. 8225/78, 28 May 1985, para. 57.

¹⁵ *Luordo v. Italy*, Application No. 32190/96, 17 July 2003, para. 85; *Levages Prestations Services v. France*, Application No. 21920/93, 23 October 1996, para 40.

¹⁶ *Heanrioud v. France*, Application No. 21444/11, 5 November 2015, paras. 73-75.

¹⁷ *Běleš and Others v. the Czech Republic*, Application No. 47273/99, para. 68.

task is to determine whether the proceedings as a whole, including availability and fairness of remedies, have been conducted in a manner consistent with the requirements of the European Convention on Human Rights.¹⁸

Furthermore, the limited reasoning by supreme courts in case of rejecting cases due to insufficient legal grounds, might satisfy the requirements of Art. 6 of the Convention. The ECtHR acknowledges that supreme court can refuse cases without detailed explanations, and such decisions may still conform to the Convention's requirements.¹⁹ The evaluations occur within the context of the overall fairness of the legal proceedings.

4. Structure of the Supreme Court in Comparator Jurisdictions

The structure of the supreme court varies across countries, however there are some similarities. Supreme courts across Europe have at least two chambers, a civil case chamber and a criminal case chamber and significant role of judicial assistants, researchers or clerks who support work of judges. Bigger courts have more chambers. In France, for example, Court of Cassation has five civil chambers: the Commercial Chamber, the Labor Chamber, the Chamber for international litigations, arbitration and personal rights of private law and family matters, the Chamber with procedural law and social security issues, and the Chamber with real estate issues (Jeuland, 2021, p. 23). The Court of Cassation in Spain also has five chambers: Civic, Criminal, Administrative, Labor and Military (de Benito, 2021, p. 62).

Smaller supreme courts consist of up to 20 judges. For example, the Supreme Court of Estonia has 19 judges who administer justice in one of four chambers: the Civic Chamber, the Criminal Chamber, the Administrative Law Chamber, and the Constitutional Review Chamber.²⁰ In Sweden, the Supreme Court is composed of 16 judges and divided into two divisions,²¹ while in Finland it has 19 judges, 18 in Denmark and 20 in Norway. Only in Denmark the precise number of judges is stipulated, while in Sweden and Norway only minimum number of judges is determined by law (Ghavanini, Grendstad & Schaffer, 2023, 784).

Supreme Courts with lower number of judges usually have strong expert support structure. In Sweden some 90 people work at the Supreme Court, most

¹⁸ *Kukkonen v. Finland (no. 2)*, Application No. 47628/06, 13 January 2009, para. 25.

¹⁹ *Nerva and Others v. the United Kingdom (dec.)*, Application No. 42295/98, 24 September 2002, para. 25.

²⁰ See <https://www.riigikohus.ee/en/chambers> (5.2.2024)

²¹ See <https://www.domstol.se/en/supreme-court/justices/> (5.2.2024)

of them being lawyers. In Norway a legal researcher has to prepare case memo within two weeks' time the appeal was registered at the Supreme Court.²² A similar role is assigned to legal assistants in Lithuania.²³ They first screen all incoming appeals. In fact, it may be inevitable for a court to vest judicial assistants or legal researchers with more tasks in filtering appeals, if a judge is overwhelmed with a significant number of cases, the judge has to adjudicate on full merits and by providing detailed reasoning. Filtering of appeals may be treated as less demanding and simpler task for which there is not enough time available for a judge to read and carefully analyze every incoming appeal. On the other hand, marginalization of filtering of appeals can have direct negative effect on adjudication of cases on the merits, because cases that are not suitable for the functions and purposes of the supreme court can indeed be selected. In Estonia, judges of the Supreme Court are assisted in the preparation and review of cases by law clerks, consultants, and secretaries. A law clerk must meet the educational requirements for a judge. The term of office of a law clerk is three years and may be extended. In Finland, referendaries of the Supreme Court prepare cases for the court and present them in hearings. The referendaries also have primary responsibility for communication with the parties to cases and for administrative work relating to the hearings. The referendaries (between 25 and 30) are appointed by the Plenary Session of the Court, and are experienced lawyers specialized in various branches of law.

In Sweden judges are supported by judge referees and drafting law clerks.²⁴ Judge referees are responsible for preparing and presenting cases. They present judicial enquiries and legal assessments of appeals and applications. To help the one or more justices of the Supreme Court deciding these, they also submit reasoned, draft solutions. Since 2016, the Supreme Court has also had drafting law clerks. This has refined the judge referee role to primarily dealing with cases that will set precedents or are otherwise more complex than usual. Judge referees are normally associate judges who have been trained for positions as judges.

On the contrary, in France and Italy, supreme courts have high number of judges. In French Court of Cassation there are 115 senior judges, 60 junior judges and 20 law clerks (Jeuland, 2021, p. 25), while in Italy there are more than 300 judges in the Court of Cassation.²⁵ According to the CEPEJ data around 5 percent of all judges are appointed to the supreme instance.

²² See <https://www.domstol.no/en/supremecourt/about/employees/> (5.2.2024)

²³ See <https://www.lat.lt/en/general-information/about-the-court/95> (5.2.2024)

²⁴ See <https://www.domstol.se/en/supreme-court/>

²⁵ CEPEJ (2022) European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation Cycle.

Although, the Supreme Court in Serbia has high volume of cases, the number of judges is significantly lower than in comparator jurisdictions. In 2022, Supreme Court in Serbia had 34,381 incoming cases and 32 judges who effectively worked on cases.²⁶

Besides the professions directly involved in processing of cases, supreme courts also have personnel working with administration and services. For example, Supreme Court of Estonia has six supporting departments: the General Department, the Personnel Department, the Assets Management Department, the Communications Department, the Information Technology Department and the Legal Information and Judicial Training Department. In addition, the Director, the Legal Adviser to Chief Justice, the Financial Manager, and the Data Protection Specialist – Archivist work at the Supreme Court of Estonia.²⁷ Structure of the administration and services depends on the competences of the Supreme Court, especially beyond adjudication.

The structure of supreme courts is evolving in the context of the growing importance of international jurisprudence and case law (Uzelac, 2019, p. 127). The supreme courts need to monitor not only their own case law but also to follow relevant rulings from supranational courts, such as European Court of Human Rights and EU Court of Justice. To meet the demand, the supreme courts are required to establish adequate services, expand staff, and organize units dedicated to legal research. In the EU member states, the supreme courts must enhance their capacity and structures for referencing and engaging in dialogue with international judicial institutions, particularly in the interpretation of legal instruments like EU law and cases related to human rights violations. Importance of clerks for the supreme court performance could be seen from the requirement that exist in Sweden, where clerks need to have legal education and specialization in specific area of law and could be asked to take part in judgments (Ghavanini, Grendstad & Schaffer, 2023, p. 793). While most supreme courts have existing staff or departments for legal research, the rising importance of international jurisprudence necessitates restructuring and reinforcement of these departments. The organization and method of work within supreme courts might change, emphasizing the importance of legal research and analysis in the fields of international and comparative law. The good example could be the German Federal Supreme Court that has made significant structural adjustments, employing numerous scientific assistants to support judges in their work, utilizing extensive court libraries. Furthermore, many supreme courts in the EU are

²⁶ Supreme Court of Serbia (2023) Annual Report on the Work of the Courts in the Republic of Serbia for 2022, pp. 9 and 18.

²⁷ See <https://www.riigikohus.ee/en/administration> (5.2.2024)

using comparative law analysis to get inspiration and produce additional arguments to strengthen own decisions (Feteris, 2021, p. 15).

Furthermore, the trend where supreme courts are increasingly becoming involved in decision-making processes that extend beyond strictly judiciary matters necessitate organizational adjustments. Instead, the supreme courts are addressing issues that impact the functioning of the national judiciary and have broader implications for the administration of justice. One specific example is active engagement of supreme courts in tackling delays and backlog within the national judiciary system. For example, in Serbia, the Supreme Court initiated a project in 2014 aimed at reducing old cases. This initiative, known as the National Backlog Reduction Program, demonstrates the Supreme Court's proactive involvement in addressing a systematic issue within the country's judiciary (World Bank, 2021, p. 76. Similar initiative was launched in Croatia in 2005.²⁸ To ensure the necessary capacities for undertaking these tasks of administration of justice, the supreme courts create special judicial units dedicated to expediting applications, the involvement of law clerks, or the temporary assignment of judges from lower courts. Additionally, specialized departments may be established to manage statistics related to time management in lower courts.

5. Criteria for the Selection of Judges in Comparator Jurisdictions

The Venice Commission recognized that provision on the appointment of supreme court judges is the only exception from a closed judicial career.²⁹ Furthermore, the composition of both the Supreme Court and the Constitutional Court should include judges with expertise in human rights.³⁰ The Venice Commission considers that election and release from duty of the President of the Supreme Court by the Judicial Council should be retained.³¹

In most European countries vacancies at the supreme court are publicly advertised. Open positions are placed on official websites either of the supreme court or the ministry of justice (Hurley, 2022, p. 11). Quite often, this is

²⁸ See https://www.vsrh.hr/CustomPages/Static/HRV/Files/2016dok/izvjesce_predsjednika_o_stanju_sudbene_vlasti_2015.pdf (5. 2. 2024)

²⁹ CDL-AD (2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, para 53.

³⁰ CDL (1999)078, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, §32.

³¹ CDL-AD (2012)024, Opinion on two set of Draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, para 17.

accompanied by an announcement in an official gazette and/or a central newspaper or journal. In Sweden, vacancies for judges of the Supreme Court are advertised on the Swedish Courts website.

In European countries, the criteria a candidate has to meet are written down by law. Some national rulings provide even a very detailed list of conditions, whereas most countries only indicate some formal aspects. Generally, the applicants must have a law degree from a university and must have passed a special professional law examination. Several countries state a minimum of age, which is between 30 and 45 years, others request a minimum of legal experience differing from 5 to 15 years.

In many European countries one does not necessarily have to be a member of the judiciary to become a judge of the supreme court. Judgeships are especially also open to university professors, in most cases also to lawyers, prosecutors and members of the administrative service. In Finland, the judges of the Supreme Court have experience in different branches of the legal profession, most often in courts of law, but also in the drafting of legislation, in academic positions, and as legal practitioners. The Danish Supreme Court is an example of initiative to bring in individuals with broader professional experiences and reflects a commitment to diversity and a recognition of the value of varied perspectives on the bench (Tamm, 2011, p. 5). This approach may contribute to a more well-rounded and versatile judiciary, enhancing the Supreme Court's ability to address a wide range of legal issues.

Across Europe there are an enormous variety of selection and nomination procedures. Several entities with a variety of functions and different scopes of influence can be involved in the selection of candidates or even appointment. In Serbia, judges of the Supreme Court are professionals, appointed by the High Judicial Council from the pool of career judges.³² In other countries where judicial council has a role, very often, a special election committee or the council of the judiciary draws up a list of candidates. In most countries, the proposal of the council is binding, or if it is not formally binding it is at least expected to be followed. It is quite uncommon that the election committee or the judicial council is restricted to an advisory role. In Denmark, Norway, and Sweden in order to limit the role of the ministry of justice the special judicial appointment boards were established to select candidates for the judicial function in the supreme court (Ghavanini, Grendstad & Schaffer, 2023, p. 785). Composition of the boards in all three countries is mixed, consisting of judges, lawyers in other professions and representatives of the population. Only in Sweden, judges have majority in the Board (5 out of 9).

³² Art. 17, Zakon o Visokom savetu sudstva [Law on High Judicial Council], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 10/2023.

The main criterion to be drawn up is qualification, which is usually verified based on references, in many countries followed by a hearing before the selection organ, and in Sweden candidates have to pass the psychological test (Ghavanini, Grendstad & Schaffer, 2023, p. 786). Other common criteria to the selection process are seniority, publications, and promotion level. In Sweden, applicant must satisfy particularly stringent requirement in respect of legal knowledge, powers of analysis, written and verbal expression, judgment, and independence.

Tenure of the supreme court judges across Europe is permanent and they are obliged to leave position at the mandatory retirement age. In Serbia, the mandatory retirement is at age of 67 for the Supreme Court.³³

6. Financial Independence of the Supreme Court in Comparator Jurisdictions

The financial independence of judiciary seems to be one of the main conditions of its institutional independence as *de facto* judicial independence (Hayo & Voigt, 2023, p. 3). The Basic Principles on the Independence of the Judiciary from 1985 as well as the 1989 Rules for the Effective Application of the Basic Principles envisaged member states duty to provide 'adequate resources' for proper functioning of the judiciary. Thus, financial independence of a supreme court is a fundamental element in upholding democratic principles of separation of powers.

Supreme courts across Europe have varying degrees of financial independence.³⁴ The financial independence is lacking in countries where the supreme court does not have its own funds, since without control over its funds, the supreme court cannot autonomously determine the use of resources necessary for its operations. There are countries where funds are limited in the scope, like in France, Slovenia, and Lithuania. In these countries, certain property investments, such as those above a threshold or specific construction projects, may be governed by the ministry of justice. Another example is when budget is managed on behalf of the supreme court by an independent judicial authority, like it is in Denmark (Danish Court Administration), Ireland (Court Service) and Norway (National Courts Administration). Having in mind that purpose of the judicial councils is to protect independence of the judiciary, this approach does not jeopardize independence of the supreme court (Matić Bošković & Nenadić, 2018, p. 44).

³³ Art. 66, Zakon o sudijama [Law on Judges], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 10/2023.

³⁴ More on financial independence of the supreme court in Newsletter No. 23, Network of the Presidents of the Supreme Judicial Courts of the European Union, December 2011.

In countries in which a supreme court has its own funds, majority of budget is spent on salaries, having in mind budget structure and expenditures. Judges' remuneration is part of judicial independence and should be sufficient to preserve it.³⁵

The president of a supreme court has the central role in managing the budget, with variations across the comparator jurisdictions in the degree of financial powers and the possibility of delegation. In some countries the president's authority in management of the budget may be restricted or subject to additional approvals. For example, in Austria, President may only authorize certain expenses, depending on their nature or amount, after obtaining consent of the Minister of Justice.

Financial management of a supreme court fails under the budgetary controls, both preventive and a posteriori. The German Supreme Court has preventive warning system that involves an automated monitoring software program, which signals when amount exceeds the allocated resources. A posteriori controls may be conducted by specialized bodies like court of auditors, treasury, parliament. In some countries the control is conducted by the ministry of justice (Finland), or independent judicial authority (National Courts Administration in Norway).

7. Conclusions

The comparative analysis shows that there is no solution that fits all countries across Europe. The system that provides good results in one country is dependent on too many variables. The Supreme Court in Serbia is faced with the increase workload and more than a decade of trend of increase in incoming cases. As a result, the pending stock is also increasing and jeopardizes efficiency of the Supreme Court and the right to a fair trial. The comparative examples could provide important insight on success of reforms related to the limitation of access to the Supreme Court.

It should be highlighted that the reforms restricting access to the supreme court have faced criticism. The concern is that reduced access may undermine the protection of uniformity. However, the article recognized that supreme courts with huge volume of cases are facing the challenges to ensure uniformity of case law. Thus, it is important to find balance between access to the supreme court and the need to unify the case law.

³⁵ European Network for Council of Judiciary (2016) Funding of the Judiciary – Summary of international and ENCJ resources, Annex I to the ENCJ Report 2015-2016, p. 6.

In relation to the structure of the supreme court, it is common for all jurisdictions to rely significantly on judicial assistance and expert staff and even to establish research units. Within the EU member states, the need to ensure application of the EU *acquis* and follow jurisprudence of the EU Court of Justice and European Court of Human Rights increases the need for legal research support. The reforms of the supreme court, especially in the transitional countries, should have this practice in mind and identify adequate solution for introduction of expert staff.

Related to the composition of the supreme court, most of the European countries have professional and career judges. However, the Scandinavian countries (Denmark) introduced mixed structure of the supreme court to enable appointment of the academics or legal practitioners that could bring new approach and vision.

Comparative analysis could bring information for the current judicial reform in Serbia and across Western Balkan region, as well as in Eastern Partner countries that aspire to the EU (Armenia, Georgia, Moldova, Ukraine).

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