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*Dossiê*

*“O papel dos tribunais constitucionais  
na definição do devido processo penal”*



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# Editorial of the dossier “*The role of constitutional courts in shaping procedural fairness in criminal cases*” – *Constitutionalisation of the right to a fair criminal trial as a process inspired by constitutional courts*<sup>1</sup>

*Editorial do dossiê “O papel dos tribunais constitucionais na definição do devido processo penal” – Constitucionalização do direito ao devido processo penal como um processo inspirado pelas Cortes Constitucionais*

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**ABSTRACT:** The 20th century is sometimes referred to as the century of constitutional courts. Constitutional justice was designed to ensure the protection of the constitution. Supporters of constitutional courts saw in it an opportunity to guarantee the supremacy of the constitution, to protect the individual against arbitrariness and omnipotence of the parliamentary majority. A key moment in this regard was the constitutionalisation of human rights and freedoms. Most of the fundamental rights, including procedural rights relevant to the criminal process, were incorporated into the constitution. This resulted in a rapid development of constitutional jurisprudence, especially in the matter of the right to a fair trial. Regardless of the

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scope of constitutional regulation, the right to a fair trial has become the most frequently invoked standard of review before the constitutional court. The constitutionalisation of guarantees of a fair criminal trial has become a fact. The article discusses what role constitutional courts play in this process and how they enrich the *acquis constitutionnel* with standards regarding fairness in criminal proceedings.

**KEYWORDS:** Constitutional courts; constitutionalisation of procedural fairness; fair trial rights in criminal cases.

**RESUMO:** O Século XX é algumas vezes denominado como o século dos Tribunais Constitucionais. A jurisdição constitucional foi desenvolvida para assegurar a proteção da Constituição. Apoiadores das Cortes Constitucionais constatarem nelas uma oportunidade para garantir a supremacia da Constituição, para proteger o cidadão contra a arbitrariedade e a onipotência da maioria parlamentar. Um momento determinante nesse sentido foi a constitucionalização dos direitos humanos e das liberdades individuais. A maioria dos direitos fundamentais, incluindo os direitos procedimentais relevantes ao processo penal, foram incorporados na Constituição. Isso resultou em um rápido desenvolvimento da jurisprudência constitucional, especialmente em questões relacionadas ao direito ao julgamento justo (devido processo). A despeito dos objetivos da normativa constitucional, o direito ao processo justo se tornou o parâmetro mais frequente para invocação da revisão diante do Tribunal Constitucional. A constitucionalização das garantias do processo penal justo se tornou um fato. Este artigo discute o papel do Tribunal Constitucional nesse processo e como tais instituições fortalecem a jurisprudência constitucional com standards relacionados ao devido processo penal.

**PALAVRAS-CHAVE:** Tribunais constitucionais; constitucionalização do devido processo; direitos do justo processo penal.

**SUMMARY:** 1. Introduction; 2. The notion of a constitutional court; 3. The powers of constitutional courts and their influence on the legal system; 4. The constitutionalisation of procedural fairness; 5. The alchemy of (constitutional) right to a fair trial in criminal cases; 6. Conclusions

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“We are under a Constitution, but the Constitution is what the Judges say it is...”<sup>3</sup>

Charles Evans Hughes, 1907

## 1. INTRODUCTION

Constitutional review was born out of the need to devise a mechanism for the protection of the constitution and the values enshrined in it. Today, a constitutional court can be seen as a body that invigorates the constitution by making it “a living legal instrument” and developing its content. The case law of the U.S. Supreme Court concerning the *Miranda* warning, the right to privacy, the exclusionary rule or the rule of law may serve as an example of such a judicial activity. The U.S. Supreme Court is mentioned here for a reason. In its landmark 1803 decision in *Marbury v. Madison*, the Court established the principle of judicial review, recognising the power of American judges to examine the constitutionality of laws at both the federal and state level.

The U.S. (“decentralised”) model of constitutional review has had a significant impact on the formation of constitutional protection procedures in other jurisdictions, especially in Latin America and former British territories (Canada, Australia, India and Israel). European countries adopted a centralised model of constitutional review based on Hans Kelsen’s concept of a constitutional court, a body specifically designed to exercise the authority of invalidating legislation found to be in conflict with the constitution. The first “Kelsenian” constitutional courts were established in Austria and Czechoslovakia (1920), and later in Spain (1931). However, the development of constitutional courts on the European continent was only possible after World War II. The painful experience of totalitarianism led to a search for effective mechanisms

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<sup>3</sup> Address by Charles Evans Hughes before the Elmira Chamber of Commerce, May 3, 1907. in: Addresses and Papers of Cuixmrils Evans 1h-UCHIES 133, cited by MASON, Alpheus T. Myth and Reality in Supreme Court Decisions. *Virginia Law Review*, vol. 48, no. 8, 1962, pp. 1385–406, <https://doi.org/10.2307/1071211>, p. 1400.

of constitutional protection ensuring respect for individual rights and safeguarding minorities against the omnipotence of the majority.

The last 40–50 years were a period of visible expansion of constitutional courts and a golden era of constitutional rights of the individual. The protection of constitutional rights and freedoms provided by constitutional courts has become an important element of their activity, especially in those systems where the constitutional complaint is available. The guarantees of judicial protection defined at the constitutional level set standards for judicial proceedings. In many cases, constitutional provisions relating to the guarantees of fair trial lie at the heart of jurisprudential activities of a constitutional court. Accordingly, the role of constitutional courts in the development of procedural justice in criminal cases is a subject worth considering. It is also important to explore the phenomenon of constitutionalisation of the criminal trial, which denotes putting the criminal trial into a constitutional framework and subordinating it to constitutional rules, procedures and norms.

## 2. THE NOTION OF A CONSTITUTIONAL COURT

At the outset, the meaning of the term “constitutional court” should be explained. In doing so, one should bear in mind different interpretation of that term. In some systems, supreme courts act as constitutional courts: they rule on constitutional matters as courts of last resort. Sometimes regional human rights courts can be seen as constitutional courts since they define universal standards for the protection of individual rights.<sup>4</sup> The European Court of Human Rights (ECtHR) plays a significant role

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<sup>4</sup> GARLICKI, Lech. Judgments of the European court of human rights (their structure, impact and authority). In: ROCA, J. García; CUENCA, E. Carmona (eds.). *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana*. Navarra: Thomson Reuters Aranzadi, 2017, pp. 42-43; GREER, Steven; WILDHABER, Luzius. Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights, *Human Rights Law Review*, vol. 12, no. 4, December 2012, pp. 655–687, p. 667; SADURSKI, Wojciech. Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments. *Human Rights Law Review*, vol. 9, no. 3, 2009, pp. 397–453, p. 446.

in interpreting the norms of the Convention<sup>5</sup>, defining the scope of Convention rights and the obligations of Member States. According to Czerwińska<sup>6</sup>, given that constitutional courts in certain European countries are yet to seize an opportunity to express their views on specific issues, the case law of the ECtHR may be only framework that offers legal solutions to certain problems. The same may be said of the Court of Justice of European Union, which is responsible for interpreting EU law.<sup>7</sup>

The scholarship of constitutional law traditionally views a constitutional court as a special body equipped with the power of constitutional review, or the authority to invalidate parliamentary legislation and other acts of public authorities found to be in conflict with the constitution.<sup>8</sup> It is assumed that a constitutional court must be a constitutionally established, independent organ of the state whose central purpose is to defend the normative superiority of the constitutional law within the juridical order.<sup>9</sup> It is also suggested that, the term “constitutional court” denotes a decision-making institution which is separate from judiciary and which has the final, and usually exclusive, say on interpretation of the constitution, as well as the constitutional validity of laws and state action.<sup>10</sup>

However, a constitutional court is not always separated from the courts system. Sometimes, a constitutional court remains an element of the judicial branch. There are also systems in which a constitutional court sits alongside a supreme court. The former can even scrutinize

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<sup>5</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950, came into force in 1953.

<sup>6</sup> CZERWINSKA, Dorota. The role of the constitutional courts and ECtHR in shaping negotiated justice mechanisms – a comparative perspective, in *this dossier*.

<sup>7</sup> DE VISSER, Maartje, *Constitutional Review in Europe. A Comparative Analysis*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 90.

<sup>8</sup> SWEET, Alec Stone. Constitutional Courts. In: ROSENFELD, M.; SAJÓ, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*. 2012, Online Publication.

<sup>9</sup> *Ibid.*

<sup>10</sup> DALY, Tom. *The Alchemists. Questioning our Faith in Courts as Democracy-Builders*. Cambridge: Cambridge University Press, 2017, p. 19.

the constitutionality of the latter's decisions, for instance in Germany and Spain. In some systems, the supreme court performs the role of a constitutional court. The "supreme court", on the other hand, denotes a judicial institution at the apex of the judiciary, which operates both as the final interpreter of the constitution as well as the final court of appeal concerning non-constitutional matters.<sup>11</sup> An obvious example of such a court is the U.S. Supreme Court, which is considered the pioneer of judicial (constitutional) review.

Finally, the role of a constitutional court can be performed by a non-judicial or quasi-judicial body.<sup>12</sup> In France, the function of a constitutional court was entrusted to the Constitutional Council, whose influence on the legal system increased significantly after the 2008 constitutional revision.<sup>13</sup> Despite the differences, constitutional courts, supreme courts and other similar institutions all engage in constitutional review. But is it these differences the factor that actually determines the legal and practical impact of these courts on procedural fairness?<sup>14</sup>

### 3. THE POWERS OF CONSTITUTIONAL COURTS AND THEIR INFLUENCE ON THE LEGAL SYSTEM

It is generally believed that the way in which constitutional courts can influence the legal system depends, first and foremost, on the scope of the courts' powers. Constitutional courts' influence also depends on the effects of their rulings declaring a law unconstitutional and, their actual position vis-à-vis other state bodies. The extent of powers conferred on

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<sup>11</sup> *Ibid.*

<sup>12</sup> DE VISSER, Maartje. *Constitutional Review in Europe. A Comparative Analysis*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 59.

<sup>13</sup> DYEYRE, Arthur. The French Constitutional Council. In: JAKAB, András; DYEYRE, Arthur; ITZCOVICH, Giulo (eds.). *Comparative Constitutional Reasoning*. Cambridge: Cambridge University Press, 2017, p. 326.

<sup>14</sup> SWEET, Alec Stone. Why Europe Rejected American Judicial Review: And Why It May Not Matter. *Michigan Law Review* vol. 101, no. 8 (2003), pp. 2744–80, p. 2772; SADURSKI, Wojciech. Judicial Review and the Protection of Constitutional Rights. *Oxford Journal of Legal Studies*, vol. 22, no. 2 (2002), pp. 275–299, p. 298.

constitutional courts varies considerably. Even among the “Kelsenian” constitutional courts in Europe, there are significant differences related to competencies granted to such courts. The scope of authority can be very broad, as is the case with the German Federal Constitutional Court, which has become a model for similar institutions introduced in other countries. Powers can also be defined narrowly, as in the case of the French Constitutional Council.

The key competence of a constitutional court is considered to be the authority to review the constitutionality of laws and other acts of public authorities, which includes the ability to repeal any laws declared unconstitutional. This power is usually referred to as a “constitutional review”. The power of constitutional review is regarded as a necessary element for the recognition of a judicial constitutional protection body as a constitutional court.<sup>15</sup> It is considered its “paradigmatic power”<sup>16</sup> and “the core task”<sup>17</sup>. A constitutional review may be carried out in different forms, through different procedures and at the request of different actors. A particular variation of constitutional review is the abstract review of laws, which is a typical form of centralised model of constitutional adjudication. A legal act can be subject to an abstract review regardless of whether it was applicable in a particular case. An abstract review may take the form of an ex-ante or ex-post review. The former makes it possible to examine the compatibility of laws before promulgation. Ex-ante review is usually initiated at the request of a narrowly defined group of public authorities (e.g. the president, cabinet, speaker of a parliamentary chamber or a group of parliamentarians). It occurs during a complex law-making process and effectively engages the constitutional court in that process, enabling it to express its opinion on the constitutionality of the law being created. At this stage, the constitutionally contested law is not yet applied in practice, so some of its deficiencies may not

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<sup>15</sup> GARLICKI, Lech. *Sądowictwo konstytucyjne w Europie Zachodniej*. Warszawa: Państwowe Wydawnictwo Naukowe, 1987, p. 175.

<sup>16</sup> GINSBURG, Tom; ELKINS, Zachary. Ancillary Powers of Constitutional Courts. *Texas Law Review*, vol. 87, no. 1431 (2008), pp. 1432-1461, [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2439&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2439&context=journal_articles), p. 1432 (accessed on: 13.03.2022).

<sup>17</sup> *Ibid.*, p. 1444.



have been yet revealed. Accordingly, the constitutional court concerned should exercise more restraint in its ex-ante review. On the other hand, ex-ante review prevents the entry into force of the entire legal act (or any of its provisions) which is declared unconstitutional. This type of review hence has a far-reaching impact on the legislative process and may even be capable of blocking it.

Abstract review is more often carried out ex-post, already after a given act begins to create legal effects. The substantive scope of ex-post review is much broader and extends beyond the acts of primary legislation. Usually, a much larger group of actors may initiate proceedings before a constitutional court after a given act has come into effect. These may be opposition parliamentarians, if they have a sufficient majority, representatives of the executive but also the judiciary, sometimes officials of local governments, as well as the attorney general (public prosecutor general), the ombudsman, state auditors, trade unions and religious associations. Having considered a given act unconstitutional, the constitutional court is capable of depriving the act of legal force, effectively eliminating it from the legal system. This is usually the ultimate measure. In doing so, the court performs the role of a “negative legislator”. Sometimes it is sufficient for the court to express its view on how a provision should be understood to remain constitutional. In such a case, the court does not repeal the provision itself but indicates its constitutionally acceptable interpretation. It should be noted, however, that in this respect the court is usually bound by the complaint formulated by the applicant.

Concrete review is another type of constitutional review. A concrete review is performed in a specific case in which a constitutional compatibility problem has arisen. A concrete review may be initiated by ordinary courts in the course of a judicial process or by means of a constitutional complaint. A court launches a concrete review by referring a question on a point of law (a preliminary reference procedure<sup>18</sup>) to a constitutional court in the event of doubts as to the constitutionality of a legal norm to be applied in a given case. The judicial proceedings are then suspended until the constitutional court has ruled on the (un)constitutionality of the contested

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<sup>18</sup> DE VISSER, Maartje, *Constitutional Review in Europe. A Comparative Analysis*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 132.

act. To successfully refer a question on a point of law to a constitutional court, the referring court must usually show that its resolution of the case depends on the constitutional court's ruling on the referred question. In other words, to effectively initiate the constitutional review process, the referring court needs to have doubts over the constitutionality of the legal norm it is about to apply. If these doubts are shared by the constitutional court, the challenged norm may be deprived of its legal force (eliminated from the legal system). This will prevent the application of an unconstitutional norm in the case examined by the referring court.

Being equipped with the power to seek a concrete review, the ordinary courts serve as an important partner of the constitutional court in guaranteeing the supremacy of the constitution and the rights of individuals. It is the ordinary courts who, when applying laws, notice the lawmakers' mistakes and can appropriately respond whenever, in a particular case, they are required to apply (constitutionally) defective legal regulations, which may lead to a violation of constitutional values.

In the case of a constitutional complaint, it is the individuals whose rights and freedoms have been violated who can seek remedies directly from a constitutional court. As a rule, such violations are caused by the action (or inaction) of a public authority. A constitutional complaint is a special and subsidiary measure – it is available after exhaustion of other available legal remedies, usually those exercisable in court proceedings. There are constitutional courts that have no power to examine constitutional complaints (e.g. Italy, Portugal, Lithuania, Romania). Moreover, there is no single model of a constitutional complaint. The constitutional complaint of the German variety can be considered a model, as it inspired similar measures subsequently adopted in other European countries. However, these measures are not “carbon copies” of German solutions but rather their appropriate modifications (such as the Polish model, which excludes the challenging of court decisions by means of a constitutional complaint).

It is worth noting that the establishment of a constitutional complaint as an element of a constitutional court's jurisdiction significantly affects the court's activities. There are indeed many constitutional courts in Europe which have embraced the examination of constitutional complaints as a core activity. The broader the scope of protection offered

by a constitutional complaint is, the more willingly individuals tend to use this remedy. This trend could be observed in Germany, Spain, but also in Czechia, where the constitutional complaint can be invoked to challenge the broadly defined acts of public authority and, above all, court rulings. The huge interest in the constitutional complaint in Germany and Spain has led to problems with the constitutional court being overwhelmed and has forced reforms limiting the availability of the complaint. However, even if a constitutional court wields the limited authority to examine constitutional complaints – as is the case if only certain activities of public authorities can be challenged – the resolution of constitutional complaints remains at the centre of the court’s activities. In Poland, despite the adoption of a narrow model of constitutional complaint, which may only be used to challenge legal provisions (and not decisions of judicial or non-judicial bodies), 438 of the 1442 judgments handed down by the Constitutional Court since 1997 were issued in constitutional complaints cases.

The effects of rulings made by a constitutional court in cases involving constitutional complaints vary from country to country. When dealing with constitutional complaints against judicial decisions, the constitutional court exercises powers similar to those of a court of cassation. It can set aside a court decision and order the court to take (or refrain from taking) a certain action (such powers are exercised, for example, by constitutional courts in Germany, Spain and Czechia). If a constitutional complaint may be used to challenge legal provisions, a constitutional court may declare the provision unconstitutional, eliminating it from the legal system (such arrangements are in place e.g. in Poland).

In a decentralised system of constitutional review (often referred to as “the American model”), there is no single institution responsible for the constitutional review of legislation. This constitutional review responsibility is borne by all courts in a given country, although the special role is performed by the supreme court – the highest-ranking element of the justice system. An essential feature of the decentralised review model is its concrete nature. A constitutional problem arises as part of a matter being resolved by a court. The consequences of the constitutional decision essentially concern the parties to the proceedings and their specific case. The outcome of a decentralised review decision taken by a lower court is barely comparable with the impact of a decision

of a constitutional court operating as part of a centralised review model. In general, the higher the court, the greater its power to influence the jurisprudence of other courts through binding case law. In the U.S. system, only the judgments by the U.S. Supreme Court are treated as authoritative and binding on everyone.<sup>19</sup>

In the history of Western constitutionalism, powers typical of both of these traditional models of constitutional review (centralised and decentralised) occur simultaneously in what is known as “mixed systems”. These are the features typical of the Portuguese constitutional system, in which a constitutional review body (constitutional court) with certain powers (*ex-ante*, *ex-post* abstract review) co-exists with ordinary courts that have the power to refuse to apply any unconstitutional laws.<sup>20</sup> A mixed system<sup>21</sup>, also known as the “hybrid system”<sup>22</sup>, exists e.g. in Brazil. It “was born purely diffuse (decentralised), and went the progressive route of concentration without suppressing that original diffuse element”.<sup>23</sup> Its current shape is the result of evolution and constitutional reforms. The Supreme Federal Tribunal of Brazil (STF) now acts as a constitutional court exercising certain powers typical of a model of centralised constitutional review, including that of abstract review.<sup>24</sup> STF decisions in abstract

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<sup>19</sup> KOKOTT, Juliane; KASPAR, Martin. Ensuring Constitutional Efficacy. In: ROSENFELD, M.; SAJÓ, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*. 2012, Online Publication.

<sup>20</sup> GONÇALO, Almeida Ribeiro. Judicial Review of Legislation in Portugal: A Brief Genealogy (2018). In: *Constitutional History: Comparative Perspectives*. Brill (2019 Forthcoming), p. 3.

<sup>21</sup> BARROSO, Luís Roberto; OSORIO, Aline. Democracy, Political Crisis, and Constitutional Jurisdiction. The Leading Role of the Brazilian Supreme Court. In: LANDFRIED, Christine (ed.). *Judicial Power. How constitutional Court Affect Political Transformations*. Cambridge: Cambridge University Press 2019, p.165.

<sup>22</sup> Cfr. FROSINI, Justin O.; PEGORARO, Lucio. Constitutional courts in Latin America: A Testing Grounds for New Parameters of Classification. *Journal of Comparative Law*, vol. 3, no. 2 (2008), pp. 39-63; p. 41.

<sup>23</sup> MENDES HÜBNER, Conrado. The Supreme Federal Tribunal of Brazil, [in:] JAKAB, András; DYEVE, Arthur; ITZCOVICH, Giulo (eds.). *Comparative Constitutional Reasoning*. Cambridge University Press 2017, p. 122.

<sup>24</sup> The Court may decide on the “direct action of unconstitutionality” (ADIs); the “direct action of unconstitutionality due to omission” (ADCs) and the claim of “noncompliance with a fundamental norm” (ADPF).

review cases have an *ex tunc* and *erga omnes* effect and are binding on the judiciary, public administration and the legislature. A manifestation of decentralised and concrete review is the power of ordinary courts to refuse the application of an unconstitutional norm in a particular case. Ultimately, however, a case may be brought before the STF as a court of last resort through a petition known as “extraordinary appeal”.

The above powers of constitutional courts allow these courts to perform the roles of a guardian of the constitution and a guarantor of the rights and freedoms of the individual. The powers create significant opportunities for constitutional courts to influence the legal system in both a “corrective” and (in a way) “incidental” fashion. In general, the broader the powers are the more impact on the legal system a constitutional court has.<sup>25</sup> Undoubtedly, what is particularly visible against this background is a constitutional court’s jurisdiction to examine constitutional complaints and questions on the points of law referred by ordinary courts. Usually, it is these powers that are most often used by the constitutional court, as evidenced by statistics published on the websites of constitutional courts.<sup>26</sup> In the event that there has been a violation of an individual’s subjective rights and the effects of this violation have not been remedied by other legal means, the constitutional complaint opens up direct access to the constitutional court for the individual concerned. Questions on the points of law, on the other

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<sup>25</sup> The activity of the French Constitutional Council has significantly increased with the acquisition of a new power to deal with ‘*question prioritaire de constitutionnalité*’. Arguably, the 2008 constitutional revision has contributed to the consolidation of the Council’s status as a central actor in the political system. Moreover, the reform, which took effect on 1 March 2010, has greatly expanded the Council’s influence over the legal system. See DYEURE, Arthur. Filtered Constitutional Review and the Reconfiguration of International Judicial Relations. *American Journal of Comparative Law*, vol. 61, no. 729 (2013), pp. 729-755, p. 730; DYEURE, Arthur. The French Constitutional Council, [in:] JAKAB, András; DYEURE, Arthur; ITZCOVICH, Giulo (eds.). *Comparative Constitutional Reasoning*. Cambridge: Cambridge University Press, 2017, p. 326.

<sup>26</sup> See the 2020 Annual Report of the Spanish Constitutional Tribunal (*Tribunal Constitucional Memoria 2020*), <https://www.tribunalconstitucional.es/en/memorias/Documents/MEMORIA-2020.pdf>, p. 226; the 2021 Annual Report of the German Federal Constitutional Tribunal (*Jahresberichte 2021*), [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht\\_2021.pdf?\\_\\_blob=publicationFile&v=8](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8), p. 50.

hand, allow ordinary courts hearing a specific case to initiate a constitutional review of the law of questionable constitutionality before a constitutional court. In a sense, these two powers correspond to the measures that exist in systems of decentralised constitutional review of legislation.

Thanks to their competencies, constitutional courts can both correct irregularities and deficiencies in the lawmakers' activities, but also those affecting the activities of other branches of government (including the judiciary). At the same time, constitutional courts can anticipate actions by the legislature by developing a framework for legislative action in a given area and setting the direction for further action. However, jurisdictions of constitutional courts have their limits. First, not all constitutional problems will be brought before a constitutional court for resolution. The bringing of a constitutional problem to a constitutional court depends on the activeness and skills of the actors initiating the proceedings (inadequately drafted or improperly reasoned allegations may be bound to be rejected). Secondly, a constitutional court is neither designed nor willing to replace the legislature. If a situation where legislative action is needed, a constitutional court merely indicates that the choice of a particular solution should be made by the lawmakers within a constitutionally permissible framework. In general, a constitutional court also lacks the power to compel the implementation of a ruling.<sup>27</sup> Consequently, the implementation of a constitutional court's ruling of unconstitutionality requires cooperation between the court and the other authorities responsible for making and applying the law.

#### **4. THE CONSTITUTIONALISATION OF PROCEDURAL FAIRNESS**

A "constitution" in the modern sense of the term is a set of legal norms which regulate the establishment and exercise of public power.<sup>28</sup>

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<sup>27</sup> See, however, the implementation powers of the German Federal Constitutional Court and the additional powers conferred on the Spanish Constitutional Court in 2015.

<sup>28</sup> GRIMM, Dieter, *Types of Constitutions*, In: ROSENFELD, M.; SAJÓ, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*. 2012, Online Publication.

The constitution defines relations between state authorities, but also those between the state and individuals. The latter are described through norms on the rights, freedoms and obligations of the individual. Nowadays, the norms on the rights and freedoms of individuals are understood in terms of positive obligations of the state, which is to ensure the effective implementation of these norms. Many modern constitutions present long lists of individual rights and freedoms modelled on international human rights instruments. The constitutionalisation of fundamental rights has thus occurred, resulting in the key civil and political rights being guaranteed at the constitutional level. The constitutionalisation process also encompasses many important procedural rights relevant from the perspective of criminal proceedings. Among those rights, the right to a fair trial is of particular significance. It is an important safeguard of other individual rights. Such rights can be protected effectively if individuals may seek remedies from courts and tribunals which are independent, impartial and follow a fair procedure for resolving disputes.<sup>29</sup> The right to a fair trial has also great practical importance. It is often used as a standard of constitutional review by constitutional courts.<sup>30</sup> As such, it has been discussed in an extensive body of judicial decisions.

There are different terms used in constitutional provisions to describe guarantees of rights associated with a fair trial. The Constitution of the United States uses the term “due process of law” (in the Fifth and, later, the Fourteenth Amendment). However, the Sixth Amendment creates the right of the accused “to a speedy and public trial, by impartial jury” and other important rights in criminal proceedings.<sup>31</sup> The German Basic Law (1949) guarantees, in Article 103 § 1, the right to a lawful hearing before a court (*Anspruch auf rechtliches Gehör*), which is a fundamental procedural right.<sup>32</sup> Its Article 19 § 4 provides for recourse to the courts against

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<sup>29</sup> CLAYTON, Richard; TOMLINSON, Hugh. *Fair Trial Rights*. Oxford: Oxford University Press, 2010, p. 1.

<sup>30</sup> BUMKE Christina; VOßKUHLE, Andreas. *German Constitutional Law. Introduction, Cases and Principles*. Oxford: Oxford University Press, 2019, p. 557.

<sup>31</sup> CLIFF, Roberson. *Constitutional Law and Criminal Justice*. Boca Raton, London, New York: CRC Press Taylor & Francis Group, 2016, p. 155.

<sup>32</sup> BUMKE Christina; VOßKUHLE, Andreas. *German Constitutional Law. Introduction, Cases and Principles*. Oxford: Oxford University Press, 2019, p. 557.

violations of a person's basic rights by a public authority. Under Article 24 of the 1947 Constitution of Italy, everyone has the right to institute proceedings before a court. Article 111 of the Italian Constitution (as amended in 1999) includes a detailed and extensive list of fair trial rights (*giusto processo*). Article 24 of the 1978 Spanish Constitution establishes the universal right to effective judicial protection (*tutela judicial efectiva*) with certain procedural guarantees. Article 5 of the Brazilian Constitution defines an extensive list of fundamental rights (currently 79, including the right to protection of personal data, according to Amendment 155 of 2022), and many of them are related to procedural guarantees.

Constitutional provisions directly express different arrays of guarantees and components of the right to a fair trial. Some constitutions, especially the more recent ones, were modelled on international rights instruments. The right to a fair trial expressed in their provisions reflects the requirements of judicial protection resulting from international human rights standards (e.g. Article 10 of the Universal Declaration of Human Rights 1948, Article 14 of the International Covenant on Civil and Political Rights 1966 and Article 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms). One of such requirements is that of a public and fair hearing within a reasonable time by an independent and impartial tribunal established by law. These requirements can be expressed as subjective rights of individuals or in provisions governing the system of courts and the status of judges. Relevant constitutional regulations are not always particularly extensive. However, a guarantee of a fair trial can also be sought in other constitutional principles or values. For example, the Polish Constitutional Court “discovered” the individual's right to a court in the principle of a democratic state ruled by law established under the previously applicable constitutional provisions (the communist 1952 Constitution amended in 1989).<sup>33</sup> This Court found

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See also the 2020 Annual Report of the Spanish Constitutional Tribunal (*Tribunal Constitucional Memoria 2020*), <https://www.tribunalconstitucional.es/en/memorias/Documents/MEMORIA-2020.pdf>, p. 233.

<sup>33</sup> This principle was expressed in Article 1: “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”. This provision has the same wording as Article 2 of the current 1997 Constitution of the Republic of Poland.



that the operative Constitution did not directly express the right to a court but observed that “it is derived from Article 1 of the Constitution [...] as an essential component of a democratic state ruled by law. This interpretation of Article 1 of the Constitution is also supported by the provisions of Articles 14 and 26 of the International Covenant on Civil and Political Rights, a treaty ratified by Poland”.<sup>34</sup> Furthermore, the Polish Constitutional Court stated that the right in question was specifically addressed in Article 56 of the then-operative Constitution, which listed the courts responsible for the administration of justice in the Republic of Poland.<sup>35</sup> The Court also held that both provisions provide for the right of the individual to a fair and public hearing.<sup>36</sup>

A similar example is France, where the lack of a clear legal basis that would resemble the Convention Article 6 in the text of the 1958 Constitution of the Fifth Republic did not prevent the French Constitutional Council from developing a wide range of requirements constituting the standard of the right to a fair trial.<sup>37</sup> The French Constitutional Council “extracted” and “named” detailed guarantees of a fair trial by referring to general principles of law (fundamental principles recognised by the laws of the Republic) and general clauses contained in the preambles to the 1946

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<sup>34</sup> Judgment of the Polish Constitutional Court of 25 February 1992, case no. K 3/91, published in OTK ZU 1992, item 1.

<sup>35</sup> Ibid. Article 56 of the 1952 Constitution in the wording established by the Act of 29 December 1989 amending the Constitution of the People’s Republic of Poland (Journal of Laws No. 75, item 444, as amended), provided that “The administration of justice in the Republic of Poland shall be exercised by the Supreme Court, ordinary courts and special courts.”

<sup>36</sup> Ruling of the Polish Constitutional Court of 7 February 1992, K 8/91, OTK ZU 1992 item 5: “One of the fundamental foundations of a democratic state ruled by law is the principle of access of citizens to a court enabling them to defend their interests before an independent body governed solely by the law applicable in the state. Consequently, the right to the administration of justice by the courts holds such an important place that any more restrictive interpretation of Article 1 of the Constitution in this respect would correspond neither to the purpose nor to the nature of the constitutional system of the Republic of Poland.”

<sup>37</sup> PUCHTA, Radosław. Problem standardów organizacyjnych i proceduralnych w zakresie sprawowania wymiaru sprawiedliwości w orzecznictwie francuskiej Rady Konstytucyjnej. *Przegląd Prawa Konstytucyjnego*, no. 3, 2016, pp. 245-274, p. 272.

Constitution and the 1958 Constitution, and to the provisions of the 1789 Declaration of the Rights of Man and the Citizen. In its early jurisprudence, the Constitutional Council included among the fundamental principles the “rights of a defence” (*droits de la défense*)<sup>38</sup>, the list and scope of which have been progressively developed and extended<sup>39</sup>. In later rulings, Article 16 of the 1789 Declaration<sup>40</sup> (recognised as the source of the rights of the accused and the right to a fair trial) became the centrepiece of fair trial rights<sup>41</sup>. The Council acknowledged that “this provision guarantees the right of persons concerned to an effective remedy, the right to a fair

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<sup>38</sup> The Constitutional Council defined the constitutional nature of the “right to a defence” already in the 1970s. No provision of the Constitution explicitly guarantees the right to a defence. Therefore, in 1976 the Council referred for the first time to the category of “fundamental principles recognised by the law of the Republic” (Decision No. 76-70 DC of 2 December 1976, § 2). See *Le Conseil constitutionnel et les droits de la défense*, speech by M. Jean-Louis DEBRÉ – Rentrée du Barreau de Paris, Théâtre du Chatelet, 4 December 2009, [https://www.conseil-constitutionnel.fr/les-membres/le-conseil-constitutionnel-et-les-droits-de-la-defense#\\_ftn1](https://www.conseil-constitutionnel.fr/les-membres/le-conseil-constitutionnel-et-les-droits-de-la-defense#_ftn1) (accessed on: 24.03.2022).

<sup>39</sup> The French Constitutional Council recognised several rights as part of the right to a defence, including the following: the right to a fair and equitable procedure (Decision No. 89-260 DC of 28 July 1989, § 44), the right to be heard and to have access to the case file before the decision is taken (Decision No. 88-248 DC of 17 January 1989, § 29), the right to have access to a lawyer at all stages of criminal proceedings (Decision No. 93-326 DC of 11 August 1993, § 12; Decision No. 97-389 DC of 22 April 1997, §§ 19 and 20; Decision No. 2004-492 DC of 2 March 2004, § 31; Decision No. 2010-32 QPC of 22 September 2010 – *Mr Samir M et al.*, §§ 5 and 7), the right to have the decision of the administrative body suspended by the court (Decision No. 86-224 DC of 23 January 1987, § 22). See PUCHTA, Radosław. Problem standardów organizacyjnych i proceduralnych w zakresie sprawowania wymiaru sprawiedliwości w orzecznictwie francuskiej Rady Konstytucyjnej. *Przeгляд Prawa Konstytucyjnego*, no. 3, 2016, pp. 245-274, p. 256.

<sup>40</sup> This provision reads: “Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution”.

<sup>41</sup> See FRAISSE, Régis. L'article 16 de la Déclaration, clef de voûte des droits et libertés. *Nouveaux Cahiers du Conseil constitutionnel n° 44 (Le Conseil constitutionnel et le procès équitable)*, June 2014, <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/1-article-16-de-la-declaration-clef-de-voûte-des-droits-et-libertes> (accessed on: 24.03.2022). See also one of the latest decision about civil proceedings examined without a hearing during a public health emergency: Decision No. 2020-866 QPC of November 2020 – Getzner France, § 12.

trial, together with the rights of a defence when a penalty designed to act as a punishment is involved".<sup>42</sup> In consequence, the standards of the right to a fair trial developed through constitutional jurisprudence essentially correspond to those laid down in Article 6 of the European Convention and the case law of the European Court of Human Rights.

The absence of an explicit constitutional provision on the right to a fair trial, or a succinct wording of such provision, does not, therefore, hinder the creative activity of constitutional courts in developing standards of judicial protection. In such a case, a constitutional court looks for the standards of fairness in the more general provisions of the constitution. These may be general principles such as those of the rule of law, a democratic state ruled by law or the separation of powers. The general provisions may also be systemic rules on the judiciary, including those on the independence and impartiality of the courts, or other subjective rights of the individual, such as human dignity, the principle of equality, the right to a defence, the principle of the presumption of innocence. The constitutionalisation of the guarantee of procedural fairness does not necessarily have to be a decision of the constitutional lawmaker. It may also be an effect of the creative decision-making approach of a constitutional court, as evidenced by the case law of the U.S. Supreme Court<sup>43</sup> or the French Constitutional Council.

The scope of constitutional guarantees of a fair trial is also a result of the implementation of international standards and jurisprudence of international courts into national legal systems. Changes in national law have often been introduced due to the need to comply with the requirements of international law. This was sometimes associated with changes in constitutional provisions although the procedure for amending a constitution is usually more complex than in the case of ordinary or organic laws. In Poland, such a change was introduced to the 1997

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<sup>42</sup> Decision no. 2006-540 DC of 27 July 2006, § 11.

<sup>43</sup> KAY, Richard; FISCH, William B. The Constitutionalization of Law in the United States. *The American Journal of Comparative Law*, vol. 46 (1998), Faculty Articles and Papers, pp. 436-462, [https://opencommons.uconn.edu/law\\_papers/512](https://opencommons.uconn.edu/law_papers/512), p. 447.

Constitution in 2006<sup>44</sup> to enable the implementation of the EU legal framework of the European Arrest Warrant. The change was made in the wake of the Constitutional Court's<sup>45</sup> finding of the incompatibility with the constitutional prohibition on the extradition of a Polish citizen of provisions of the Polish Code of Criminal Procedure implementing European Union law<sup>46</sup>. In any case, the constitutionalisation of international standards of the right to a fair trial takes place in the jurisprudence of constitutional courts, which attempt to interpret – to an extent possible – the content of constitutional guarantees in accordance with international requirements.<sup>47</sup> Constitutional courts also seem to be a natural partner to hold a dialogue with international courts.

## 5. THE ALCHEMY OF (CONSTITUTIONAL) RIGHT TO A FAIR TRIAL IN CRIMINAL CASES<sup>48</sup>

The concept of procedural fairness is a difficult one to define. It seems rather vague. As Vogler correctly observes, “the apparent simplicity of the idea of due process, conceals a much-contested

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<sup>44</sup> This was the first of two amendments to the 1997 Constitution made since its enactment.

<sup>45</sup> Judgment of Polish Constitutional Court of 27 April 2005, P 1/05 OTK ZU 4A/2005 item 42.

<sup>46</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision.

<sup>47</sup> See the example of the German Federal Constitutional Court, as reported by MICHAELSEN Christopher. ‘From Strasbourg, with Love’- Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights, *Human Rights Law Review* 12:1(2012), pp.148-167, p. 165.

<sup>48</sup> I use the notion of “alchemy” referring to Voger’s “alchemy of due process”, see VOGER, Richard. Due Process. In: ROSENFELD, Michel; SAJÓ András (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford 2012, Online Publication, and also with reference to DALY, Tom’s book *The Alchemists. Questioning our Faith in Courts as Democracy-Builders*. Cambridge University Press, 2017.

reality”.<sup>49</sup> It is generally accepted that the phrase “due process” conveys a powerful ideological message of commitment to the rule of law<sup>50</sup> but it is difficult to determine what “due process” actually means and what its implications are. Vogler asks very relevant questions indeed: “Can a mere procedure – any procedure – be protective of human rights in all contexts?” and “What makes that certain forms may be considered ‘due’ and others not?”. Answers to those – admittedly difficult – questions must be provided by constitutional courts engaged in the evaluation of the compliance of specific legislative measures with the requirements of procedural fairness, which themselves are based on other constitutional values. At times, constitutional courts are expected to perform an impossible feat of alchemy: transmute imperfect constitutional and international texts into the gold of procedural justice<sup>51</sup>; in doing so, they risk the charge of going beyond the text of the constitution<sup>52</sup>.

As Vogler convincingly argues, the term “due process” is a predominantly modern and North American concept primarily associated with the rules of criminal procedure applicable in the United States of America.<sup>53</sup> The term was introduced into the U.S. Constitution with the adoption of the Fifth Amendment in 1791 and then repeated in the Fourteenth Amendment of 1868. Surprisingly the “constitutional career” of the phrase appears to be confined to the United States. Its

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<sup>49</sup> VOGER, Richard. Due Process. In: ROSENFELD Michel, SAJÓ András (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford 2012, Online Publication.

<sup>50</sup> CLAYTON, Richard; TOMLINSON, Hugh. *Fair Trial Rights*, Oxford: Oxford University Press, 2010, p. 1.

<sup>51</sup> Compare with DALY, Gerald Tom. *The Alchemists. Questioning our Faith in Courts as Democracy-Builders*. Cambridge: Cambridge University Press, 2017, p. xxii.

<sup>52</sup> VEDEL Georges. Le gouvernement des juges commence quand ceux-ci ne se contentent pas d’appliquer ou d’interpréter des textes, mais imposent des normes qui sont en réalité des produits de leur propre esprit, *Neuf ans au Conseil constitutionnel*, Extract from ‘Le débat’ n° 55 (March-August 1989), <https://www.conseil-constitutionnel.fr/les-membres/neuf-ans-au-conseil-constitutionnel> (accessed on: 25.03.2022).

<sup>53</sup> VOGER, Richard. Due Process. In: ROSENFELD Michel, SAJÓ András (eds.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford, 2012. Online Publication.

untranslatability into other languages, including French, and its ambiguity may have been the reason for the non-proliferation.<sup>54</sup> Other constitutions more commonly use the expressions “according to law” or “procedure established by law”. International human rights instruments replace “due process” with different wording. The 1948 Universal Declaration of Human Rights (UDHR) uses the term “fair hearing” (in Art. 10) and protects against “arbitrary arrest, detention or exile” (Art. 9). The ECHR, which was the first international human rights treaty, has no due process clause but sets out an extensive catalogue of criminal fair trial rights (in Article 6 and Article 5). The ICCPR does not contain a due process clause, too, although it describes even more detailed due process guarantees related to the criminal procedure. The Charter of Fundamental Rights of the European Union provides for a number of procedural guarantees and uses the terms “fair trial” and “effective remedy”. Outside the United States, and especially in Europe, “fair trial rights” is the more commonly used term.<sup>55</sup>

Procedural fairness is associated with the concept of procedural justice.<sup>56</sup> Researchers studying sociology of law and social psychology point to the social perception (acceptance) of the procedure by its participants as a source of the concept of procedural justice. In this context, a note must be made of the conclusions of American researchers Thibaut and

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<sup>54</sup> *Ibid.* Voger points out that the availability of a workable Spanish translation (*debido proceso*) and U.S. influence in Latin America caused the concept to spread and be widely discoursed in the Hispanic literature.

<sup>55</sup> It appears in many publications, for example: SUMMERS Sarah. *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*. Oxford and Portland, Oregon: Hart Publishing 2007; GOSS Ryan. *Criminal Fair Trial Rights. Article 6 of the European Convention on Human Rights*. Oxford and Portland, Oregon: Hart Publishing, 2014; JACKSON, John D.; SUMMERS, Sarah J. (eds.) *Obstacles to Fairness in Criminal Proceedings. Individual Rights and Institutional Forms*. Oxford and Portland, Oregon: Hart Publishing 2018.

<sup>56</sup> For instance, the Polish Constitutional Court links the requirement of fair proceedings with the idea of procedural justice, pointing out that the requirement constitutes the essence of the constitutional right to a fair hearing. Without maintaining the standard of fairness of the proceedings, the Constitutional Court argues, right to a fair hearing would be devoid of meaning and relevance. See judgment of 16 January 2006, SK 30/05, OTK ZU no. 1/A/2006, item. 2.

Walker<sup>57</sup>, and Lind and Tyler<sup>58</sup> who argue that disputants (and uninvolved parties) are often as concerned with the fairness of the process as with its outcome<sup>59</sup>. If disputants do not see the procedure as fair, they will not accord it legitimacy and will not readily accept the outcomes.<sup>60</sup> It can thus be assumed that the notion of procedural fairness refers to how the litigants are treated, whether they can take part in the proceedings on equal terms, whether they are heard, and whether their opinions are taken into account. According to the procedural justice theory, the conclusion that the entire procedure is “fair” largely depends on the assessment of the procedure and its course rather than on its ultimate outcome.<sup>61</sup>

The emergence and development of the concept of procedural justice in contemporary research streams are often associated with features of a modern pluralistic society in a democratic state based on the rule of law.<sup>62</sup> Nowadays, procedural justice goes beyond the limits of instrumentalisation and must correspond to certain principles and realise certain values such as human dignity, the principle of equality, the exclusion of certain measures regardless of their effectiveness but also the principle of procedural efficiency<sup>63</sup>. From that perspective, judicial procedures must reflect constitutional axiology, conform to the principles and values enshrined in the constitution and respect human rights.

Procedural fairness thus appears as a set of principles and rules that deal with how an individual is treated in a trial. A universal collection of procedural rights derives from international human rights standards.

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<sup>57</sup> THIBAUT, John; WALKER, Laurens. *Procedural Justice: A Psychological Analysis*. Hillsdale, N.J.: Lawrence Erlbaum Associates, 1975.

<sup>58</sup> LIND, E. Allan; TYLER, Tom R. *The Social Psychology of Procedural Justice*. New York: Plenum, 1988.

<sup>59</sup> VIDMAR, Neil. The Origins and Consequences of Procedural Fairness, *Law and Social Inquiry* 1991, pp. 877-892, p. 877.

<sup>60</sup> *Ibid.*

<sup>61</sup> BORUCKA-ARCTOWA, Maria. Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawnego. In: TRZCINSKI, Janusz; JANKIEWICZ, Adam (eds.). *Konstytucja i gwarancje jej przestrzegania*. Warszawa: Biuro Trybunału Konstytucyjnego, 1996, p. 27.

<sup>62</sup> *Ibid.*, p. 26.

<sup>63</sup> *Ibid.*, p. 26.

One may speak of a “universal canon” of procedural rights, especially with regard to criminal cases. These are essential requirements that a procedure should meet in order to be considered fair. Some authors divide these requirements into four general categories: the character of the court, the public nature of the hearing, the rights of the accused in the conduct of their defence and “a miscellany of other single rules”.<sup>64</sup> Other authors present fair trial rights as a set consisting of (1) general rights to procedural fairness, including the right to a public hearing before an independent and impartial tribunal that gives a reasoned judgment; (2) the presumption of innocence in criminal proceedings; (3) specific rights for those accused of criminal offences, including the right to be informed of the charge, the right to be tried within a reasonable time, the right to legal assistance and the right to cross-examine witnesses; (4) the right to be free from retrospective criminal laws.<sup>65</sup> The right of an appeal in criminal matters, the right to compensation for wrongful conviction and the right not to be tried or punished twice for the same offence<sup>66</sup> are added to the above list.

A useful categorisation of fair trial rights can be found in *Guide on Article 6 of the European Convention o Human Rights. Right to a fair trial (criminal limb)*, a study on the ECtHR case-law available on the Court’s website.<sup>67</sup> The *Guide* distinguishes four categories of fair trial guarantees: (1) the right of access to a court; (2) institutional requirements; (3) procedural requirements (both named as general guarantees); and (4) specific guarantees. The notion of “access to a court” refers to the ability to bring a case to a court and any restrictions on doing so. The institutional requirements relate to the court and concern the requirement of its establishment by law, as well as its jurisdiction, independence and

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<sup>64</sup> HARRIS, David. The Right to a Fair Trial in Criminal Proceedings as a Human Right Author. *The International and Comparative Law Quarterly*, vol. 16, no. 2 (April 1967), pp. 352-378, p. 354.

<sup>65</sup> CLAYTON Richard; TOMLINSON Hugh. *Fair Trial Rights*. Oxford: Oxford University Press 2010, p. 2.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Guide on Article 6 of the European Convention o Human Rights. Right to a fair trial (criminal limb)*, updated in 31 December 2021, [https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf) (accessed on: 25.03.2022).



impartiality. Procedural requirements include the requirements of fairness, public hearing and hearing the case in a reasonable time. The principle of the presumption of innocence and the rights of the defence in general have been identified as specific guarantees. The issue of fairness in the narrow sense has notably been discussed in the Strasbourg Court's case law, *inter alia*, in the context of the effective participation in the proceedings, equality of arms and adversarial proceedings, the reasoning of judicial decisions, the right to remain silent and not to incriminate oneself, administration of evidence, entrapment, the principle of immediacy, legal certainty and divergent case law, prejudicial publicity and plea bargaining.<sup>68</sup>

The basic elements of the above list, in particular those concerning an independent and impartial court, the fairness and public nature of court proceedings, the principle of the presumption of innocence and the right to a defence, are – to a greater or lesser extent – included in constitutional texts. More detailed fair trial guarantees have been incorporated into what is known as the “*acquis constitutionnel*” through the jurisprudence of constitutional courts. It was constitutional courts that developed these specific guarantees to expand and supplement the original sets of constitutional safeguards. They often did so by referring to international standards and the jurisprudence of international courts, other constitutional courts and views presented by the scholarship. Therefore, it seems reasonable to conclude that there is a “partial” internationalisation and globalisation of constitutional fair trial standards, affecting at least the core elements of such standards. The list of these elements is non-exhaustive and constantly evolving. Arguably, the constitutionalisation of fair trial standards is therefore a process amplified by such factors as the jurisprudential activity of constitutional courts responding to emerging constitutional issues.

Some of these issues have a local dimension and are related to the specificity of national solutions, traditions and legal cultures of individual countries. Other problems are more universal and have become the subject of constitutional adjudication across many jurisdictions. This process was also driven by the jurisprudence of international courts,

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<sup>68</sup> See *Ibid.*, pp. 32-53. See also: TRECHSEL, Stefan, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press, 2005.

in particular, the European Court of Human Rights and later also the Court of Justice of the European Union, which set the general direction of the development of standards of the right to a fair trial. These bodies' active interpretation of the norms on the rights of the individual could not go unheard of in national legal systems. Constitutional courts had no other option than to rise to the challenge of protecting the rights of the individual. Fraisse aptly summarised this process when justifying the French Constitutional Council's activist interpretation of Article 16 of the 1789 Declaration:<sup>69</sup> "*Le Conseil constitutionnel ne pouvait se recroqueviller sur une interprétation littérale de son bloc de constitutionnalité sans affaiblir la Constitution qu'il a pour mission de faire respecter*"<sup>70</sup>. Indeed, constitutional courts no longer operate in closed legal ecosystems governed solely by local constitutions; they exist in a society that has become more judicialised as a result of the emergence of supra-state legal systems. At the same time, they respond to complaints raised by litigants and their legal representatives, who often refer to international human rights standards in their submissions.

It is possible to identify many universal problems relating to the fairness of the criminal process that have, in recent years, been resolved in constitutional jurisprudence. Authors of papers published in this issue undertook to present some of these problems and the ways in which constitutional courts have tackled them. Andrzej Sakowicz examines the development of the pre-trial detention standards by the Polish Constitutional Court<sup>71</sup>. Arthur Sodré Prado discusses the proper justification of judicial decisions in the context of the Brazilian Constitution and case law of the STF<sup>72</sup>. Constitutional courts, and specifically the

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<sup>69</sup> FRAISSE, Régis. L'article 16 de la Déclaration, clef de voûte des droits et libertés. *Nouveaux Cahiers du Conseil constitutionnel* n° 44 (*Le Conseil constitutionnel et le procès équitable*), June 2014.

<sup>70</sup> "The Constitutional Council could not huddle around a literal interpretation of its constitutional bloc without weakening the Constitution which is obliged to enforce."

<sup>71</sup> SAKOWICZ, Andrzej, The impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland, *in this dossier*.

<sup>72</sup> PRADO, Arthur Sodré. Entre a decisão e o conselho: como a jurisprudência do Supremo Tribunal Federal dificulta a instalação de uma etapa intermediária no processo penal brasileiro, *in this dossier*.

Spanish Constitutional Court, have developed an extensive body of rulings on collection of evidence in the context of the principle of the presumption of innocence. Ademar Borges presents this problem from a comparative perspective<sup>73</sup>. Undoubtedly, a major challenge for constitutional courts is the use of new technologies in the criminal process, including for the purpose of obtaining evidence. Constitutional courts have to decide on how extensively (and on what terms) new technologies can be used in the criminal process. In doing so, they must be guided not only by the fair trial principle but also by other constitutional values, as explained by Michalina Marcia<sup>74</sup>. The problems that constitutional courts must address in the context of procedural fairness also include plea bargaining agreements discussed by Dorota Czerwińska<sup>75</sup>. Some constitutional courts have been dealing with the extradition and surrender of persons under the European Arrest Warrant procedure in the context of the right to an independent and impartial tribunal and the right to a fair trial, the topics elaborated by Dominika Czerniak<sup>76</sup>.

Characteristically, constitutional courts in their judgments usually do not comment on what a “fair trial” is, although they emphasize the concept’s relevance and significance for democracy and the rule of law.<sup>77</sup> In fact, constitutional courts are more willing to indicate what is or is

<sup>73</sup> BORGES, Ademar, Presunção de inocência e a doutrina da prova além da dúvida razoável na jurisdição constitucional, *in this dossier*.

<sup>74</sup> MARCIA, Michalina, The role of constitutional courts in taming adverse impact of new technologies in the criminal proceedings, *in this dossier*.

<sup>75</sup> CZERWIŃSKA, Dorota, The role of the constitutional courts and ECtHR in shaping negotiated justice mechanisms – a comparative perspective, *in this dossier*.

<sup>76</sup> CZERNIAK, Dominika, The (lack of) consequences of reasonable doubts on the independence of the judiciary system on cooperation in criminal matters in the EU, *in this dossier*.

<sup>77</sup> See The 2018 Yearbook of Constitutional Court of the Czech Republic, [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Rocenky/Ustavni\\_soud\\_Rocenska\\_2018\\_AJ\\_fin.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Rocenky/Ustavni_soud_Rocenska_2018_AJ_fin.pdf), p. 71. The Czech Republic Constitutional Court in its decision 1994/10/12 - Pl. ÚS 4/94 stated that: “The goal of a criminal proceeding is not merely the “just punishment of a perpetrator”; the goal of a criminal proceeding is also to have a fair procedure. The existence of due process is an indispensable condition of the existence of a democratic, law-based state”. [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/Pl%20US%204-94.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%204-94.pdf).

not permissible according to the standards of fairness and describe the circumstances of permissibility. At the same time, the courts balance conflicting values using the proportionality test. Accordingly, the concept of procedural fairness consists of a conglomerate of indications regarding how individuals should be treated in the criminal process and how the procedural authorities should proceed. However, these indications are not always unambiguous and consistent, giving lawmakers a clear-cut signal as to the objectives of legislative measures. This state of affairs is a consequence of the unique features of a constitutional court's activities, which are by and large taken in response to the complaints lodged by "constitutional claimants". However, it is the lawmakers bound by constitutional norms - and not a constitutional court - who decide on the adoption of specific measures. By definition, the former create laws governing the criminal process and assume responsibility for doing so. Given the above, the role of a constitutional court boils down to correcting and inspiring actions of the legislature and setting the constitutional limits of the discretion to legislate.

## **6. CONCLUSIONS**

Constitutional courts are traditionally assigned the role of ensuring the effectiveness (supremacy) of the Constitution. Therefore, constitutional review is regarded as the core competence of a constitutional court. The power of constitutional review means that constitutional courts may deprive unconstitutional legal provisions of their legal force or repeal other unconstitutional acts of public authority. The extent of powers exercised by individual constitutional courts varies considerably. The scope of authority of a constitutional court depends on the model of constitutional review adopted and developed in a given country, in many cases through the jurisprudence of the constitutional court itself. In general, the broader these powers are, the greater is a constitutional court's impact on the national legal system. The legal system can also be influenced by a constitutional court equipped with limited powers provided that the court's decisions are effective, i.e. have an impact on the activities of other constitutional actors. However, due to the nature of the constitutional judicature constitutional courts are unable to

effectively uphold constitutional values on their own. This goal can only be achieved if the courts cooperate with other state bodies and entities. Such cooperation must exist both as authorised actors initiate constitutional review before a constitutional court and when the constitutional court's decision is implemented. What is crucial here is constitutional courts' cooperation with the legislative and executive branches of government but also a collaboration between constitutional and ordinary courts. It can therefore be said that the role of ordinary courts is twofold. On the one hand, they are entitled to initiate a constitutional review by means of questions on the points of law. On the other hand, they participate in the implementation of constitutional standards created by constitutional courts.

As the individual's rights become increasingly constitutionalised, constitutional courts have also assumed the role of guarantors of individual rights. Constitutions guarantee key human rights, including many important procedural guarantees pertinent to the criminal process. This provided an important impetus to the activity of constitutional courts in the realm of protection of individual rights, especially those equipped with the power to examine constitutional complaints. Among the procedural guarantees, the right to a fair trial deserves special attention. Different constitutions address the right to a fair trial in different ways, defining it in a more or less comprehensive manner. However, regardless of the adopted constitutional formula, the majority of constitutional courts (including all courts described in this issue) have dealt with this right in numerous decisions. Constitutional courts have remedied any deficiencies in the relevant constitutional frameworks by referring to more general principles or values, such as the rule of law, human dignity or the principle of separation of powers. In doing so, the courts have been often invoking international standards of judicial protection. It was constitutional courts who made these standards an important point of reference for the interpretation of constitutional provisions and incorporated them into the *acquis constitutionnel*.

The constitutionalisation of the right to a fair criminal process is either a work of the constitutional lawmaker or an outcome of constitutional jurisprudence. What can be noticed is the expanding constitutionalisation of procedural fairness in criminal cases, a process in

which constitutional courts actively participate. However, constitutional courts are not always willing to explain what they understand by a “fair trial”. Even if they provide such an explanation, they do so by referring to the values of the liberal state and democratic society or by invoking more specific constitutional guarantees. A fair trial, therefore, becomes a reflection of constitutional axiology, a set of specific principles and guarantees emanating from a constitution. When describing what a fair trial is, constitutional courts assume the perspective of an individual, especially in the light of the relations between an individual and the state. Whenever they engage in the evaluation of specific legislative measures – and especially those detrimental to the rights of the individual, constitutional courts balance conflicting interests or values. This issue of *Revista Brasileira de Direito Processual Penal* aims to provide an overview of how constitutional courts have decided specific constitutional issues arising in criminal cases based on fair trial standards.

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