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THE *AN* AND THE *QUOMODO* OF THE RIGHT TO APPEAL: A THEORETICAL FRAMEWORK

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Abstract: The paper reproduces the report presented during the International Congress “Revisiting The Fundamental Guarantees Of Civil Litigation” held at the Plenary Hall of the Court of Justice of the State of Espírito Santo (TJES 1) - Vitória (Brazil) on the 2nd-4th April 2025, panel “Right to Appeal and Discretionary Filters of Access to Superior and Supreme Courts”.

The contribution aims to reconstruct, from the point of view of general theory and comparative law, the potential existence and extent of the right to appeal. Although concluding that this right tends not to be recognized (unlike the right to access to court), the author nevertheless argues that the provision of at least one level of appeal is in the state’s own interest, and that any limits to this right can be set, but must pass a rationality test.

Keywords: Right to appeal – Discretionary Filters – Supreme Courts – Law and economics – Rationality test

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1. INTRODUCTION: IS THERE A RIGHT TO APPEAL?

Dealing with the “Right to Appeal and Discretionary Filters of Access to Superior and Supreme Courts” is not an easy task. Indeed, the very fact that the expression “right to appeal” is juxtaposed with the one “discretionary filters” raises at least two questions: first, is there *really* a right to appeal? Secondly, and assuming that the first question is answered in the abstract in the affirmative, can we still call it a “right” to appeal if its admissibility depends on a discretionary decision?

An Italian Scholar would little doubt in saying yes, there is a right of appeal, and, consequently, no, appeal admissibility cannot be left to discretionary filters, because that would mean the denial of that right¹. But, as will become evident in the next few pages, the Italian regulatory context in this respect is exceptional, more unique than rare, so that the Italian point of view would not be representative of the international landscape at all. By contrast, when one poses oneself from the standpoint of general theory and comparative law, it appears to be difficult to give an affirmative answer to the first question, because, while there is a universally recognized guarantee of access to the courts, such a guarantee, at least in civil matters, is limited to the first instance, which then well could also be the last one.

Actually, the issue until very recently has not even been addressed in a comprehensive manner. Among the few papers devoted to the topic, the majority are limited to one legal system (namely, the US one)², or at most to specific geographic areas (such as continental Europe)³; one must thus wait until 2024 to find Nieva Fenoll’s study devoted to the scope of the right to appeal in civil cases (if any) in all democratic Countries, “the only ones where rights are truly conceivable”, of the world⁴. Such a lack of doctrinal papers may be partly explained by the fact that a paradox exists in the field: while in

- 1 In fact, art. 111 of the Italian Constitution guarantees the right to appeal to the Court of Cassation in all cases; there is no constitutional guarantee of the right to the first appeal, but ordinary law (Article 339 of the Italian Code of Civil Procedure) establishes it is always provided for, unless otherwise specified, and the exceptions established by law are so few and statistically insignificant that, in practice, it could be deemed a right too.
- 2 While several scholars have already argued for a right to appeal in criminal cases (see, among others, LOBSENZ, James E. “A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction”. In: *University of Puget Sound Law Review*, v. 8, 1985, p. 375 ff.; ELLERSON, Alex S. “Note, The Right to Appeal and Appellate Procedural Reform”. In: *Columbia Law Review*, v. 91, 1991, p. 373 ff.), and some for a right to appeal in limited subsets of civil cases [DALTON, Harlon Leigh. “Taking the Right to Appeal (More or Less) Seriously”. In: *Yale Law Journal*, v. 63, 1985, p. 62 ff.], ROBERTSON, Cassandra Burke. “The Right to Appeal”. In: *North Carolina Law Review*, v. 91, n. 4, 2013, p. 1219 ff., has been the first to claim for an overarching right to appeal in civil and criminal cases; but also see FINS, Henry G. “Is the Right of Appeal Protected by the Fourteenth Amendment?”. In: *Journal of the American Judicature Society*, v. 54, 1971, p. 296 ff.
- 3 NORKUS, Rimvydas. *The Filtering of Appeals to the Supreme Courts*, Introductory Report at Dublin Conference of November 26-27, 2015, organized by the Network of The Presidents of The Supreme Judicial Courts of The European Union, available at <https://www.lat.it>.
- 4 NIEVA FENOLL, Jordi. “La paulatina constitucionalización del derecho al recurso”. In: *Revista de Derecho Político*, n. 120, 2024, p. 43 ff. and NIEVA FENOLL, Jordi. “Hacia la constitucionalidad del diseño procesal de los medios de impugnación”. In: *Revista de Derecho Político*, n. 121, 2024, p. 35 ff.

the past there has been much discussion of the necessity and advisability of providing for an appeal in criminal matters, in civil matters its provision has always been taken for granted⁵. The result is that today there are international sources that provide for a criminal appeal⁶, and not also for a civil one⁷; nor has an extension of the guarantee been promoted by the supranational human rights courts, whose jurisprudence on the contrary confirms the absence of a guarantee of appeal⁸.

Of course, this does not exclude the possibility that each state may confer on the parties a right to one or more additional degrees, and indeed, this is usually the case; but this is typically a choice made by virtue of tradition, and in any case a choice that is *lato sensu* political, as such susceptible to being influenced by changing circumstances and consequently revised (in particular, as far as it is of more interest here, in order to cope with Courts congestion, which, in turn, notoriously impacts on the length of the trial).

Consequently, the question becomes one of verifying, on a case-by-case basis, whether such a provision is contained in a written source or recognized by jurisprudence. In the former case, it is also necessary to investigate the rank of the provision granting the right to appeal within the state's own hierarchy of sources, in order to verify whether other sources — obviously superordinate or, at most, equiordinate — can impose limitations on that right. And, moving again from theory to empirical observation, this latter possibility appears to be very wide, since the cases in which the guarantee of appeal is provided for in the Constitution are rare. Indeed, results of the abovementioned 2024 research⁹ show that only a few countries expressly recognize a right to appeal in civil proceedings in their Constitutions, and it is not always the same appeal either: normally, the guarantee is extended to the first appeal, not to the one

5 NIEVA FENOLL, Jordi. “La paulatina constitucionalización del derecho al recurso”, cit., p. 46-47.

6 Namely, art. 14, § 5, of the International Covenant on Civil and Political Rights and art. 2 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

7 As GIABARDO, Carlo Vittorio. “Availability of a First Appeal”. In HESS, Burkhard; WOO, Margaret; CADIET, Loic; MENÉTREY, Séverine; VALLINES GARCÍA, Enrique (coord.). *Comparative Procedural Law and Justice (Part VIII Chapter 1)*, available at cplj.org/a/8-1, notes, “[t]hese provisions are evidently driven by the distinct values at stake in criminal proceedings, that may affect personal liberty or reputational integrity. This reflects a perceived hierarchy of importance. However, this conventional narrative and its theoretical underpinnings should be reconsidered. Certain non-criminal areas (such as family law, tax law, bankruptcy law, labour law, etc) are equally sensitive as criminal law and can generate similar profound consequences on individuals’ lives. For that, they should perhaps enjoy the guarantee of a full review. Conversely, there are criminal offences that, while significant, may have a comparatively lesser impact. An analytic approach to this issue would therefore be welcome, even if it may prove challenging to implement in practice”.

8 See, among others, *De Cubber v. Belgium* (n. 9186/809), 26-10-1984, according to which “Article 6 para. 1 (art. 6-1) concerns primarily courts of first instance; it does not require the existence of courts of further instance”, and *Dorado Baúlde v. Spain*, n. 23486/12, 24-9-2015, § 18, stating that “neither Article 6 of the Convention nor Article 13 guarantees, as such, a right of appeal or a right to a second level of jurisdiction (see, *mutatis mutandis*, *Nurhan Yilmaz v. Turkey* (no. 2), no. 16741/04, § 21, 8 April 2008, and *Gurepka v. Ukraine*, no. 61406/00, § 51, 6 September 2005)”.

9 See NIEVA FENOLL, Jordi. “La paulatina constitucionalización del derecho al recurso”, cit., p. 49 ff.

to the Supreme Court. Actually, Italy seems to be the only country to provide for this: article 111 Const. states that appeals to the Court of Cassation for violations of law is always allowed against judgments.

2. IS IT REALLY USEFUL TO REFLECT ON THESE ISSUES?

Against this background, one might first of all wonder why, to cope with the justice crisis, States do not simply decide to eliminate appeals.

In either case, one might be inclined to think that, if appeal is not a necessary guarantee, so much so that the legislature might as well not provide for it at all, all the more reason for the legislature itself to be free to restrict access to the appeal already provided for. In other words, if access to appeal is not a right, no one could complain about being excluded from it.

Finally, and consequently, one might conclude that there is very little room for doctrinal reflection on the subject. If, in fact, both the choice of whether or not to provide for an appeal and that of its scope of application are made beforehand, it is impossible to imagine a prescriptive investigation: scholars would then have no choice but to acknowledge these choices and, if anything, to limit themselves to a descriptive analysis of their consequences and/or of the practical application of legal provisions and/or case law. And the impression would seem to be confirmed by the fact that any existing regulatory data could not even be contested by invoking any of the theoretical arguments that usually engage civil procedural law doctrine: in other words, once it is ruled out that there are normative indices on which to base any criticism of the very provision of the filter, nothing can be derived on the subject from the traditional distinction between theoretical models of the Supreme Court (that of cassation or revision), nor from its evolution. As recently argued, in fact, by now, “the categorisation of procedural models concerning access to a supreme court cannot be made on the basis of “outer appearances” and form”, like the name of the Court or that of the means of recourse; nor a reliable index is the kind of decision that the Court is capable of taking (that is, whether it can “only quash the decision and remand the case to the lower court [...] or [...] reverse the decision of the lower court and thus replace such with its own decision”); and not even useful is whether the appeal to the supreme court is considered to be an ordinary or extraordinary means of recourse. By contrast, nowadays, the main, of maybe the only, decisive criteria for categorisation is the function assigned to the Court¹⁰. And this, once again, is not something intrinsic to the court (that is, something that can be derived from the nature of the court itself and invoked by doctrine for demonstrative purposes), but depends entirely on the body that holds the power to establish it (be it the legislator or the supreme court itself).

10 GALIČ, Aleš. “A Civil Law Perspective on The Supreme Court and Its Functions”. In: *Studia Iuridica*, LXXXI, 2019, p. 45 ff.

However, this is not exactly how things are.

The aim of this paper is, in fact, to demonstrate 3 assumptions: first of all, that the provision of at least one appeal, even when not imposed by a formal source of law, is *necessary* from the point of view of the state; secondly, that the tendential liberty that the legislature enjoys in the *an* does not translate into an equal liberty in the *quomodo*; finally, and consequently, that, if scholars cannot oppose with purely technical arguments what are eminently political choices, they can certainly verify their legitimacy downstream.

Before starting, one last warning should be added: as the just listed questions and answers suggest, the subject will be approached by trying to see the big picture. This has two consequences:

- first, this paper won't be dealing directly with individual filters provided for in specific legal systems; however, the discussion will touch on different types of filters;
- secondly, discussion will start with the classics on the subject: the idea underlying this analysis is that current problems can most often be answered by looking to the past; and this is especially true when addressing problems like the one at stake, which involves a comparison between public and private interests, since the needs of the system – on the one hand – and human behavior – on the other – seem to repeat themselves in time and space, despite all the differences.

3. THE NEED FOR APPEAL

First of all, the already mentioned analysis by Nieva Fenoll¹¹ notes how the recognition of the right to appeal, although still a minority, tends to expand over the years; both at a state and supranational level. In this latter regard, it is interesting to recall the most recent jurisprudential developments of the African Court on Human and Peoples' Rights. Article 7 African Charter on Human and Peoples' Rights states that "Every individual shall have the right to have his cause heard", then specifying that "[t]his comprises", among other, "[t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force". A literal interpretation of the article would seem to suggest that the term "appeal" is used as a synonym for "means of recourse", without implying the need to ensure multiple degrees of jurisdiction. Yet, the African Court found it to be the basis of the states' obligation to ensure dual jurisdiction¹². Of course, the weak literal argument mobilized by the Court can cast doubt on the persuasive capacity of its rulings on the other supranational human rights Courts; and yet the

11 NIEVA FENOLL, Jordi. "La paulatina constitucionalización del derecho al recurso", cit., p. 49 ff.

12 *Mallya v Tanzania* (merits and reparations) (2019) 3 AfCLR 482, §43, in <https://www.african-court.org/wpafc/african-court-law-report-volume-3-2019/>. *Werema v Tanzania* (merits) (2018) 2 AfCLR 520, §68. *Makungu v Tanzania* (merits) (2018) 2 AfCLR 550, §57 in <https://www.african-court.org/wpafc/wp-content/uploads/2020/04/African-Court-Law-Report-Volume2-2017-2018.pdf>.

phenomenon of cross-fertilization between Courts is well known, so it is not possible to exclude with certainty future developments in the sense of a recognition, at least in some cases, of a right to appeal.

On the other hand, the fact that almost every system allows for at least a further degree after the first one, even if not required to do so, cannot be considered without significance. Nor is it simply a matter of tradition: in reality, tradition certainly plays a role in explaining the *introduction* of the appeal, not its *current preservation*. But, once again, tradition has its roots in political choices, which, as mentioned, change over time.

The above remarks seem to be confirmed by the extensive study conducted by Shapiro¹³ in 1980, aimed at identifying the real reason behind the appeal's proliferation. It appears appropriate to briefly review that study, to show how the author was able to reconstruct the past and reconnect it to the present and, arguably, the future, which at the time was only glimpsed.

The starting point is the observation that the appeal has traditionally been viewed from two perspectives:

the "bottom up" one, which adopts the perspective of the losing party at trial, and assigns the appeal the aim "to protect the loser against an arbitrary, capricious, or mistaken decision by the trial judge", and in any case a "certain psychic benefits, such as catharsis", and the "lateral" one, referring to the upper Courts role of standardization of the law¹⁴.

This latter point of view already highlights a public interest in the establishment of appeal: uniformity, indeed, is certainly a guarantee for individuals, because it implies that they are all treated in the same way when they are in the same situation, but it is usually a goal also sought by the state. But, on the one hand, if this were really the reason, it would not explain those systems that have two tiers of appeals, one before the courts of appeal and one before the supreme court. Indeed, "[i]f the sole function of appeal were to correct biased or arbitrary trial court behavior, then one appeal would be sufficient [...] The third opinion rendered by the Supreme Court is superfluous in checking the arbitrariness of trial judges: surely it is no more likely to be just than the judgment rendered by the first appellate court"¹⁵. On the other hand, at a closer inspection, also the former point of view (namely, the "bottom up" one) turns out not to

13 SHAPIRO, Martin. "Appeal". In: *Law & Society Review*, v. 14, n. 3, 1980, p. 629 ff.

14 *Ibid.*, p. 629.

15 *Ibid.*, p. 631 s. The point seems absolutely reasonable. However, in the context of a discussion on filters for appeals, it is worth recalling what has already been observed elsewhere regarding the possibility that the first appeal may in itself constitute a filter: indeed, «it has been emphasized their ability to perform a dual function for the benefit of the higher Courts: the first – temporary – occurs when a new *échelon juridictionnel* is introduced ex novo, because it allows "un *trasfert mécanique de charges des juridictions supérieurs vers les nouvelles juridictions*", correspondingly relieved of a part of the litigation; the second – standing – relies on their skimming function with respect to the upper step»: CAPASSO, Valentina, "Supreme Courts' jurisprudence as a dispute avoidance mechanism?". In: *Civil Procedure Review*, v. 9, n. 3, 2018, p. 42, also for further references.

be exclusively private, since “the regime itself may have interests in ensuring that losers at trial enjoy the catharsis of an appeal and perceive it as affording an opportunity for getting fair treatment”¹⁶.

But that’s not all. As Shapiro also emphasizes, both perspectives, although not incorrect, only partially reflect the functions of the appeal, and thus of the reasons behind its provision, since they appear to be incapable to give an account of the spread of the appeal even in countries that “have displayed little or no respect for individual rights or even for the rule of law in any conventional sense. Frequently, moreover, appeal not only increases the arbitrariness and partiality in the legal system but is actually designed to do so”¹⁷.

The real lowest common denominator among the various systems, from the most to the least liberal, appears thus to be what the author calls “distributive politics”. The idea is that appeal functions as a form of favor or patronage distributed by a central government to garner public support, so that its value as a tool for dispensing favors may outweigh its role in correcting judicial errors. This system, exemplified by early English one, involves centralizing the judicial apparatus, with major courts like King’s Bench, Common Pleas, and the Chancellor’s equity court located in the capital, and special courts like the Star Chamber operating at the sovereign’s discretion¹⁸. This centralization, though not encompassing all trials, established London as the primary source of justice.

Therefore, by generalizing Shapiro’s findings, the appeal – at least the appeal to the supreme court – beyond and perhaps more than being based on issues of distributive justice, may be seen as a necessary tool for political control, which can be more or less pervasive depending on the type of government in place and therefore the degree of independence of the judiciary.

Of course, today this reason may appear unacceptable if expressed in these terms; but the current economic conception of the appeal is not very different: political control in the strict sense is replaced by that of economic policy, but the importance of centralization stands.

Such a development too had been glimpsed by Shapiro: the author, indeed, noted that appeal may also constitutes a source of information for the regime¹⁹, both because it allows the compliance of lower courts with the dictum of higher courts to be verified²⁰, and because each dispute represents a cross-section of social life that can be

16 *Ibid.* p. 631.

17 *Ibid.*, p. 631.

18 *Ibid.*, p. 637 ff.

19 *Ibid.*, p. 641 ff.

20 Actually, reality is not *that* simple, since the relationship between the Supreme Court and lower courts can be reconstructed in various ways.

considered a sample of what happens in society, and allows the identification of any structural errors in the system (i.e. errors depending on the general sources of the legal system, and not on judge's mistake in the specific case)²¹.

These latter remarks, which at the time Shapiro wrote referred to topics of study that had just begun, are now absolutely common, and allow the discussion to shift from politics to economics. Here too, however, the interests of the parties and that of the system seem to converge.

On the one hand, their interactions can be seen as a typical principal-agent problem (on which see EISENHARDT, Kathleen M. "Agency Theory: An Assessment and Review". In: *The Academy of Management Review*, v. 14, n. 1, 1989, p. 57 ff.; SHAPIRO, Susan P. "The Social Control of Impersonal Trust". In *American Journal of Sociology*, v. 93, n. 3, 1987, p. 623 ff.; ARROW, Kenneth J. *The Economics of Agency*. Stanford: Harvard Business School Press, 1984): once the top body has established what the law is, it must rely on the lower courts to ensure that it is applied extensively; but, since the former cannot structurally verify that this happens in every case - either because the scrutiny of dissenting decisions is entrusted to the initiative of the parties, or because the law itself may, when the Constitution allows it, impose limits on appeals of legitimacy - and since no real incentives for compliance can be configured (under penalty of undermining the internal independence of the Judiciary), the concrete implementation of the dictum is essentially left to the will of the agents. And this latter not only manage - often with impunity - to evade the task outright (CANON, Bradley C. "Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision". In: *Law & Society Review*, v. 8, n. 1, 1973, p. 109 ff.; ROMANS, Neil T. "The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda and the Use of Judicial Impact Analysis". In: *The Western Political Quarterly*, v. 27, n. 1, 1974, p. 38 ff.), but sometimes, more subtly, circumvent frontal opposition by narrowing the ruling's scope of application (RE, Richard M. "Narrowing Supreme Court Precedent from Below". In: *The Georgetown Law Journal*, v. 104, 2016, p. 921 ff.; but also see RE, Richard M. "Narrowing Precedent in The Supreme Court". In: *Columbia Law Review*, v. 114, 2014, p. 1909-1910).

On the other hand, before the Supreme Court rules, the *ius dicere* function is entirely entrusted to the lower Courts' jurisprudence, which physiologically generates contrasts and, thus, uncertainty; but, while uncertainty is certainly a cost for the community, the very observation of the ongoing debate in the *jurisprudence du fond* is a source of information for the higher judges, who therefore 'learn' from that. This explains why "Justices like the smell of well-percolated cases" (PERRY, H.W. Jr. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University Press, 1991, p. 230; but also see FERRARIS, Federico. "Rationing Justice". *La selezione dei ricorsi nelle Corti supreme di Stati Uniti e Italia*. Torino: Giappichelli, 2015, p. 100 ff.). And it is precisely by balancing the costs of legal uncertainty with the informational benefits stemming from the comparison of conflicting rulings that US scholars propose to calculate the optimal trade-off, or the best time, for the Supreme Court, to intervene, granting *certiorari* (CLARK, Tom S.; KASTELLEK, Jonathan P. "The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model". In: *The Journal of Politics*, v. 75, n. 1, 2013, p. 150 ff.).

- 21 The type of errors (i.e. *structural errors*) discussed in the text is therefore different from *specific errors*, which may result from the incorrect reconstruction of the facts or application of the law. However, even with regard to the latter type of errors, there is a long-standing idea that appeals—at least under certain conditions—may constitute an effective method of correction. See, among others, SHAVELL, Steven. "The Appeals Process as a Means of Error Correction". In: *The Journal of Legal Studies*, v. 24, n. 2, 1995, p. 381-382, advocating that "if litigants possess information about the occurrence of error and appeals courts can frequently verify it, litigants may be led to bring appeals when errors are likely to have been made but not otherwise. (This outcome may be fostered by imposition of fees for bringing appeals, so as to discourage appeal when decisions were likely to have been correct.) Under these circumstances, not only may the appeals process result in error correction, it may also do so cheaply, for the legal system will be burdened with reconsidering only the subset of cases in which errors were more probably made. This may render society's investment in the appeals process economical by comparison to its improving the accuracy of the trial process—an approach that, by its nature, would require extra expenditure in every case. The appeals process, allow society to harness information that litigants have about erroneous decisions and thereby to reduce the incidence cost".

As recently noted, indeed, “the appeals process also contributes substantially to the improvement of existing laws and regulations: first, because lower court decisions are reviewed by experienced higher courts (thereby contributing to the extension of high-quality case law) and, second, because the frequent occurrence of appeals cases as such provide signals to public policy makers on the (suboptimal) efficiency of existing laws and regulations (thereby initiating, e.g., the publication of guidelines or even the revision of the respective law or regulation). In that sense the appeals process also contributes to the avoidance of erroneous future decisions”²².

Summarizing what has been covered so far, it seems fair to conclude that the real problem Courts are facing today does not stem from an *a priori* divergence of objectives, but from the possible discrepancy between the matter at stake in each judicial proceeding and the areas of law that require improvement. In other words, it is possible that individual interest exists in cases where the law is already (deemed to be) efficient and thus not requiring further clarification or jurisprudential developments, and, viceversa, that the parties cannot or do not consider it convenient to challenge judicial measures in areas that would instead require improvement.

This means that the need for selection does not only arise from quantitative, but also qualitative reasons. But it also implies at least three indications for the policy maker who intends to dictate rules to govern the flow of appeals:

- first, as long as the power to appeal remains in the hands of the parties, it will only be used if the parties can reasonably expect to benefit from it. This explains the failure of mechanisms aimed at ensuring only jurisprudential production of law, such as the appeal in the interest of the law in Italy: until the law stipulated that only the attorney general had the power to bring to the attention of the Court of Cassation rulings that could not be challenged or had not been challenged by the parties, the mechanism was almost completely unapplied. By contrast, since the Court has been given the power to state the principle of law even when declaring the appeals proposed by the parties inadmissible, the instrument is used with huge frequency... indeed, even too much²³;

- second, and consequently, the selection mechanism must be based on reasonably reliable criteria, in order to induce the party to *file* an appeal. The greater the uncertainty of the result, the greater the number of litigants who will avoid facing the costs and time of an appeal;

- third, selection mechanisms cannot be limited to negative ones; and, in fact, they are not. In a recent paper, Giannini²⁴ recalls the distinction between negative and posi-

22 HÜSCHELRAH, Kai; SMUDA, Florian. *The Appeals Process: An Empirical Assessment*, ZEW Discussion Paper No. 14-063, available at <http://ftp.zew.de>, p. 1.

23 AULETTA, Ferruccio. *Diritto giudiziario civile. I modelli del processo di cognizione (ordinaria e sommaria) e di esecuzione*³. Bologna: Zanichelli, 2023, p. 398 s.

24 GIANNINI, Leandro J. “Access Filters and the Institutional Performance of the Supreme Courts”. In: *International Journal of Procedural Law*, v. 12, n. 2, 2022, p. 207.

tive selection mechanisms: the former are those used to filter appeals based on their substantive merit, notwithstanding their procedural correctness, and operate as exceptions to general appeal admissibility, allowing courts to prioritize cases with significant legal or public importance. Besides these, however, there are also positive selection mechanisms, which, by contrast, allow Supreme Courts to admit appeals that would otherwise be inadmissible based on standard requirements. These mechanisms, unlike “negative” filters, act as “opening valves”, admitting cases due to their importance.

For the purposes of this discussion, however, it is worth emphasizing that, despite the different rationale, both mechanisms constitute ways to restore the convergence of public and private interests: appeals which are negatively selected because of their unmeritoriousness are also those whose decision would not bring any benefit to the development of the law; those positively selected, on the other hand, while certainly benefiting the appellant (whose appeal is exceptionally admitted), are mainly aimed at satisfying the public interest, in cases where the generally imposed inadmissibility would represent a loss also for the system.

But if the above empirical findings appear to conclusively demonstrate that the appeal serves both individuals and the system, and that Governments are well aware of that, obviously they are still not enough to answer the question of what is the best design of the selection mechanism. After all, as Giannini also notes, “[t]he positive or negative character of the mechanism says nothing about its openness or restrictiveness”²⁵: the time has therefore come to address the second point.

4. ONCE THE APPEAL HAS BEEN GIVEN, IT MUST BE EFFECTIVE

The idea that if the legislator is free (now it seems appropriate to say, apparently free) to eliminate the appeal, then he can just as freely limit it, is only apparently logical.

Even the supranational Courts other than the African one, while – as already mentioned – at present exclude any obligation for States to provide for more than one degree of jurisdiction, already place limitations on the discretion of the States themselves, once they have decided to introduce a means of appeal. According to the European Court of Human Rights jurisprudence, it is indeed well established that, albeit article 6, § 1, “does not [...] compel the Contracting States to set up courts of appeal or of cassation [...], a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (art. 6) [...]”. There would be a danger that serious consequences might ensue if the opposite view were adopted; [...] and the Court cannot overlook them. In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation

25 *Ibid.*, p. 209.

of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision²⁶.

Moreover, in most cases it is perhaps not even necessary to refer exclusively to supranational case law to infer the impossibility of limiting access to any upper Court in an absolutely discretionary manner. In fact, while the issue of access to justice does not necessarily come to the fore – since, in light of what has been said, it should probably be limited to access to the court of first instance – the decision maker’s choices are normally subject to a rationality test in all democratic countries, even if in different forms and with different extension²⁷.

Irrationality can take two forms: it may be intrinsic, as, with reference to the topic at hand, it would end up setting an appeal so limited as to be substantially useless or setting burdens on the parties that are disproportionate to the results that can actually be achieved. And this applies to procedural requirements too: it is indeed irrational to set a filter system based on procedural rules that are overly stringent and formalistic. In this sense, it is possible to recall the recent case of *Succi v. Italy*, where the European Court of Human Rights held Italy responsible for violation of the “*droit à un tribunal*”, due to the declaration of inadmissibility pronounced by the Court of Cassation on the basis of an excessively formalistic interpretation of the content-form requirements of the appeal²⁸.

But irrationality may also derive from the violation of the principle of equality. And this principle, in turn, would not only be violated if the selection criteria for admissible appeals were discriminatory in themselves, but also – albeit indirectly – when the choice was left to the discretion of the judge, who would therefore be free to apply discriminatory criteria as well.

Finally, any type of filter, even the most rational one, can become irrational in its practical application, whether because an apparently sensible exclusion turn out to be (or appear) unjustified in the face of the particularities of an individual case (and this explains, for example, why some supreme courts have recognized forms of extraordinary appeal even in cases where the law states that a decision is not open to appeal)²⁹;

26 *Delcourt v. Belgium*, 17 January 1970, Application no. 2689/65, § 25; but also see, among others, *Kudla v. Poland*, 26 October 2000 § 122 ; *Platakou v. Greece*, 11 January 2001, Application no. 38460/97, § 38.

27 Of course, the test is not always appreciated or appreciable: see, for example, a critical review in the US debate, NACHBAR, Thomas B. “The Rationality of Rational Basis Review”. In: *Virginia Law Review*, v. 102, n. 7, 2016, p. 1627 ff.

28 *Succi c. Italia*, 28 October 2021, Application no. 55064/11.

29 Suffice here to mention the so-called *appel-nullité* or *appel-restauré*, created by French case law (and then transferred, becoming autonomous in terms of content, to the Belgian system) in order to allow appeals even in cases where they are (exceptionally) excluded or deferred, on the assumption that any limitation imposed by the legislator on the appeal of a measure is implicitly conditional on the validity of the latter (see HOC, Arnaud. *De l'appel-nullité au recours restauré. Étude de droit belge et de droit français*. Bruxelles: Larcier, 2019); or the tendency of the Italian Court of Cassation to extend its review of the rulings of the Council of State (which, according to Article 111, paragraph 8, of the Constitution, should be limited to grounds relating to jurisdiction) to cases of particularly serious procedural errors (see CAPASSO, Valentina, *Nullità degli atti e offensività necessaria. Contributo alla difesa della legalità del processo civile*. Roma: Dike, 2022, p. 375 ff.

whether because of the interpretation that the courts give to the filtering criteria. And this latter problem becomes even more serious with reference to the appeal to the supreme court, which, even when it is not entitled to make statements like the famous one contained in *Cobbledick v. United States* (“[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice”³⁰), is in fact free from any higher control.

5. THE ROLE OF SCHOLARS IN ASSESSING SELECTION MECHANISMS’ RATIONALITY

This latter remark leads to the third point: the role of doctrine then becomes that of verifying the reasonableness of the selection criteria and denouncing those that are or are applied in an irrational manner, possibly proposing alternative and more acceptable and/or functional interpretations; but, to do so, reference to pure procedural law rules or even principles seems not to be enough, because, as in any other case where it comes to evaluating the efficiency and rationality of legal rules, the topic would seem better analyzed using the concepts of law and economics. But, as will be explained below, this impression is only partially correct.

As is well known, law and economics is a form of legal analysis that uses micro-economics to understand and evaluate legal systems, by examining how laws affect behavior, assessing their efficiency, and predicting their creation. And, regardless of the different schools of thought that this science has subsequently been divided into³¹, the starting assumption from which any study of law and economics unfailingly moves is that the individuals are rational, and therefore pursue their own profit maximization: indeed, law and economics can be defined as the application of the rational choice approach to law³².

As far as is relevant here, this means that, just like the decision to file a lawsuit in the first instance, the decision to file an appeal will also be influenced by the estimated outcome of the trial: in essence, the party will only appeal if s/he can reasonably estimate that the benefits will outweigh the costs. The most straightforward way to reduce appeals would thus seem to increase costs. And it is precisely on this idea that Posner based his famous, and now long-standing, proposal, which has been adopted, even if only implicitly, by various systems. In detail, Posner identified 3 transaction costs:

30 *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940)

31 PARISI, Francesco. “Positive, Normative and Functional Schools in Law and Economics”. In: *European Journal of Law and Economics*, v. 18, 2004, p. 259 ff.

32 KERKMEESTER, Heico. “Methodology: General”. In: BOUCKAERT, Boudewijn; DE GEEST, Gerrit (coord.), *Encyclopedia of Law and Economics. Volume I. The History and Methodology of Law and Economics*. Cheltenham: Edward Elgar, 2000, p. 384; ULEN, Thomas S. “Rational Choice Theory in Law and Economics”. In: BOUCKAERT, Boudewijn; DE GEEST, Gerrit (coord.), *Encyclopedia of Law and Economics*, cit., p. 797; PARISI, Francesco. “Positive, Normative and Functional Schools in Law and Economics”, cit., p. 262

the cost of the judicial services;
 delay, that, because of inflation, reduces the economic value of any subsequent judgment;
 the court financial minimum required to establish standing.

According to Posner, courts could act on all three factors, possibly increasing them to reduce the flow of demand, albeit with some limitations (e.g., regardless of the practicality of a system that places the cost of the judicial services entirely at the user's expense, this would not be justified even from a strictly economic point of view, given the positive externalities produced by the court ruling for the benefit of the community)³³.

However, if Posner model has been followed for a long time without being empirically verified, subsequent studies have rightly questioned its validity. In particular, it has been demonstrated that the assumption according to which any losing litigant with a positive cost-benefit analysis would appeal is incorrect in at least two respects: on the one hand, the economic trade-off is only one of the elements evaluated by the parties in deciding whether or not to appeal, so that there will be litigants who will propose an appeal even if potentially at a loss; on the other hand, there will be parties who will not be able to afford the advance payment of the expenses necessary to propose the appeal, and therefore will not file it despite the cost-benefit analysis being theoretically positive³⁴. As a result, the suggested increase in fees and delay would end up translating in a more restrictive access to the “appellate arena” and “decreas[ing] the legitimacy of the courts as these institutions [would be] increasingly viewed as available only to the wealthiest segments of society”³⁵. And, needless to say, such a system – which is nothing more than a negative selection mechanism based on census – would not even pursue the interests of the system, because there is obviously no correlation between a party's income and the importance of the legal issue raised in the dispute in which that same party is involved.

The same reasoning – which suggests that it is not possible to automatically apply law and economics models to judicial proceedings rules – can be extended to filters based on the so-called *suma gravaminis*, that is, the value of the case. It has already been noted that the only advantage of this system is the certainty of the selection criterion, clearly knowable in advance. However, the criticism against the *suma gravaminis* criterion is only partial: according to Giannini, “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. [...] In other words, instead of focusing on the impact that the decision will have on the clarification, coherence,

33 POSNER, Richard A. *The Federal Courts*, Cambridge: Harvard University Press, 1985, p. 6 ff.; see also POSNER, RICHARD A. *Economic Analysis of Law*². Boston: Little, Brown and company, 1985, p. 522 ff. and p. 550 ff.

34 BARCLAY, Scott. “Posner's Economic Model and the Decision to Appeal”. In: *The Justice System Journal*, v. 19, n. 1, 1997, p. 77 ff.

35 *Ibid.*, p. 96.

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”³⁶. Such a criticism can certainly be shared if the objective aimed at by the political decision maker is to give prevalence to the public interest, as the criterion in question is unsuitable for this purpose; and yet, there are at least two other aspects which deserve consideration, and which show that such a system is clearly irrational.

On the one hand, “[t]he minimum-amount-in-controversy approach is the equivalent of an infinite filing fee for cases below the minimum and a zero filing fee for cases above it”³⁷, so that the mechanism ends up posing the same problem as Posner’s model; on the other hand, it is not even true that the setting of a *suma gravaminis* invariably meets litigant’s interest, because the relative value of a case depends on the economic conditions of the party; with the consequence that the principle of equality is violated also from this point of view, because the filter systematically excludes from the possibility of appealing those with a lower income (and for whom, therefore, even small sums can be extremely important).

This second line of criticism remains valid even if the system based on case value is combined with a positive selection mechanism based on merit; and in some way applies to filters based on procedural requirements too. Not only these latter – as seen – cannot be used too widely without rendering the appeal ineffective, but they are also in no way connected with the public interest, since they prevent access to the appeal court due to party’s error, regardless of the importance of the issue raised by the appeal.

6. CONCLUSION: DISCRETIONARY FILTERS AS A (NECESSARY) LAST RESORT

Any other type discarded, it only remains to analyze the last kind of filters previously recalled, namely those exclusively based on merit, which, in light of the above considerations, end up being the only possible ones. But this kind of filters can only be discretionary, both because - in this matter as in any other - it is unrealistic to expect the legislator to be able to foresee all the hypotheses that could arise in practice, and therefore to list exhaustively all the cases in which the appeal must be granted; and because, even if it were possible, language in general, and legal language in particular, is intrinsically vague and requires interpretation.

This summary makes it clear that in the context of this paper, which is only intended to provide a general theoretical framework, it would be impossible to go beyond a few broad considerations, since greater precision would only be possible by interpreting individual legislative provisions. With this caveat in mind, it is nonetheless possible

36 GIANNINI, Leandro J. “Access Filters and the Institutional Performance of the Supreme Courts”, cit., p. 202.

37 POSNER, Richard A. *Economic Analysis Of Law*, cit., p. 550.

to sum up the now long discussion to define the general parameters that legitimize the use of discretionary filters: they must be *broad enough* to induce the parties to appeal, since – as shown – individual interest remains the necessary driving force of the system; but *not so broad* as to allow the Court total freedom to apply them arbitrarily, both because this would make the filter irrational, and because its unpredictable application would act as a deterrent for risk adverse parties, regardless of the merits of their case and the importance of the legal issue there addressed.

And, where the law does not appear capable of achieving the right balance – which, it must be admitted, is rather difficult to define – this task will inevitably fall to the Court itself, as the Spanish experience of the *Acuerdos sobre criterios de admision de los recursos de casacion y extraordinario por infraccion procesal* demonstrates³⁸. Because, in the end, every law can be good or bad depending on *how* it is interpreted.

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38 Reference is here made to the *acuerdos* issued by the *Sala primera* in 2010, 2011 and 2017, in order to interpret article 477 LEC/2000, according to which an appeal to the Supreme Court must be based on an infringement of procedural or substantive rules, provided that there is a “casational interest”; the same article specifies that such an interest shall be considered to exist when the appealed decision opposes the doctrine of the Supreme Court or resolves points and issues on which there is contradictory jurisprudence of the Provincial Courts or applies rules on which there is no doctrine of the Supreme Court.

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