

PART IV

**CONSTITUTIONALIZATION AND FUNDAMENTALIZATION OF CIVIL PROCEDURAL
GUARANTEES AND PRINCIPLES**

CHAPTER 1

**GENERAL THEORETICAL AND HISTORICAL ANALYSIS OF THE
CONSTITUTIONALIZATION AND FUNDAMENTALIZATION OF CIVIL
PROCEDURAL PRINCIPLES AND GUARANTEES**

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1 INTRODUCTION

- 1 This first sub-chapter captures the main conceptual approaches to civil procedural guarantees, with a specific focus on the presence or absence of constitutionalizing and fundamentalizing features. It is intended to illustrate the variety of terms, sources, and concepts, but also to show the extent to which general concurring trends can be discerned towards granting civil procedural guarantees a higher status and a fundamental rights enhancement. It will also be shown that some legal systems lack constitutionalization and fundamentalization at all or for certain principles and rules of civil procedure, and to what extent corresponding discourses nevertheless exist in doctrine or other concepts are dominant. Thus, the sub-chapter is essentially constitutional rather than procedural in focus.
- 2 The subchapter is structured as follows. First, the general conceptual scope of due process guarantees is explained. We highlight the different concepts used across the world to describe these guarantees, and we list the specific concepts and principles which commonly feature within the general scope of due process. What follows is an analysis of the interaction of the variety of sources of fundamental and constitutional guarantees (written law and case law), and the position of due process within them.

2 THE DISPARITY OF THE RESPECTIVE CONCEPTS/TERMS/ISSUES AND AN ATTEMPT TO IDENTIFY THE CORE OF 'DUE PROCESS'

- 3 Immediately upon embarking on a comparative research exercise into *due process*, one faces a significant and truly fundamental obstacle. Perhaps not uniquely for this topic, but rather as a common challenge to comparative studies, different concepts are used to describe the key point of focus. These are: 'due process', 'fair process', 'the right to fair trial',² the 'right to trial',³ and 'procedural fairness'.⁴ The differences reach beyond mere terminology, as their main features also differ somewhat. As a scholar advocating for due process reform within the United Nations (UN) structures argued, 'while due process rights are recognized by most legal systems, we should not be led into the error of thinking either that the relevant principles are consequently "universal" or that they

² In Europe, the notion of 'the right to fair trial' is firmly established in the European Convention on Human Rights (ECHR) (Art 6) and in the EU Charter of Fundamental Rights (Art 47).

³ Art 27(1) of the Constitution of Korea.

⁴ The use of specific notions also changes over time. For instance, in Brazil it has become frequent, particularly in doctrine, to say that the original idea of 'due process of law' needs to be replaced by the notion of a 'fundamental right to a fair trial'. In describing the main point of focus of this chapter, we will be referring to due process, due process rights or due process guarantees, as well as the right to fair trial.

take the same “judicial” shape in every legal system’.⁵ Unsurprisingly, therefore, no globally uniform body of civil procedural guarantees exists.

- 4 Having said the above, as it is frequently discovered in comparative endeavours, while the concepts and features may differ, at least some core elements remain. This chapter seeks to bring some clarity as to the origins and the essence of these core elements.
- 5 The guarantees which can be found under the collective concepts of ‘due process’ or ‘fair trial’ focus on procedural access (justice of access), procedural fairness (justice of process) and procedural justice (justice of outcomes).⁶ The general idea of procedural protection of a party in civil proceedings against the arbitrary use of governmental power has been almost universally accepted across the globe.⁷ It is a reflection of the key foundational element, again a universally accepted one, of democratic states: the rule of law. Due process rights are a fundamental guarantee of not only the freedoms that are within their specific scope (of which below).⁸ They are also the underpinnings of democracy, transparency and good governance. As noted by a comparative constitutional scholar, fair trial ‘represents a standard by which a state’s commitment to democracy and the rule of law is measured. Accordingly, the concept of fair trial is also a basic component of the wider notion of the separation of powers’.⁹
- 6 This means that while democracies – especially constitutional democracies – developed, so too did the guarantees of due process. As national constitutions were drafted and re-drafted, they included due process as one of the core elements of the systems they established. Thus, discussion of due process cannot be separated from a wider discussion of constitutionalization.
- 7 Here also we encounter two different expressions with regard to rights: fundamental rights and constitutional rights. While the latter term denotes rights recognized in a constitutional document,¹⁰ fundamental rights can also be established in other sources of rules, whether written or unwritten, whether domestic or international (and even supranational – in the case of the European Union). In the United States, for instance, fundamental rights are only those derived from the US Constitution – this includes rights enumerated in the Bill of Rights (the first ten amendments to the US Constitution), as

⁵ D Hovell, ‘Due Process in the United Nations’ (2016) 110(1) *The American Journal of International Law* 1-48, 2, also referring to C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* 187, 204.

⁶ This terminology was adopted for the purposes of this study.

⁷ This chapter refers to the concept of due process in its procedural, not substantive dimension. This conceptual choice flows from the focus of the entire CPLJ project.

⁸ Due process rights are also seen a guarantee of other substantive constitutional and fundamental rights, such as freedom of speech, right to family, life, etc.

⁹ A Koprivica, *Right to Fair Trial in Civil Law Cases* (SSRN 2018); the later, updated version was published in R Grote, F Lachenmann and R Wolfrum (ed), *Max Planck Encyclopaedia of Comparative Constitutional Law* (Oxford University Press 2018) 3.

¹⁰ It should be acknowledged that some constitutional rights can feature in unwritten documents or customs, especially in the UK where there is no written constitution.

well as other constitutional rights inferred by the US Supreme Court and defined in the Court's jurisprudence. European states that are members of the Council of Europe recognize the fundamental rights listed in the European Convention of Human Rights (ECHR), and the Member States of the European Union accept fundamental rights established in the EU's Charter of Fundamental Rights (CFEU). These rights exist within these systems in addition to their constitutional rights. To summarize, fundamental rights include constitutional rights, but they can be a wider category. Fundamental rights can derive from, in addition to internal sources, international or supranational sources.

- 8 Thus, this sub-chapter reflects the processes of constitutionalization as well as fundamentalization of due process rights. As international law and various forms of international cooperation, harmonization, Europeanization and globalization emerged, due process became enshrined in these processes as well – thus becoming a fundamental right in addition to a constitutional right. At the UN level, '(t)he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law'.¹¹
- 9 Yet another concept often appears alongside due process, sometimes as part of it, other times as a larger category, wider in scope and containing due process within it – access to justice. It is referred to as a

cross-cutting right that must be understood and interpreted in line with other principles such as equal recognition before the law. It is a right that enables and enhances other rights. For example, due process enhances the right to health because it guarantees judicial and administrative protection of that right.¹²

- 10 As described by a constitutional law scholar,

[a]ccess to justice is one of those kaleidoscopic expressions, reflecting an idea that 'draws the mind to the multitude of questions about the sources of injustice and the legal systems around the world that have developed to help provide an avenue for redressing a wrong'. [...] While some take narrow views, others include almost all of the problems in the justice systems.¹³

¹¹ General Comment No 32, Art 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (UN, International Covenant on Civil and Political Rights).

¹² UN, 'Access to Justice, A discussion paper for the 11th session of the United Nations General Assembly Open-ended Working Group of Ageing (6 to 9 April 2020)' (January 2020) 2, <https://social.un.org/ageing-working-group/documents/eleventh/Discussion%20paper%20on%20access%20to%20justice%20January%202020.pdf> accessed 1 July 2024.

¹³ B M Salles and P M Cruz, 'Access to Justice: A Concept in the Light of the European and American International Systems' (2021) *Academia Letters*, Art 1420, 1, 2 <https://doi.org/10.20935/AL1420> accessed 7 November 2024.

- 11 Taking a wider stance, access to justice may be seen as encompassing fair trial or due process as regards litigation as well as access to other forms of dispute resolution mechanisms. For these reasons, our report often refers to access to justice.
- 12 Different methodologies for categorizing due process rights have emerged. As to the main features, while their specific shape differs in each legal system, they may be categorized into two key groups:
 - a) Institutional guarantees (such as the organization of courts, their funding, rules governing judiciary and ensuring judicial independence and impartiality, as well as, more recently, rules concerning alternatives to litigation such as arbitration, mediation or ombudsmen) and
 - b) Procedural guarantees (in the context of the CPLJ project, these are civil procedure rules - including standing, pleadings and discovery, the position of the litigants, the right to appeal - the rules concerning the legal profession and who can offer legal advice and assistance, the costs and funding of litigation, and apportionment of costs).
- 13 Other scholars focus on the role of procedural guarantees and distinguish between the political function and the technical function. While the former are the principles inherent in the essence of the procedure, the latter have a more technical character (contingent principles referring to the nature of the procedure).¹⁴
- 14 Below is a list of general principles which, despite many differences between legal systems around the world, are considered fundamental principles of civil procedure. The universal and overarching principle spanning them all is *due process*. They have been compiled with the inspiration of scholarly writings, in particular those of Neil Andrews, based on the ELI/UNIDROIT Project in 'Fundamental Principles of Civil Procedure'.¹⁵
- 15 Principles relating to access to courts and to justice:
 - a) Access to legal advice and information,
 - b) Choosing a lawyer,
 - c) Choice between litigation and alternative modes of dispute resolution,

¹⁴ See for example L Cadet, 'Et les principes directeurs des autres procès? Jalons pour une théorie des principes directeurs du procès' in *Mélanges en l'honneur de Jacques Normand* (Editions du Jurisclasseur 2003) 70-108.

¹⁵ N Andrews, 'Fundamental Principles of Civil Procedure' in X E Kramer and C H van Rhee (ed), *Civil Litigation in a Globalising World* (Springer 2012) 33-34.

- d) Funding: access to mechanisms enabling litigation to be funded,
- e) Proportionate costs of litigation,
- f) Mechanisms for filtering unmeritorious claims.

16 Principles relating to ensuring fairness in the proceedings:

- a) Judicial independence,
- b) Judicial impartiality,
- c) Transparency of the proceedings (openness, publicity),
- d) Equality between the parties,
- e) Fair play between the parties,
- f) The obligation to duly notify the parties,
- g) Equal access to information (including disclosure between the parties).

17 Principles relating to ensuring efficiency of the proceedings:

- a) Judicial control over the process,
- b) Avoidance of undue delay.

18 Principles relating to ensuring just and effective outcome:

- a) Duty of the court to provide reasons,
- b) Accurate decisions,
- c) Protective relief,
- d) Effective enforcement of decisions,
- e) Finality.¹⁶

¹⁶ The list, while inspired by the writings of N Andrews, has been adapted and used by the co-author of this chapter in M Tulibacka, M Sanz and R Blomeyer, 'Common minimum standards of civil procedure, European Added Value Assessment, 1.2 Annex I' https://www.europarl.europa.eu/cmsdata/105660/EPRS_CIVIL_PROCEDURE.pdf accessed 7 November 2024.

19 The rest of this sub-chapter does not focus specifically on these principles but provides a historical, contextual, constitutional and fundamental (international and supranational) outlook on the development of their common theme – due process. The specific principles (and sometimes specific rules reflecting them) are addressed in further sub-chapters. The purpose of the analysis of the various concepts of procedural guarantees protected on a constitutional level or as a fundamental right is to reveal to what extent there are differences in the substance and scope of protection of the individual party behind these ostensibly different concepts and terms, or to what extent there is convergence in certain respects and perhaps on an only regional basis.

3 CURRENT CHANGES IN CIVIL JUSTICE SYSTEMS – DO WE NEED TO UPDATE DUE PROCESS GUARANTEES?

20 This topic will be elaborated at the end of this chapter, but it merits a short introduction at this point. It should be noted that, in the light of many changes affecting global political, economic and legal systems, the concept of due process in civil proceedings may need a revision, or at least a reconsideration. The revision should follow the tendencies which can already be observed in some countries, to revisit the entire concept of civil justice. They are voiced in academic and policy papers; they have not yet found their way into constitutional or fundamental instruments.¹⁷ The developments lead to both internal and external pluralism of options in civil justice systems.

21 The growing appetite for more robust fundamental legal guarantees of justice may be a response to wild political swings in states with softer guarantees, such as the United States' increasingly conservative legal turn since the 1970s. Economic crises and a variety of geopolitical emergencies and conflicts entail on the one hand an increased demand for civil justice and, on the other hand, decreased available financial resources. Courts are overwhelmed and not adequately funded. As demand for public funding grows, its availability for civil litigation is becoming a problem. Within the court-based processes these changes have produced greater pressures for efficiencies: whether through collective actions (traditionally in the US but currently also in Europe and many other jurisdictions), front-loading of procedural activities (England and Wales, the US), encouraging settlement and discouraging trial (England and Wales, the US, but also Europe and beyond), and the overall emphasis on judicial management of litigation. Even further, according to a scholar, there has been a shift from 'adjudication, the ideals of substantive law and a substantively correct judgement [...] towards the ideal of negotiated law and a pragmatically acceptable compromise'.¹⁸ The new role for judges

¹⁷ This chapter will be emphasizing such changes throughout. For an excellent overview see for example: L Ervo, 'Should Fair Trial Rights be Redefined? Civil Litigation as a Societal Discussion' and other submissions in A Uzelac and C H Van Rhee (ed), *Revisiting Procedural Human Rights. Fundamentals of Civil Procedure and the Changing Face of Civil Justice* (Intersentia 2017). For a changing scope of civil justice – see the writings of C Hodges (for instance C Hodges and S Voet, *Delivering Collective Redress: New Technologies* (Bloomsbury Publishing 2018)).

¹⁸ Ervo (n 17) 77.

in this context would be to ensure that the parties are involved in open, transparent proceedings, with greater cooperation and less authoritative decision-making taking place. The *result* rather than a mere *guarantee* of a fair trial is said to be the new focus.¹⁹ In the writings of several scholars, what transpires is the need for civil justice tailored to the needs of the particular parties and the particular case, a responsive and flexible justice.²⁰

- 22 In line with this new mandate for civil justice, search for alternatives to court-based justice is already bringing many alternatives: both public (mediation, arbitration and other mechanisms conducted by state bodies such as ombudsmen; there are also increasing roles for public regulators in civil justice) and private (industry bodies, other non-public mechanisms). These alternatives, while meeting some of the postulates of efficiency, raise concerns over other important functions of civil justice, as well as concerns about constitutional and fundamental rights to due process or fair trial. A further concern is the funding of civil justice. When the availability of legal aid is limited, can we ensure that private funding meets the criteria of fair justice? These are the challenges for contemporary states, and this report will reflect them from time to time, pointing to certain developments which may require a constitutional intervention.

4 SOURCES OF LAW – THE POSITION OF DUE PROCESS GUARANTEES

4.1 Introduction

- 23 The very essence of constitutions – as instruments regulating the functions, organization and relations within government as well as between government and the people – means that they are the natural sources of fundamental guarantees, also those concerning due process.
- 24 For many countries, constitutions are the sole source for fundamental guarantees. Nonetheless, some systems use their ordinary legislation to offer a summary of these guarantees. This is the case in England and Wales (Part 1 of the Civil Procedure Rules, UKCPR) and in Brazil (Art 1-12 of the Code of Civil Procedure, BRCCP). In fact, the current picture of most legal systems is the coexistence of many different sources of law at the highest level: domestic (constitutions and other sources), supranational or international. In Germany, for instance, sources of law come from eight levels of different types of norms. Beginning with the Federal Constitution, rules can be created by federal laws, *Verordnungen* (federal decrees), *Satzungen* (federal statutes), and further by the state

¹⁹ Ibid.

²⁰ Ibid. See also – the idea for a multidoor courthouse routing incoming cases to the most suitable dispute resolution mechanisms (pilot study in Brazil, and the work of F Sander (M H C Gonstead, ‘A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the Multi-Door Courthouse (Part One)’ (2008) 5(3) University of St. Thomas Law Journal 665, available at SSRN: <https://ssrn.com/abstract=1265221> or <http://dx.doi.org/10.2139/ssrn.1265221>)).

constitutions, state laws, state decrees and state statutes.²¹ Further, infra-constitutional rules may also establish fundamental rights, generating the so-called ‘material constitution’.²²

- 25 Normally, fundamental guarantees are considered to be on the top of the legislation pyramid, sharing this rank with other constitutional rules and principles. Nevertheless, in some legal systems, fundamental guarantees may be even considered above other constitutional norms. They can have their source in national legal systems, as well as in international and supranational law. This can raise the problem of constitutional rules considered potentially unconstitutional.²³
- 26 Below is an analysis of the interaction of these various sources, and the position of due process within them. In addition to elaborating on sources of written laws, the chapter also highlights the importance of judicial decisions which interpret, clarify and apply those written laws; sometimes building new guarantees in the process.

4.2 Constitutional Sources

4.2.1 *The Legal Force of National Constitutions and Other Fundamental Sources of Rules (National and International)*

- 27 The majority of national constitutions are directly effective – they are capable of creating rights that individuals can enforce directly before their national courts. Further, other fundamental instruments, especially those deriving from Europe – the Charter of Fundamental Rights and the European Convention of Human Rights – have capacity to have legal impact directly. Thus, individuals whose constitutional and fundamental rights have been violated (including due process rights) are able to obtain redress or rectification in national and some international courts as well.

²¹ J Ipsen, *Allgemeines Verwaltungsrecht* (11th edn, C.H.BECK München 2018) 96. It is also important to mention that jurisprudence plays a major role in developing the extent of fundamental rights in Germany. As a consequence, besides the list of fundamental guarantees provided by German Constitution, many other fundamental rights are accepted by jurisprudence.

²² Of course, in the field of infra-constitutional legislation, particularly in federal States, it is possible to find different layers of rules with different normative power. There are the laws enacted by Legislative Branch (either in a federal, a state or a municipal level) and there are administrative rules, created by Government (also in a federal, state or a municipal level).

²³ See O Bachof, *Normas constitucionais inconstitucionais?* (Trad. J Da Costa. Coimbra: Almedina 1994) *passim*. Brazilian jurisprudence has, on some occasions, adopted this approach (Case ADI 981-MC (Supreme Court, Brazil), Judgment 17 December 1993 [Diário da Justiça, 05.08.1994]; Case ADI 2096 (Supreme Court, Brazil), Judgment 13 October 2020 [Diário da Justiça, 27.10.2020]).

4.2.2 The Shape of Fundamental Rights in National Constitutions

- 28 In some countries, constitutions have an extensive list of fundamental rights. Such is the case in Germany,²⁴ Brazil, Colombia,²⁵ Korea, and, to a lesser extent, Spain. Other countries, especially France, only refer to some general rights,²⁶ leaving to the jurisprudence (mostly through judicial review) the responsibility of developing the extent of these fundamental guarantees.
- 29 There are also some federal countries that share the power in establishing fundamental guarantees with states, provinces or regions. This is the case of the United States,²⁷ Argentina, Switzerland and Germany, for instance.
- 30 The UK does not have a codified constitution and, therefore, the constitutional and fundamental guarantees may be found scattered throughout legislation and case law. It relies on a variety of written (acts of parliament) and unwritten (constitutional conventions, which are binding unwritten standards of conduct) sources. The role of a constitutional document is also played by the Human Rights Act (1998), which implemented the European Convention on Human Rights into the dualist system of the UK. The UK signed the Convention in 1951, but it was much later, in 1968, that the Government allowed the citizens to refer their cases involving violations of human rights to the European Court of Human Rights (ECtHR). Another important aspect of the English system is that, due to parliamentary sovereignty, it is difficult to guarantee a particular *status* to any principle as a fundamental right. Although some guarantees have such special status, an act of Parliament may establish different patterns of procedure, disregarding previous experiences.²⁸ In Brazil, harmonization between guarantees explicitly established by the Constitution and other principles implicitly deduced or provided by treaties is not an easy task. Brazilian Constitutional Court tends (with some exceptions) to give more weight to explicit constitutional guarantees than to the others. This approach created a sort of second-class-fundamental guarantee. For instance, Brazil recognizes the same clause derived from Art 8 no 1 of the American Convention on

²⁴ Mainly, Art 1-19 *Grundgesetz* (Federal Constitution) (GG).

²⁵ Art 11-41 Constitution of Colombia (for individual rights), with particular importance to Art 83-94 in the procedural field.

²⁶ See the general formulations contained in the Declaration of Man and Citizen 1789 (France).

²⁷ Though political climate can come to close off such guarantees; for instance, in the United States, it is considered next to impossible to meaningfully amend the Constitution by a majority vote of state legislatures. So, while the US states can technically participate in creating fundamental guarantees, functionally, the federal supreme court is the only institution that can readily participate.

²⁸ As Jolowicz points out, although some statutes deserve a special 'veneration, and substantial departure from the spirit of their more fundamental provisions would be difficult if not impossible politically; but legally the answer is that their status is no different from that of any other Act of Parliament' (J A Jolowicz, 'Fundamental guarantees in civil litigation: England' in M Cappelletti and D Tallon (ed), *Fundamental guarantees of the parties in civil litigation* (Milano, Giuffrè 1973) 124).

Human Rights (Pact of San Jose)²⁹, and from Art 9 no 1, Art 14 of the International Covenant on Civil and Political Rights³⁰. Further, according to Art 5 para 2, the fundamental rights mentioned in the Constitution ‘do not exclude others arising from the regime and the principles adopted’.³¹ As a consequence, for example, it is currently said that, while not explicitly named in the Constitution, there is a right to a *digital privacy* (including in civil proceedings) granted as a fundamental right, because this right is compatible with the other principles expressly listed.

- 31 Another special note needs to be made concerning the UK. As a devolved state (different from a federation or a confederation), it combines England and Wales, Scotland and Northern Ireland. This chapter only focuses on the system of England and Wales, although often it will refer to the UK in general when describing concepts or laws binding throughout the country.
- 32 A further important note concerns the effects of Brexit on the legal system of the UK. The UK joined the EU in 1972, and the European Communities Act 1972 incorporated all EU (then European Economic Community, EEC) laws into the UK system and established supremacy of EU law within this system. The Act was repealed with effect from 31 January 2020. The EU (Withdrawal) Act 2018 provided that EU law should continue to apply during the transition period (until 31 December 2020). Starting in 2021, EU law in force at that time was to remain part of the UK's domestic legal system as a new category of retained EU law. Any national law implementing EU laws (including primary and secondary laws such as directives) retains legal force, as do any EU laws that do not require implementation (such as regulations). Further, any other directly applicable and directly effective EU laws (such as many Treaty articles) would have been converted into national law, and thus the rights, obligations, as well as remedies and procedures they gave rise to remain part of UK law. Importantly, also any case law of the Court of Justice

²⁹ Art 8 no 1 of the American Convention on Human Rights: ‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature’.

³⁰ Art 9 no 1, and Art 14 of the International Covenant on Civil and Political Rights: ‘[...] No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’ and ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children’, respectively.

³¹ Nevertheless, the Brazilian judicial system seldom invokes those sources – or even the opinions of international Courts – in examining controversies. Those decisions remain scarcely studied and rarely mentioned or debated, what turns them into a *formal* (but not real) source of procedural law.

of the European Union (CJEU) from before the end of the transition period will retain their binding force.

- 33 Some systems offer constitutional status not only to formal constitutional rules – included expressly in constitutional text – but also to other sources of law. In some cases, international law texts receive a fundamental status – occasionally depending on a special form of *assimilation* by internal law – as well as some international practices (see below).

4.2.3 Flexibility

- 34 It is important to pay attention to an important distinction between flexible and rigid constitutions. Flexible constitutions are those that can be amended by an ordinary process of legislation. Therefore, since constitutional rules are not subject to a specific form of modification, fundamental guarantees may also be changed by ordinary legislation, which makes it difficult to distinguish between fundamental and non-fundamental rules. This is, again, the case of the English system, but also of New Zealand, Canada and Israel. In such systems, it may be difficult to develop a theory on fundamental guarantees – particularly in the procedural field – since there are no core of inescapable principles to restrain legislation. Also, there is not much utility in discussing the hierarchy of such norms. Other constitutions, such as the US Constitution, are relatively rigid and it is very difficult to amend them.³² Thus, hierarchization is limited to systems that have rigid constitutions and that deal with the notion of fundamental rights as a separate body of rules. In these systems, it is possible to set fundamental guarantees either at the top of the hierarchy or below some other principles or rules (particularly of international origin).

4.2.4 Constitutional Review

- 35 Irrespective of the flexibility element, within many or even most systems there is a phenomenon that contributes to the application and development of constitutional rights. It is the presence and operation of constitutional courts or another mechanism for constitutional review. While the role of constitutional review is to provide a mechanism for assessing the constitutionality of any governmental and legislative action, the effects can be more complex. Within the scope of the review, it is not uncommon for the courts or tribunals involved to provide interpretation and guidance on the existing constitutional guarantees and in the process also expand the scope of these guarantees and even create new guarantees. Allowing the judiciary to control the consistency of ordinary law with the principles/guarantees specified in the constitution is a significant way to solidify the hierarchy of these norms. Thus, when a constitution sets forth a system of judicial review, it clarifies its commitment to the respect of

³² The US, while *formally* rigid, is *functionally* flexible. The Supreme Court has the power to ‘reinterpret’ provisions of the Constitution, and thus significant fundamental guarantees are subject to abrupt change by its jurisprudence.

fundamental guarantees and to the rank offered to these rights. Many constitutions set out this mechanism expressly.³³ This is the case of Germany³⁴, Portugal³⁵, France,³⁶ Poland, Russia³⁷, and of Spain³⁸. Also, many South American countries mention judicial review in the constitutional texts.³⁹ Such is the case of Brazil⁴⁰, Peru⁴¹, and of Colombia⁴². Furthermore, countries in other parts of the world tend to do the same, such as South Korea⁴³ and Turkey⁴⁴.

- 36 Globally, there are two distinct models of constitutional review: the ‘American model’ and the European model (also referred to as the ‘Austrian model’ or the ‘Kelsenian model’).⁴⁵ The American model, described by Cappelletti as the decentralized model, is also a model in Sweden where every court can perform constitutional review and the Supreme Court can invalidate legislation violating the Constitution, in Switzerland where

³³ H Fix-Zamudio, ‘Les garanties constitutionnelles des parties dans le procès civil en Amérique Latine’ in M Cappelletti and D Tallon, *Fundamental guarantees of the parties in civil litigation* (Giuffrè 1973) 37 ff.

³⁴ Art 100 GG. In this country, individuals may also take legal action to enforce fundamental procedural rights. This possibility was introduced in 1969 and is now written in Art 93 (1) No 4a GG.

³⁵ Art 204 of the Portuguese Constitution states that ‘in matters that are submitted for judgement the courts may not apply norms that contravene the provisions of the Constitution or the principles enshrined therein’. And Art 223 establishes the jurisdiction for the Constitutional Court, mentioning that it ‘has the competence to consider unconstitutionality and illegality, in accordance with Art 277 *et sequitur*’.

³⁶ Art 61 (1) of the French Constitution.

³⁷ Chapter 7 of the Russian Constitution.

³⁸ Art 161 of the Spanish Constitution.

³⁹ See K Rosenn, ‘Judicial review in Latin America’ (1974) 35 *Ohio State Law Journal* 785, *passim*; A R Brewer-Carías, *Judicial review in comparative law* (Cambridge University Press 1989) *passim*; A Tschentscher and C Lehner, ‘The Latin American model of constitutional jurisdiction: amparo and judicial review’ (2013) <https://dx.doi.org/10.2139/ssrn.2296004> accessed 7 November 2024.

⁴⁰ Brazil employs both diffuse and concentrated forms of judicial review. The last one is mentioned in Art 102 and 103 of the Constitution, when dealing with *Supremo Tribunal Federal* (the Supreme Court) jurisdiction and some general rules for the action of unconstitutionality.

⁴¹ Art 201 of the Constitution of Peru, adopts the concentrated form of judicial review, stating the jurisdiction of the Constitutional Court for it. Art 138, on the other hand, states a diffuse form of judicial review, mentioning that ‘in all proceedings, when an incompatibility exists between a constitutional and a legal rule, judges shall decide based on the former. Likewise, they shall choose a legal rule over any other rule of lower rank’.

⁴² Art 241 of the Colombian Constitution, deals with jurisdiction of the Constitutional Court, prescribing their task to decide petitions of unconstitutionality in several cases. Besides, Art 4 states that ‘the Constitution provides the norm of regulations. In all cases of incompatibility between the Constitution and the statute or other legal regulations, the constitutional provisions shall apply’.

⁴³ Art 107 of the Constitution of the Republic of Korea provides that ‘when the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof’.

⁴⁴ The Turkish Constitution states in Art 148 that ‘the Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance’.

⁴⁵ J E Ferejohn, ‘Constitutional Review in the Global Context’ (2003) 6 *New York University Journal of Legislation & Public Policy* 49.

judges can disregard laws of the cantons that contravene the Federal Constitution,⁴⁶ in Norway, Denmark, Canada, Australia, India, and Japan.

- 37 Decentralized review systems entrust general courts with the power to perform a review of the constitutionality of a particular law or an administrative action and, when necessary, to suspend the application of the law or regulation in the particular case. When the US Supreme Court or state supreme courts declare a federal or state law unconstitutional, that law does not apply in the case, and it can no longer be enforced in any other case before subordinate courts. The federal system of the US also entails federal constitutionalism. The US has 50 state constitutions and one federal constitution (US Constitution), all of which can be invoked in judicial review. State courts can review compliance of state legislation with state constitutions as well as the US Constitution (the US Supreme Court has the final say as to the latter). Federal courts can review the constitutionality of state as well as federal legislation, but only against the US Constitution. Notably, the Supreme Court's power for judicial review of legislation is not mentioned in the US Constitution. It was established by the Court itself in the case of *Marbury v Madison (1803)*. As held by Chief Justice Marshall:

It is emphatically the province and duty of the Judicial Department to say what the law is [...] If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution [...] the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.⁴⁷

- 38 Constitutional review in most of Europe follows a centralized model. European states developed their constitutional review systems using a model established by an Austrian legal theorist Hans Kelsen. He was a constitutional scholar tasked with drafting a section on constitutional review in the new Austrian constitution (Austria was the first European state that had judicial review after World War I). He realized that constitutional reviewers had the power to control and impact legislation, and thus in some respect they had legislative power. He suggested a special tribunal consisting not of judges but of law professors. This is the model that the great majority of European states adopted,

⁴⁶ The Swiss system cannot, however, be classified as purely an American model, but rather as a mixed model: Section 113 of the Federal Constitution provides that laws passed by the Parliament are not subject to judicial review (statutes must be submitted to popular vote if 50,000 citizens signed a petition to this effect) – it is the Parliament's or the electorate's role to ensure the constitutionality of laws, not the role of the judiciary. G F De Andrade, 'Comparative Constitutional Law: Judicial Review' (2001) 3(3) *Journal of Constitutional Law* 977, 978. A different mixed model was adopted in China: Chinese courts have no general power to declare the unconstitutionality of a piece of legislation. They do, however, have the power to review actions by administrative authorities under the Administrative Procedure Law of the People's Republic of China (PRC). The Legislation Law of the PRC outlines the process of resolution of issues of potential violation of the constitution: interpretation is conducted by the legislative body that adopted the law.

⁴⁷ The US Supreme Court's power of judicial review deriving not from the text of the US Constitution, but rather from its own jurisprudence, is emblematic of what makes constitutional and fundamental rights in the US unstable.

especially those that emerged from dictatorships or authoritarian regimes: Germany, Italy, Spain, Portugal and Greece, and from the domination of the Soviets: Central and Eastern European states (such as Poland, where the Constitutional Tribunal was established already in 1982)⁴⁸, but also others such as France⁴⁹. Russia also adopted the centralized model. Its Constitutional Tribunal⁵⁰, whose powers are regulated in Chapter 7 of the Constitution, is the only body with the power to assess constitutionality of laws and even draft laws.⁵¹ Further, other countries globally also adopted the Austrian model – such as South Korea.⁵² In Korea, the Constitutional Court was established in 1987, and it has exclusive jurisdiction over the issues of constitutionality. In a case where the constitutionality of a statute is a precondition for rendering a substantive judgment, the ordinary court adjudicating the case should request adjudication on the constitutionality of the statute to the Constitutional Court, *ex officio* or by its decision upon a motion from a party (per Art 41 of the Constitutional Court Act).⁵³

- 39 The features that contributed to the selection of this centralised model can be found in the legal cultures of the countries mentioned above. These are for instance: distrust of the judiciary and commitment to legal positivism. Old and well-established democracies such as the UK and the Netherlands did not have such a pressing need for special constitutional review tribunals. In fact, neither of these two states grants their courts the power to declare laws unconstitutional.⁵⁴ Further, as the UK Parliament's acts are part of the constitution of the UK, it is difficult to talk about a constitutional review

⁴⁸ Germany: Art 93 GG – Federal Constitutional Court (1949). Italy: Art 134-137 of the Constitution of the Republic of Italy (1948) – Constitutional Court. Laws void from the moment of publication of the decision. France: Art 56-63 (and in particular Art 61.1 enacted in 2008 that allows anybody to challenge constitutionality of a statute during ongoing litigation – before this amendment only political organs – President, members of parliament, Prime Minister – could challenge constitutionality of legislation, and only before its promulgation) of the Constitution of the Republic of France (1958) – Constitutional Council.

⁴⁹ Although France admitted for a long time a *a priori* judicial review of laws, since 2010 it has allowed parties to raise the unconstitutionality of a rule relevant to a case (*question prioritaire de constitutionnalité*), adopting a complete system of judicial review.

⁵⁰ In December 1990, an amendment created the Constitutional Court of the Russian Soviet Federative Socialist Republic. In fact, it was named as 'Court' half a year later, but this is considered a landmark in judicial review for Russia.

⁵¹ Art 125 (a), (b) of the Constitution of the Russian Federation.

⁵² The Constitutional Court of South Korea was established under Chapter VI of the Constitution of the Republic of South Korea (following the democratisation process which began in 1988).

⁵³ The Constitutional Court examines the constitutionality of the challenged provisions based on Art 37(2) of the Constitution. The criteria for determining constitutionality is the principle of prohibition of excess (or the principle of proportionality), and the specific factors underlying the criteria include the legitimacy of purpose, the appropriateness of means, the extent of infringement, and the balance between competing legal interests.

⁵⁴ De Andrade (n 46) 977. Note, however, that the Human Rights Act 1998, which the UK Parliament adopted to implement the European Convention of Human Rights into the UK system, seems to have caused a change in the approach of UK courts – see A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009).

system there unless one takes the view of some scholars who argue that the Human Rights Act 1998 introduced a judicial review in the UK.⁵⁵

- 40 The role of constitutional or judicial review is very significant in the context of due process rights and in fact any other constitutional rights. Whether in a decentralized or a centralized system, constitutional rights are thus upheld, interpreted and even extended.
- 41 The French system offers a remarkable example of this trend. In a decision of 16 July 1971,⁵⁶ the Constitutional Council granted constitutional value to the Declaration of the Rights of Man and Citizen of 1789, and to the preambles of the constitutions of 1946 and 1958. Thus, the interpretation of these provisions was placed on the same level as that of the articles of the current Constitution itself in the hierarchy of norms. With this extension of the constitutional sources, the Constitutional Council took on a new role as a defender of the fundamental rights of citizens. Further, in 1986 it decided to interpret Art 16 of the Declaration of Human and Civic Rights of 1789 (DDH) ('A society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution') as meaning that the effective guarantee of rights and judicial review are guarantees resulting from the principles and rules of constitutional value.⁵⁷ In 1996, the same court made a clear reference to this norm and ruled that

Art 16 of the Declaration of Human and Civic Rights reads: 'Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution'; it follows that as a matter of principle there may be no substantial constraints on the right of interested persons to bring actions before the courts.⁵⁸

- 42 The Constitutional Court made a very extensive and creative interpretation of Art 16 DDH of 1789. This provision is still used as the constitutional ground for many procedural rights.
- 43 Another example took place in Korea. On 28 September 1995, the Constitutional Court held that Art 186(1) of the old Patent Act, which stipulated that the judgment of the Korean Intellectual Property Trial and Appeal Board (ie, an institution of the Korean Intellectual Property Office) could be appealed to the Supreme Court only for the alleged statutory violation, was unconstitutional.⁵⁹

⁵⁵ Kavanagh (n 54).

⁵⁶ Case no 71-44 (Constitutional Council, France), Judgment 16 July 1971 [ECLI:FR:CC:1971:71.44.DC].

⁵⁷ Case no 86-207 (Constitutional Council, France), Judgment 25 and 26 June 1986 [ECLI:FR:CC:1986:86207DC].

⁵⁸ Case no 96-373 (Constitutional Council, France), Judgment 9 April 1996 [ECLI:FR:CC:1996:96.373.DC].

⁵⁹ Case 92Hun-Ga11,93Hun-Ga8-9-10 (Constitutional Court, Korea), Judgment 28 September 1995 [Vol 5, no 2, 65].

4.3 International Sources

4.3.1 Introduction

44 Another very important source of fundamental rights may be found in international law. International (bilateral and multilateral) treaties are often an important space to conceive and determine the range of guarantees. Further, an important role is played by the jurisprudence of international courts, by writings of international scholars and even by non-binding reports and recommendations from various international bodies.⁶⁰

4.3.2 Substance

45 In this field, the Universal Declaration of Human Rights (from 1948, UDHR), the European Convention on Human Rights (1950, ECHR), the International Covenant on Civil and Political Rights (1966, ICCPR) and the American Convention on Human Rights (1969, ACHR) are important examples of sources of procedural guarantees. While the Universal Declaration of Human Rights is not legally binding, it contains fundamental rights which are established in other, binding, legal instruments – such as the ICCPR. The International Covenant on Civil and Political Rights (Art 2.3) requires each party state:

- a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c. To ensure that the competent authorities shall enforce such remedies when granted.

46 The Covenant also includes a comprehensive article on equality before courts and tribunals (Art 14.1 ICCPR). Further, access to justice is recognized by the Declaration on the Rights of Indigenous Peoples (Art 40 ICCPR), the Convention on the Rights of Persons with Disability (CRPD) and the United Nations Convention on the Rights of the Child (UNCRC).⁶¹ The American Convention of Human Rights recognizes the right to fair trial in Art 8.1.⁶²

⁶⁰ We are not reflecting here all the sources of public international law as per Art 38 of the Statute of the International Court of Justice.

⁶¹ Art 13 CRPD, signed but not ratified by the US; UNCRC, Art 37 and 40, signed but not ratified by the US For more details see <https://social.un.org/ageing-working-group/documents/eleventh/Discussion%20paper%20on%20access%20to%20justice%20January%202020.pdf> accessed 7 November 2024.

⁶² The US signed but did not ratify the Convention.

47 These international treaties set the basis for the recognition of the right to a fair and public hearing (Art 10 UDHR; Art 6 ECHR; Art 14 no 1 ICCPR; Art 8 no 1 ACHR) and the right to an effective remedy (Art 8 UDHR; Art 13 ECHR; Art 25 ACHR), which are the most common expressions of the due process of law guarantee. Hence, these general landmarks tend to be accepted worldwide.

48 The European Convention on Human Rights needs to be singled out as not only the most comprehensive source of guarantees but also as the one with the most impact on individual freedoms. While international law is usually only enforceable between states, and its norms produce national legal effects subject to the system of reception of international law determined internally (see below), the ECHR is enforceable by individuals.⁶³ Art 6.1 of the Convention reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

49 Further, Art 13 of the Convention provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

50 When deciding cases brought by individuals against states which were held not to have fulfilled these requirements, whether in their written laws or in judicial and administrative practice, the European Court of Human Rights interpreted and clarified the scope of procedural guarantees.⁶⁴ For instance, in a case against the UK⁶⁵, the ECHR held measures that fundamentally undermine effective access to a court to be unacceptable per Art 6 of the Convention.⁶⁶ This review of the compliance of national laws and practices with the requirements of the Convention is also being conducted by national courts. The common law of the UK sometimes serves as a useful tool in the application and interpretation of the international legal requirements that the UK

⁶³ Individuals have the right to bring a case before the European Court of Human Rights as long as they exhausted the domestic remedies in the particular case and as long as the merits of the case are within the scope of the European Convention of Human Rights. The Court's judgements are binding.

⁶⁴ See the European Court of Human Rights, Guide on Art 6 of the European Convention on Human Rights. Right to a fair trial (civil limb), updated to 31 December 2021.

⁶⁵ *Golder v UK*, Case 4451/70 (ECtHR), Judgment 21 February 1975 [ECLI:CE:ECHR:1975:0221JUD000445170].

⁶⁶ *Ibid* para 35.

assumed. In *Ahmed* for instance, the UK Supreme Court held that issuing an asset-freezing order was ultra vires when it did not provide for the fundamental right of access to a judicial remedy.⁶⁷

4.3.3 International Law's Domestic Effects

51 As mentioned above, the reception, the recognition and the actual application of these international norms in the national legal systems vary widely. While the utility of the distinction between monist and dualist states has been questioned,⁶⁸ the distinction remains a popular method for categorizing the relationships between domestic and international laws. In dualist states, as a rule, all international treaties require a domestic act implementing/incorporating them into the domestic system to produce legally binding effects internally. There are wide divergences about what type of act it needs to be (an act of parliament, an administrative act or even common law). Dualist states are almost all the British Commonwealth countries (Canada, Australia, or India) as well as Israel, Denmark and other Nordic countries.⁶⁹ Monist states (which constitute the majority of jurisdictions around the world, including all EU Member States, as well as Brazil, China, Chile, Columbia, Egypt, Japan, Mexico, Russia, South Africa, Switzerland, Thailand, and the US) also sometimes require such incorporating acts, but at least for some international treaties these are not required. The monist approach sees international treaties and domestic laws as being part of one legal universe.

52 Monist states, usually in their constitutions, establish a hierarchy of importance for international norms in relation to sources of domestic law. As summarized by Sloss:

[i]n Austria, Egypt, Germany, and the United States, treaties rank lower than statutes. [...] In China, France, Japan, Mexico and Poland, (at least some) treaties rank higher than statutes but lower than the Constitution. [...] In the Netherlands, some treaties rank higher than the Constitution. [...] In Chile, Russia, and Switzerland, the hierarchical rank of treaties is contested, but it is undisputed that at least some treaties rank higher than statutes, [...] and there is some authority for the proposition that some treaties have constitutional rank.⁷⁰

53 Going beyond the traditional distinction into monist and dualist states, national peculiarities seem to dictate how international law serves to protect fundamental procedural guarantees. Currently, international law scholars highlight the role of domestic courts in enforcing international treaties in individual cases, even in states

⁶⁷ *HM Treasury and other appeals v Ahmed and others (No 1)* (Supreme Court, UK) [2010] UKSC 2. See Lord Mance at para 246, see also A Patrick, 'Access to Justice, the common law and human rights' (2017) Legal Action Group <https://www.lag.org.uk/article/201772/access-to-justice-the-common-law-and-human-rights> accessed 25 April 2022.

⁶⁸ D Sloss, 'Domestic Application of Treaties' (2011) Santa Clara Law Digital Commons (Faculty Publications).

⁶⁹ *Ibid* 3.

⁷⁰ *Ibid* 8.

where national implementation was required but did not take place. This approach is taken by courts in dualist states such as Australia, the UK and Israel, thus blurring the distinction between monist and dualist states.⁷¹ Whether applying international law directly (which is possible in monist states) or indirectly (which is the only option formally acceptable in dualist states) domestic courts are increasingly active in enforcing international laws and thus protecting guarantees established by those laws.

54 Below is a short overview of the position of the systems reviewed by the authors of this chapter with regard to international law.

55 The Brazilian Federal Constitution states that:

the rights and guarantees expressed in the Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.⁷²

56 It also mentions that:

international human rights treaties and conventions which are approved in each house of the national congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments.⁷³

57 As a consequence of these rules, although the Brazilian Constitution authorizes civil arrests in two types of cases,⁷⁴ the Supreme Court decided that international provisions should prevail and, as a consequence, the possibility of arresting unfaithful trustees was not guaranteed. Such a possibility was not granted by international treaties such as the American Convention on Human Rights (Pact of San José de Costa Rica).⁷⁵ In this case, the Brazilian Supreme Court recognized a *supra-legal* (but still infra-constitutional)

⁷¹ The *Project Blue Sky* ((High Court, Australia) (1998) 194 CLR 355) and *Minister of State for Immigration and Ethnic Affairs v Teoh* ((High Court, Australia) (1995) 183 CLR 273) cases in Australia, quoted in Sloss (n 68) 5; in the UK: *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd.* [2002] EWCA Civ 1409; Israel: *Hamoked The Center for the Defense of the Individual v IDF Commander*, 57 P.D. (1) 385, quoted in Sloss (n 68) 6.

⁷² In a similar way, Colombian Constitution prescribes that ‘international treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority. The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia’.

⁷³ Art 5 para 2 and 3 Brazilian Federal Constitution.

⁷⁴ Art 5, LXVII Brazilian Federal Constitution: ‘There shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee’.

⁷⁵ Art 7 no 7 ACHR (Pact of Jan José de Costa Rica): ‘No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support’. Brazilian Supreme Court considered, examining the conflict between these two rules that civil arrests of trustees are always illegal, in observance of the international treaty (*Súmula Vinculante*, no 25 (Supreme Court, Brazil), Judgment 16 December 2009 [Diário de Justiça, Vol. 238, 2009, 1]).

status of human rights treaties, in the sense that these rules are under constitutional norms but are above other ordinary rules.

- 58 The German Constitution does not prohibit violations of international law.⁷⁶ Considered to have the same hierarchy as internal federal law (Art 59 para 2 first sentence *Grundgesetz* (GG))⁷⁷, international law generally⁷⁸ can be overridden by subsequent federal law⁷⁹ (according to the principle *lex posterior derogat legi priori*). However, the GG establishes the assumption that the legislator does not intend to infringe international law. Therefore, national law is to be interpreted in such a way as to avoid an infringement of international law⁸⁰ (*Grundsatz der völkerrechtsfreundlichen Auslegung* / principle of interpretation favourable to international law). A treaty override can thus only occur when the methodical boundaries of such interpretation are exceeded.⁸¹ This applies to the rank of the ECHR, however, despite its higher rank, the GG is to be interpreted in accordance with the ECHR⁸² especially when there is applicable jurisprudence by the ECtHR.⁸³ In practice this jurisprudence of the *Bundesverfassungsgericht* (BVerfG, Federal Constitutional Court (Germany)) has granted

⁷⁶ Case 2 BvL 1/12 (BVerfG, Germany), Order 15 December 2015, BVerfGE 141, 1 [ECLI:DE:BVerfG:2015:ls20151215.2bvl000112]; A von Arnould, *Völkerrecht* (4th edn, C F Müller 2019) mn 524.

⁷⁷ Art 59 para. 2: 'Verträge, welche die politischen Beziehungen des Bundes regeln oder sich auf Gegenstände der Bundesgesetzgebung beziehen, bedürfen der Zustimmung oder der Mitwirkung der jeweils für die Bundesgesetzgebung zuständigen Körperschaften in der Form eines Bundesgesetzes.' Translation: 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law'.

⁷⁸ General principles of international law and customary international law are granted a rank between federal law and the German Federal Constitution (Art 25 GG): Case 2 BvG 1/55 (BVerfG, Germany), Judgement 26 March 1957, BVerfGE 6, 309; von Arnould (n 76) mn. 516, 517.

⁷⁹ von Arnould (n 76) mn 513; M Herdegen, *Völkerrecht* (23rd edn, CH Beck 2024) para 22, mn 2.

⁸⁰ Case 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10 (BVerfG, Germany), Judgment 4 May 2011, BVerfGE 74, 358 [ECLI:DE:BVerfG:2011:rs20110504.2bvr236509]: 'Der Grundsatz der Völkerrechtsfreundlichkeit dient nach der Rechtsprechung des Bundesverfassungsgerichts ferner als Auslegungshilfe [...] im Rahmen geltender methodischer Grundsätze von mehreren möglichen Auslegungen eines Gesetzes grundsätzlich eine völkerrechtsfreundliche zu wählen ist'. Translation: 'According to the jurisprudence of the Bundesverfassungsgericht the principle of comity towards international law also serves as a means of interpretation [...] if more than one interpretation lies within the methodical boundaries of legal interpretation, the one of greatest comity towards international law is preferable'; cf, further von Arnould (n 76) mn 522; and Herdegen (n 78) para 22 Rn. 10.

⁸¹ Case 2 BvL 1/12 (n 76) (30); von Arnould (n 76) mn 524.

⁸² Case 2 BvR 1481/04 (BVerfG, Germany), Order 14 October 2004, BVerfGE 111, 307 [ECLI:DE:BVerfG:2004:rs20041014.2bvr148104] (317): 'Der Konventionstext und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten und rechtsstaatlichen Grundsätzen des Grundgesetzes [...]'. Translation: 'The convention and the jurisprudence of the ECtHR serve as a means of interpretation for the content and scope of constitutional fundamental rights and principles, that are established by the rule of law of the Grundgesetz [...]'; C Zehetgruber, 'Die EMRK, ihre Rechtsstellung sowie die Entscheidung des EGMR im Stufenbau der deutschen Rechtsordnung' (2016) 9(1) Zeitschrift für das Juristische Studium 52, 52-54; Herdegen ((n 78) para 22 mn 10; von Arnould ((n 76) mn 525-528.

⁸³ Case 2 BvR 1481/04 (n 82) (319, 320); Zehetgruber (n 82) 54-60.

the ECtHR substantial influence on the interpretation of German fundamental rights including procedural rights.⁸⁴

59 According to Art 54 of the French Constitution:

[i]f the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the parliament's houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.

60 This does not mean that international treaties have a higher rank than the Constitution. Art 54 only requires compatibility between them and the Constitution. If compatibility cannot be achieved, France can either withdraw from the treaty (very seldom) or amend its Constitution.⁸⁵ The French civil⁸⁶ and administrative⁸⁷ courts refuse to give precedence to an international treaty over the Constitution and decide the conflict in favour of the latter despite Paragraph 4 of the preamble to the Constitution of 1946 ('The French Republic, faithful to its traditions, conforms to the rules of public international law'). According to Art 55 of the Constitution, 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. This has been expressly endorsed by the Court of Cassation in the 1970s in respect of EC law⁸⁸, and later by the Administrative Council⁸⁹. Currently, it is clear that an international treaty has precedence over a national act, notwithstanding the fact that the domestic act is more recent than the treaty.

61 The United Kingdom is an example of a dualist legal system for the purposes of international law. In fact, it takes what was described as a 'fundamentally dualist view of international law'.⁹⁰ As held by the Supreme Court in *Miller v Secretary of State for Exiting the European Union*:

international law and domestic law operate in independent spheres [...] treaties between sovereign states have effect in international law and are not governed by

⁸⁴ Zehetgruber (n 82) 54. See **D. III** for an example.

⁸⁵ This has been done seven times so far in order to adapt to EU law.

⁸⁶ Case Melle Fraisse (Court of Cassation, France), Judgment 2 June 2000 (Bulletin 2000, no 4, 7).

⁸⁷ Case Sarran, Levacher et autres (State Council, France), Judgment 30 October 1998 (AJDA 1998, 1039).

⁸⁸ Case Société des cafés Jacques Vabre (Court of Cassation, France), Judgment 24 May 1975 (Bulletin, no 4, 6).

⁸⁹ The Council ruled until 1989 that a *more recent* Law Act should have precedence over an international treaty. See Case Nicolo (State Council, France), Judgment 20 October 1989 [ECLI:FR:CEASS:1989:108243.19891020].

⁹⁰ Lord Mance, 'International Law in the UK Supreme Court' (13 February 2017) King's College, London, <https://www.supremecourt.uk/docs/speech-170213.pdf> accessed 13 December 2022.

the domestic law of any state [...]. [...] although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.⁹¹

- 62 As mentioned above, the UK is bound by the Human Rights Act, having implemented the European Convention on Human Rights. The Human Rights Act is seen by commentators as a constitutional-level document. England and Wales, and the entire United Kingdom, are also bound by their other international law commitments, subject to the conditions explained above.
- 63 The US relationship with international law is complex. The US is a monist state where the executive negotiates and signs international agreements but needs (except for executive agreements) consent of the legislative (Senate). International law, according to the US Constitution, (Art VI clause 2) is the supreme law of the land.⁹² In practice, however, neither international treaties nor international customary rules are supreme over acts of US Congress succeeding them. Further, US courts have established a complex approach to international law, especially treaties. They distinguish between self-executing (directly enforceable before national courts by individuals) and non-self-executing treaties.⁹³ This creates a dichotomy where the US may be bound by an international treaty at the international level, and yet individuals cannot enforce the rights deriving from those treaties in the domestic sphere (*Medellin v Texas*).⁹⁴

⁹¹ *Miller v Secretary of State for Exiting the European Union* (Supreme Court, UK) [2017] UK SC 5.

⁹² Art VI clause 2 US Constitution: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'.

⁹³ In a certain way, this distinction is also perceived in other system, such as German law and French law. Within the same international convention, some provisions can be self-executing and others not. See, for instance, R De Munagori, 'Qu'est-ce qu'un texte directement applicable? A propos de la Convention de New-York sur les droits de l'enfant et la Charte constitutionnelle de l'environnement' (2005) *Revue trimestrielle de droit civil*, 556-561. C Emmanuelli, 'L'application des traités internationaux et des règles dérivées dans les pays de droit civil et de common law' (2007) 37 (2) *Revue générale de droit*, 269-299.

⁹⁴ *Medellin v Texas*, No 06-984 (Supreme Court, US) [552 US 491 (2008)]. In French law, in the opinion delivered by the Court of Cassation (Case no 91-11.301 (Court of Cassation, France), Judgment 10 March 1993 (Bulletin Civile, 1993, vol I) about the UN Convention of the Rights of Children (1990) it was clear that 'the provisions of the Convention on the Rights of the Child, signed in New York on 26 January 1990, cannot be invoked before the courts, as this Convention, which creates obligations only for States Parties, is not directly applicable in domestic law'. The same solution was offered regarding Art 8-1 of the same Convention: Case no 91-17.487 (Court of Cassation, France), Judgment 2 June 1993 (Bulletin Civile, 1993, vol I, no 195) (same reasons as quoted for the previous ruling). Later, the Court of cassation reversed its case law (see Case no 02-20.613 (Court of Cassation, France), Judgment 18 May 2005 (Bulletin Civile, 2005, vol I, no 212)). Before quashing, the ruling refers expressly to the UN Convention, which means that the provisions of the Convention relating to the case are self-executing ('Having regard to Art 3-1 and 12-2 of the New York Convention of 26 January 1990 on the Rights of the Child, together with Art 388-1 of the Civil Code and 338-1, 338-2 of the New Code of Civil Procedure'). Then it states that 'in all decisions concerning children, the best interests of the child must be a paramount

- 64 Spain is a monist state, which similarly to the US system makes a distinction between self-executing treaties (which become part of the national legal order and can be enforced by courts directly) and those that require implementation.
- 65 In South Korea, international treaties duly ratified and promulgated under the Constitution and the generally recognized rules of international law also have the same effect as the domestic laws. As is typical in a monist system, some international treaties still require national implementation in order to create domestic legal effects.

4.3.4 Jurisprudence of International Courts and Tribunals

- 66 A number of international treaties created international courts responsible for interpreting and applying those treaties and other international law sources. As a consequence, some of these courts create another channel to enforce the guarantees we examine in this chapter. Their jurisprudence has the potential to provide those guarantees with a more coherent and homogeneous interpretation throughout different countries.
- 67 The effects of judgements of international courts domestically in a large measure depend on a country's approach to the incorporation of international law into its national system (see above). While according to the Statute of the International Court of Justice, its decisions are only binding between the parties to the case (which can only be states), judicial decisions are 'subsidiary means for the determination of rules of law'.⁹⁵ As noted by Buergethal,

[t]he ICJ, together with the other existing international courts, make up a rapidly evolving international judicial system that continues to expand and gain in importance because states resort to it increasingly to resolve their disputes and because they invoke its jurisprudence as law with ever greater frequency. [...] It is therefore not surprising that when it comes to determining what the relevant international law rule is, a decision by the ICJ will today, in general, be treated by the

consideration; when a minor capable of discernment requests to be heard, he or she may submit his or her request to the judge at any stage of the proceedings and even, for the first time, in the case of an appeal'. See also, more indirectly: Case no 02-16.336 (Court of Cassation, France), Judgment 18 May 2005 (Bulletin Civile, 2005, vol I, no 211): 'the appellate court, which took into account the best interests of the child within the meaning of Art 3.1 of the Convention of 26 January 1990 on the Rights of the Child, by organising visiting rights, legally justified its decision, which was not contrary to Art 8, 12 and 14 of the European Convention on Human Rights'. According to French highest administrative court (Case no 163043-G.I.S.T.I (State Council, France), Judgment 23 April 1997 (Recueil Lebon, no 17)), a treaty is self-executing if 1) its provisions do create individual rights; 2) the provisions are precise, complete and unconditional.

⁹⁵ Respectively, Art 59 and 38 of the International Court of Justice Statute (ICJ Statute).

international community as the most authoritative statement on the subject and accepted as the law.⁹⁶

68 This important role is currently also played by other international courts: such as the European Court of Human Rights, the Inter-American Court of Human Rights and of course the European Court of Justice (of which below). As far as the main subject matter of this chapter is concerned, the courts with the greatest impact are undoubtedly the ECHR, the African Court of Human and People's Rights and the Inter-American Court of HR. These courts sometimes cross-reference each other's decisions (specifically – it has been noted that the Inter-American Court of HR refers to judgements of the ECHR), and their work contributes to building a common understanding of fundamental rights, including procedural guarantees we examine in this chapter. Further, what makes the ECHR such an important court is its mandate to hear cases brought by individuals. It is also noted that its judgements are very often followed not only by the state parties to the European Convention on Human Rights but also by national courts within these states.⁹⁷

4.3.5 *Non-binding Resolutions, Guidance and Other Measures Taken by International Bodies*

69 While not within the scope of this chapter, the soft law measures and model rules are important in shaping discussions and influencing legal reforms including those concerning due process. Some of the more notable sources are:

ALI/Unidroit Principles and Rules of Transnational Civil Procedure, adopted in 2004,⁹⁸

the ELI-Unidroit Model European Rules of Civil Procedure, adopted in 2020.⁹⁹

70 In fact, both the ALI and ELI sets of model rules are founded on the need to ensure due process.¹⁰⁰

4.4 **Supranational Sources – The Law of the European Union**

71 The European Union law is specifically referred to as supranational law because, in contrast to traditional international law, it created

⁹⁶ T Buergenthal, 'Lawmaking by the ICJ and Other International Courts' (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) (International Law As Law) 403, 404.

⁹⁷ Ibid 405.

⁹⁸ ALI/UNIDROIT Principles of Transnational Civil Procedure <https://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> accessed 7 November 2024. See for instance Principles 1.3, 3.1, 5.5 or 5.8.

⁹⁹ ELI/UNIDROIT Model European Rules of Civil Procedure <https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf> accessed 7 November 2024.

¹⁰⁰ See the ELI/Unidroit Principles (n 99) 1.

a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. Independently of the legislation of member states, EU law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.¹⁰¹

- 72 Thus, EU laws: the Treaty on European Union, the Treaty on the Functioning of the European Union, the protocols attached to them, the European Charter of Fundamental Rights, general principles of EU law, and secondary laws passed by EU law-making bodies (most of the time – the Council of the EU acting together with the European Parliament on proposals by the European Commission) can, under some conditions, be directly invoked before national courts by individuals. Further, they are supreme over the laws of the Member States of the EU,¹⁰² and over other international obligations of the Member States.¹⁰³
- 73 While the supremacy of EU law was confirmed by the European Court of Justice on numerous occasions,¹⁰⁴ only one Member State expressly recognized the supremacy in its domestic law (the Netherlands).¹⁰⁵ Other Member States, and especially their highest courts and constitutional tribunals, expressed reservations and conditions. This is the case, for instance, in Germany (*Vorrang des Unionsrechts* / primacy of Union law).¹⁰⁶ The BVerfG tends to put European Union law neither as a national nor as an international

¹⁰¹ *NV Algemene transport-en Expeditie Onderneming van Gend & Loos v Netherlands*, Case 26-62 (CJEU), Judgment 5 February 1963 [ECLI:EU:C:1963:1].

¹⁰² *Costa v ENEL*, Case 6-64 (CJEU), Judgment 15 July 1964 [ECLI:EU:C:1964:66], *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal II)*, Case C-106/77 (CJEU), Judgment 9 March 1978 [ECLI:EU:C:1978:49].

¹⁰³ See cases *Kadi I (Kadi v Council and Commission)*, Case C-402/05 (CJEU), Judgment 16 January 2008 [ECLI:EU:C:2008:11] and *Kadi II (Commission v Kadi)*, Cases C-584/10 P, C-593/10 P and C-595/10 P, (CJEU), Judgment 18 July 2013 [ECLI:EU:C:2013:518].

¹⁰⁴ The CJEU held that this status is to be found in the treaties (particularly, Art 4 para 3 Treaty of European Union (TEU), and Art 18, 288 Treaty on the Functioning of the European Union (TFEU)) and, for this reason, European law is to be considered autonomous from other sources of international law. *Costa v ENEL* (n 102); *Simmenthal II* (n 102). More recently, the CJEU seems to condone the application of certain constitutional considerations when interpreting EU law though: *Taricco II*, Case C-42/17 (CJEU), Judgment 5 December 2017 [ECLI:EU:C:2017:936]; Böse, *ZJS* 2020, vol 5, 476.

¹⁰⁵ L Besselink and M Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution' in A Albi and S Bardutzky (ed), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports* (Asser Press, Springer Open 2019).

¹⁰⁶ *Flaminio Costa v E.N.E.L.*, Case C-6/64 (CJEU), Judgment 15 July 1964 [ECLI:EU:C:1964:66]; Case 2 BvR 2735/14 (BVerfG, Germany), Order 15 December 2015, BVerfGE 73, 339 [ECLI:DE:BVerfG:2015:rs 20151215.2bvr273514]; Case 2 BvR 687/85 (BVerfG, Germany), Order 8 April 1987, BVerfGE 75, 223; R Streinz, *Europarecht* (C.F. Müller 2023) mn. 207. In fact, the jurisprudence of the ECJ does not allow for the limits to the '*Vorrang des Unionsrechts*' (supremacy of EU law) that the BVerfG established by means of its derivation from the GG. Pursuant to the BVerfG the '*Vorrang des Unionsrechts*' is a principle, that allows for exceptions, whereas the derivation from EU law does not. Nevertheless, the general idea may be linked to this main principle.

source of law. It is rather a supranational legal system independent of its foundation in international law.¹⁰⁷ The higher rank of European law is, according to the BVerfG, derived from German constitutional law, entailing constitutional limits to European integration.¹⁰⁸ These limits arise from violations of the core values of the German Constitution (*Identitätskontrolle* / identity check), the transgression of European competences (*Ultra-Vires Kontrolle* / *ultra-vires* check) and the violation of German fundamental rights (*Grundrechtskontrolle* / fundamental rights review).¹⁰⁹

- 74 The French *Conseil Constitutionnel* (Constitutional Council) has, in several cases, stated that the core values of the French Constitution must be preserved even when the primacy of EU law would be hampered.¹¹⁰
- 75 Within the scope of EU law, fundamental rights have been receiving significant attention, both at the level of EU lawmaking bodies and the European Court of Justice (ECJ). Initially, in fact, it was the ECJ that interpreted EU law (which initially did not include any specific reference to fundamental rights) as containing the respect for fundamental

¹⁰⁷ Case 1 BvF 1/05 (BVerfG, Germany), Order 13 March 2007, BVerfGE 22, 293 (296) [ECLI:DE:BVerfG:2007:fs20070313.1bv000105].

¹⁰⁸ Case 2 BvR 197/83 (BVerfG, Germany), Order 22 October 1986, BVerfGE 73, 339 (374-376) [ECLI:DE:BVerfG:1986:rs19861022.2bvr019783]: p 375: 'Art 24 Abs. 1 GG ermöglicht es indessen von Verfassungen wegen, Verträgen, die Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen, und dem von solchen Einrichtungen gesetzten Recht Geltungs- und Anwendungsvorrang vor dem innerstaatlichen Recht der Bundesrepublik Deutschland durch einen entsprechenden innerstaatlichen Anwendungsbefehl beizulegen. Dies ist für die europäischen Gemeinschaftsverträge und das auf ihrer Grundlage von den Gemeinschaftsorganen gesetzte Recht durch die Zustimmungsgesetze zu den Verträgen gemäß Art 24 Abs. 1, 59 Abs. 2 Satz 1 GG geschehen. [...] Die Ermächtigung auf Grund des Art 24 Abs. 1 GG ist indessen nicht ohne verfassungsrechtliche Grenzen.' | Translation: 'Art 24 para 1 GG provides a constitutional basis for the transfer of sovereign powers to international organizations and allows the legislation of such organizations to be assigned a higher rank than national law of the Federal Republic of Germany by means of a corresponding national legal instrument. In the case of the treaties establishing the EU and the legislation of the organs of the EU this has happened by means of the legislative approval of the treaties according to Art 24 para 1, Art 59 para 2 s. 1 GG. [...] This empowerment according to Art 24 para 1 GG is however not without constitutional limits'; Case 2 BvR 687/85 (BVerfG, Germany), Order 8 April 1987, BVerfGE 75, 223; Streinz (n 106) mn 228.

¹⁰⁹ Case 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (BVerfG, Germany), Judgment 20 June 2009, BVerfGE 123, 267 (353, 354) [ECLI:DE:BVerfG:2009:es20090630.2bve000208]; Streinz (n 106) mn 241; the hitherto only enactment of the *Ultra-Vires Kontrolle* occurred recently regarding the PSPP Program of the ECB: BVerfG NJW 2020, 1647.

¹¹⁰ See CC, Dec. No. 2021-940 QPC of 15 October 2021. The Court, for instance, states that 'the Constitutional Council is only competent to control the compliance of the disputed provisions with rights and freedoms that are guaranteed by the Constitution in that they call into question a rule or principle that, not having found an equivalent protection in European Union law, is inherent to France's constitutional identity'. Despite the fact that, in some previous decisions, the Court refused to consider some principles as 'inherent to France's constitutional identity', in this opinion, it held that 'according to Art 12 of the Declaration of Human and Civic Rights of 1789: "To guarantee the Rights of Man and of the Citizen a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted". It results that it is prohibited to delegate to private entities the general administrative police powers which are inherent to the use of public force necessary for guaranteeing rights. This requirement constitutes an inherent principle of France's constitutional identity' and stated for the first time the criterion to be applied in order to decide whether the rule or principle at stake is 'inherent to France's constitutional identity'.

rights. Those rights, according to the Court, were drawn from rights that are common to Member States and are present in their constitutions as well as in international treaties such as the ECHR.¹¹¹ Among other rights, the right to effective remedy was confirmed in the *Johnston* case,¹¹² and elaborated in many other cases, for instance concerning legal aid for legal persons.¹¹³ While building the body of fundamental rights of the EU and drawing inspiration from national constitutions and the ECHR, the Court inserted the European Union into the European constitutionalization and fundamentalization process. With time, the Treaties were amended to include Art 6.1 TEU, specifying that the Charter of Fundamental Rights of the EU (see below) is legally binding and has the same legal force as the Treaties, Art 6.2 TEU establishing a duty to accede to ECHR (which was rejected by the ECJ in 2013),¹¹⁴ and Art 6.3 TEU, providing that fundamental rights (ECHR and national constitutions) were general principles of EU law. The Charter of Fundamental Rights, in force since 2009, contains a list of fundamental rights which can be enforced in national courts or before the ECJ in cases where implementation of EU law is involved. The Charter is addressed to the EU institutions and agencies, and to the Member States when they are *implementing* the Union law, and thus it cannot apply where EU law does not apply. Thus, its utility with regard to European citizens is limited.

- 76 Art 47 of the Charter establishes the right to an effective remedy and to fair trial. It provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

¹¹¹ Cases: *Stauder v Stadt Ulm*, Case C-29/69 (CJEU), Judgement 12 November 1969 [ECLI:EU:C:1969:57]; *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case C-11/70 (CJEU), Judgment 17 December 1970 [ECLI:EU:C:1970:114]; *Nold KG v Commission*, Case C-4/73 (CJEU), Judgment 14 May 1974 [ECLI:EU:C:1974:51]; *P v S and Cornwall County Council*, Case C-13/94 (CJEU), Judgment 30 April 1996 [ECLI:EU:C:1996:170]; *Grant v South West Trains*, Case C-249/99 (CJEU), Judgment 17 February 1998 [ECLI:EU:C:1998:63]; *Coman and Hamilton v Romanian Immigration Authority*, Case C-673/16 (CJEU), Judgment 5 June 2018 [ECLI:EU:C:2018:385].

¹¹² *Johnston v Chief Constable of the Royal Ulster Constabulary*, Case C-222/84 (CJEU), Judgment 15 May 1986 [ECLI:EU:C:1986:206].

¹¹³ *DEB*, Case C-279/09 (CJEU), Judgment 22 December 2010 [ECLI:EU:C:2010:811].

¹¹⁴ ECJ Opinion of 18 December 2014 was referred to as the ‘Christmas bombshell from the European Court of Justice’. The Court held: ‘the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is *not compatible* with Art 6(2) TEU or with Protocol (No 8) relating to Art 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms’. Opinion revolved around the autonomy of EU law and the exclusive jurisdiction of the ECJ.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

- 77 Even beyond the scope of the Charter, due process is enshrined in the entire system of EU law. Freedom, democracy, equality, the rule of law and respect for human rights are the core principles upon which the EU legal system is based.¹¹⁵ While the EU's legislative power within the area of civil justice is limited (Art 81 TFEU only allows it to harmonize the Member States' laws and regulations in matters with cross-border implications), the measures it passed are almost uniformly grounded in the ideas of better access to justice, fair justice and equality.¹¹⁶ In fact, a new fundamental measure has been proposed. It deals with common minimum standards of civil procedure and is aimed at harmonizing such common standards as fair conduct of proceedings, fair trial and effective remedy, or adversarial proceedings. This measure is an interesting hybrid with regard to the fundamental principles which it attempts to regulate. Fair trial and effective remedies are no doubt some of the more fundamental principles of the EU legal system, and yet the European Parliament proposed their regulation in a secondary law measure (a directive),¹¹⁷ not in the treaties. This shows how due process and fair trial guarantees, while fundamental rights, need to also find a more detailed expression in sources of law that, because of their nature and legal effects, may be more suitable for such detailed content.
- 78 The support for the core values is also clear in the jurisprudence of the Courts of Justice of the EU (mostly – the European Court of Justice), as mentioned above. International courts and tribunals affect the development of fundamental principles of law, both within the international and domestic spheres. The impact of the jurisprudence of the European Court of Justice is even more significant because the EU is a supranational entity. Through its own jurisprudence, the ECJ established a *de facto* stare decisis system, where its judgements interpreting, applying and assessing the constitutionality of EU laws and actions (and assessing the legality of laws of the Member States) are binding on EU institutions, Member States, their governments, lawmakers, their courts and their citizens. Importantly, a new level and a new mechanism of judicial review was established. The reviewed measures can be those passed by EU bodies.¹¹⁸ Further, any national law, regulation or administrative provision can be reviewed for its compliance with EU Treaties, and it must be disapplied and later repealed if found to fail the test. In

¹¹⁵ Art 2 of the TEU.

¹¹⁶ For instance – Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2002/8/EC of 27 January 2003 (EU), Recital 4 and Art 1.1.

¹¹⁷ Information about the proposal is available at <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-common-standards-in-the-field-of-civil-procedure> accessed 26 February 2025.

¹¹⁸ Art 263 TFEU.

specified, albeit very limited circumstances,¹¹⁹ even judgments of national courts may be reviewed.

- 79 Utilizing its power to interpret and apply EU law, the Court uses preliminary references brought by national courts to build a coherent, clear system of rules deriving from European Union law.¹²⁰ While dealing with the application of substantive EU laws, the Court was faced with questions concerning their enforcement in the national courts of EU Member States. Since the 1970s, the Court emphasized the right to an effective remedy as the necessary element of a well-functioning legal system. It reviewed references where natural or legal persons' ability to enforce their EU law-granted rights was thwarted by substantive or procedural requirements deriving from national law. The Court established two important principles which must be followed by the Member States when designing their justice systems: equivalence and effectiveness. As explained in the *Unibet* case, the procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).¹²¹ While these principles do not speak to due process or fair trial directly, they do ensure that potential litigants have a fair chance to access proceedings where their rights will be enforced.

4.5 Other Sources of Law, Sources of Guarantees

- 80 It is also worth mentioning that some countries accept as a valid source for fundamental guarantees some principles of law or some principles of good governance.
- 81 For instance, Art 33 of the Argentinian Constitution stipulates that 'the declarations, rights and guarantees which the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated but rising from the principle of sovereignty of the people and from the republican form of government'. Colombian Constitution states in Art 94 that 'the enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them'. The US Constitution, in Amendment IX, stipulates that '[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people'. As already mentioned, the Brazilian Constitution states that the fundamental rights explicitly stipulated 'do not exclude others arising from the regime and the principles adopted'.
- 82 Some countries with a strong history of indigenous rights protection also preserve these rights as a source of fundamental guarantees, including in the procedural field. Such is

¹¹⁹ *Lütticke v Commission*, Case C-4/69 (CJEU), Judgment 28 April 1971 [ECLI:EU:C:1971:40].

¹²⁰ Art 267 TFEU.

¹²¹ *Commission v France*, Case C-423/05 (CJEU), Judgment 29 March 2007 [ECLI:EU:C:2007:198].

the case of Mexico (Art 2), where the Constitution explicitly mentions that ‘the nation is multicultural, based originally on its indigenous peoples, described as descendants of those inhabiting the country before colonization and that preserve their own social, economic, cultural and political institutions, or some of them’. The same rule states that these people have the right to:

apply their own legal system to regulate and solve their internal conflicts, subjected to the general principles of this Constitution, respecting the fundamental rights, the human rights and, above all, the dignity and safety of women. The law shall establish the way in which judges and courts will validate the aforementioned regulations.

83 It also states the right to

have full access to State jurisdiction. In order to protect this right, in all trials and proceedings that involve natives, individually or collectively, their customs and cultural practices must be taken into account, respecting the provisions established in this Constitution. Indigenous people have, at all times, the right to be assisted by interpreters and counsels, who are familiar to their language and culture.

84 Bolivia’s Constitution is also an important example of this opening to traditional values. It recognizes the authority of Rural Native Indigenous Jurisdiction, specifying that ‘the nations and native indigenous rural peoples shall exercise their jurisdictional functions and competency through their authorities, and shall apply their own principles, cultural values, norms and procedures’ (Art 190).

5 DUE PROCESS AND FAIR TRIAL – ROOTS AND HISTORICALLY GROUNDED DIFFERENCES

5.1 Introduction

85 The common law system is where the notion of due process has its roots. Its predecessor can be found in England’s Magna Carta (1215), which provided protection for every “freeman” from arrest, being detained, or being deprived of their freehold, outlawed, banished or in any other way molested [...] unless by the lawful judgement of his peers and by the law of the land’.¹²² The common law values of procedural justice and equity remained and continue to permeate justice systems of the UK, the US and other common law jurisdictions. They also influenced the evolution of these guarantees in civil law systems, as well as international instruments for the protection of human rights

¹²² See H E Willis, ‘Due Process of Law under the US Constitution’ (1926) 74(4) University of Pennsylvania Law Review and American Law Register 331, 332. The notion of ‘the law of the land’ was later changed to ‘due process of law’ by Edward III.

(such as the European Convention of Human Rights, and the American Convention of Human Rights, albeit this evolution took a slightly different direction, of which below).¹²³

5.2 The Legal Expressions of Procedural Guarantees - Evolution

- 86 The process of fundamentalisation of procedural rights and principles is undoubtedly influenced by political and historical circumstances.¹²⁴ Countries tend to put in their constitutions some rights as a consequence of remarkable political or historical facts and, for this reason, each constitution may be seen as a country's logbook, where relevant moments leave their print and set a new path for people. Further, as already mentioned above, many constitutional and fundamental procedural rights are also a product of world history and international policies.
- 87 Many of the basic procedural principles adopted worldwide may be found in very ancient documents, such as the party's right to initiate the proceedings (*nemo iudex sine actore*) or the right to an impartial judge (*nemo iudex in re sua*), or even the right to be heard in Court (*audiatur et altera pars*). Others may be considered as a more recent idea, such as the publicity of proceedings or the right to a judge predetermined by law. Finally, others are quite recent and lack the generality, such as the right to legal aid in civil cases, provided only by some countries.¹²⁵
- 88 In fact, for many countries, World War II meant an event of major importance in the history of fundamental rights. As a reaction to the horrors and abuses promoted by the dictatorships defeated, many countries realised the importance of establishing guarantees, preventing ordinary legislators or governments from trespassing on these spheres of liberty. Furthermore, this tendency led to the adoption of international documents – adopted by the majority of countries – proclaiming the relevance of these rights as basic guarantees for individual development, such as the Universal Declaration of Human Rights of 1948 or the United Nations Covenant on Civil and Political Rights, of 1966.¹²⁶ It is also easy to notice that different systems develop a different approach to fundamentalisation and constitutionalisation of procedural rights. Mauro Cappelletti, in an anthological report, offers three possible approaches to this problem.¹²⁷ He calls them: a) the English approach; b) the intermediate approach; and c) the US and German

¹²³ B M Salles, P M Cruz, 'Access to Justice: A Concept in the Light of the European and American International Systems' (2021) *Academia Letters* (Art 1420) https://www.academia.edu/50033909/ACCES_TO_JUSTICE_A_CONCEPT_IN_THE_LIGHT_OF_THE_EUROPEAN_AND_AMERICAN_INTERNATIONAL_SYSTEMS accessed 2 July 2024.

¹²⁴ F K Comparato, *A afirmação histórica dos direitos humanos* (4th edn, São Paulo, Saraiva 2005) *passim*.

¹²⁵ M Cappelletti and V Vigoriti, 'Fundamental guarantees of the litigants in civil proceedings: Italy' in M Cappelletti and D Tallon (ed), *Fundamental guarantees of the parties in civil litigation* (Milano Giuffrè 1973) 514.

¹²⁶ M Cappelletti, 'Fundamental guarantees of the parties in civil proceedings (general report)' in M Cappelletti and D Tallon (ed), *Fundamental guarantees of the parties in civil litigation* (Milano Giuffrè 1973) 666.

¹²⁷ Cappelletti (n126) 668 et seq.

approach. In spite of the fact that much has changed since his analysis, those frameworks may be used nowadays to establish some idealistic models.

- 89 The first model is characterized by a 'negative approach', meaning that there is no positive superior rank occupied by fundamental guarantees. Although this superiority can be reached by tradition and other historical factors, the essential nature of certain rules may only be achieved by the notion of 'natural justice'.¹²⁸ Besides, 'no special sanctions and recourses, differentiated from those provided for violations of ordinary law, are provided in cases of infringement of those fundamental guarantees by non-legislative state or private action'.¹²⁹
- 90 In the second approach, there is a tendency to put the constitution (and the rights provided therein) as a higher source of law. As a consequence, there are special procedures and a special majority to amend the constitution and, hence, to change those rights. Nevertheless, judicial review in these systems is either not allowed, or admitted in very restricted situations. Moreover, many of these systems have very few fundamental procedural rights, specified in the constitution, since the role of providing them is considered to be a task for ordinary legislator or even to the Executive branch.¹³⁰
- 91 Finally, the last approach offers both a rigid constitution – with a list of fundamental guarantees (material and procedural) to be protected – and a judicial review system, strong enough to enforce the superiority of these rights. This tends to be currently the more used model, and many of the countries formerly classified by Cappelletti as belonging to the second group, would nowadays be better put in this third model. Such is the case of France and Russia.

5.3 Historically Grounded Differences in Focus

- 92 In terms of constitutional or fundamental rights for litigants, there is a difference between the US where due process is emphasized, and European (and other) civil law systems where - sometimes - access to justice and effective remedies are prioritized.¹³¹ Two important arguments arise out of the distinction. The first argument indicates that the two approaches are closer than the terminology may indicate. The second argument reinforces the validity of the distinction by emphasizing the different points of focus of due process and access to justice/effective remedies, potentially also resulting in different outcomes in civil justice.
- 93 The first argument is as follows. Both due process and access to justice requirements concern relationships between individuals on the one hand and states and their

¹²⁸ Ibid 669.

¹²⁹ Ibid.

¹³⁰ Ibid 670-673.

¹³¹ In fact, in European systems due process, referred to as the right to fair trial, is part of the wider category which is access to justice.

apparatus, particularly but not exclusively the judicial system, on the other. They indicate what states are required to do or to refrain from doing to make sure individuals are granted all they are due within the scope of civil justice.

- 94 The second argument implies that while legal systems emphasizing due process focus attention on the defendant's rights in litigation, systems emphasizing access to justice focus on the protection of the claimant/plaintiff's right to their day in court. This argument was put forward by scholars commenting on the rules on jurisdiction and enforcement of judgements.¹³² A question arises as to whether the implications of this distinction for civil justice are as significant as those commentators perceive them to be in the context of jurisdiction and enforcement of judgements. After all, many of the legal and procedural measures that are meant to protect due process apply to all litigants, not only to defendants (for instance: the impartiality of judges). It is notable, however, that there is no right of access to civil justice in the US Constitution. The situation is different in England and Wales, where access to justice is emphasized. In *R v Secretary of State for the Home Department ex p Leech* (No 2), Steyn LJ held that 'It is a principle of our law that every citizen has a right of unimpeded access to a court'.¹³³ In another case, access to a court was held to be a constitutional right to which common law should afford special protection.¹³⁴
- 95 While this point is further elaborated below, it is also worth mentioning here that access to civil justice is widely seen as insufficient in the US: insufficiently emphasized in laws and procedural rules, insufficiently noted in policies on the federal and state level, and insufficiently funded.¹³⁵ Whether this situation results from the constitutional emphasis on due process rather than access to justice is beyond the scope of this project, but it seems there is at least a correlation between the two phenomena.

5.4 Historical Evolution of Due Process in Selected Systems

5.4.1 The US

- 96 The emphasis on due process in the US is unique not just when contrasted with civil law states of Europe, but also other common law states. It dominates vast areas of constitutional legal thought and jurisprudence, legal writing and legal learning. Through its solid constitutional footing (Amendments V and XIV to the US Constitution, interpreted in seminal judgements of the US Supreme Court), due process became one of the most important constitutional rights.¹³⁶ Indeed, it is understood as a guarantee of

¹³² R A Brand, 'Access-to-Justice Analysis on a Due Process Platform' (2012) 112 Columbia Law Review (Sidebar) 76-82.

¹³³ *R v Secretary of State for the Home Department ex p Leech* (QB, England) [1994 QB 198] 210 A.

¹³⁴ *R v Lord Chancellor ex p Witham* (QB, England) [1998] 575.

¹³⁵ Findings from the Rule of Law Index, World Justice Project, 2021, <https://worldjusticeproject.org/rule-of-law-index/country/2021/United%20States/Civil%20Justice/> accessed 7 February 2025.

¹³⁶ Consistently with the rest of this chapter, any remarks concerning due process in the US and other common law systems only refer to procedural due process.

other constitutional freedoms and of the rule of law. The concept of ‘jurisdiction’, which reflects the postulates of due process, occupies a significant part of civil procedure courses for first-year law students.¹³⁷ The essence of jurisdiction which centres upon protecting the defendant from situations when he/she would be sued by the claimant in an inappropriate forum, targets and elaborates the rights of defendants in civil litigation. As held in the US Supreme Court’s *International Shoe* judgment:

[T]he Due Process Clause ‘does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.’ [...] Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.¹³⁸

- 97 The US Constitution contains two Amendments establishing the constitutional right of due process. The Fifth Amendment is part of the Bill of Rights adopted very shortly after the Constitution. The rights included in the Bill of Rights limited the powers of the federal government.¹³⁹ According to the Amendment, ‘[n]o person shall [...] be deprived of life, liberty, or property, without due process of law [...]’. The Fourteenth Amendment, ratified in 1868, introduced the same limitation on the powers of state governments. However, the incorporation of the right to due process against the states created a jurisprudential split along partisan lines.
- 98 A split in US due process jurisprudence may have been inevitable. While upon reading the text of the amendments one may have an impression that what is due in terms of process would be within the competence of the legislator to establish, legislators have not taken on that challenge, so US courts took it upon themselves to shape due process rights.¹⁴⁰ The two amendments generated a wealth of jurisprudence, both at the state and federal level. The US Supreme Court interpreted them in a wide variety of cases, essentially creating the scope and boundaries of the constitutional right to due process. This has resulted in two competing conceptions of due process, substantive and procedural due process. The due process rights as they were established by the

¹³⁷ R Freer, *Civil Procedure* (4th edn, Wolters Kluwer 2017). One of the key textbooks on civil procedure for US law students. The first 150 pages are devoted to personal jurisdiction, then a further 160 pages to notice and opportunity to be heard as well as subject matter jurisdiction, and there is no chapter or section concerning ‘access to justice’ for plaintiffs. This is not to say that access to justice issues are not present throughout analyses of other concepts and procedural steps, but it certainly is not emphasized as a distinct issue worthy of substantial analysis.

¹³⁸ *International Shoe Co. v Washington* (Supreme Court, US) [326 US 310, 319 (1945)].

¹³⁹ H E Groves, ‘Due Process of Law: A Comparative Study’ (1961) 45(2) *Marquette Law Review* 257, 258.

¹⁴⁰ *Murray’s Lessee v. Hoboken Land & Improvement Co.* (Supreme Court, US) [59 US (18 How.) 272, 276].

amendments and by their judicial interpretation constitute a control mechanism for the exercise of power by the legislative, executive and judicial authorities.

- 99 In general terms, liberals tend to support substantive due process, and conservatives tend to favour procedural due process. The former is summarized by Supreme Court Justices William Douglas and Hugo Black as applying the ‘pretty sturdy standard’ of the guarantees of the first eight amendments.¹⁴¹ This means state and federal governments are held to the same standards of guaranteeing fundamental rights throughout all interactions with the citizens. The procedural due process camp, as championed by Justice Felix Frankfurter, merely demanded ‘ordered liberty’, a regime of reasonable regulation – meaning states have the power to modify and control the degree to which they must apply constitutional guarantees as long as they do so through legitimate means.¹⁴² This dichotomy reflects the essential political split – US liberals believe that state governments must be subordinate to the federal government so that it can offer safeguards against grievous violations of fundamental rights. Therefore, they believe, the states cannot dilute the due process their citizens are entitled to. US conservatives, on the other hand, believe in the supremacy of the states’ right to define their own obligations to observe fundamental guarantees.
- 100 Constitutions of US states, instead of introducing their own due process clauses, rather regulate specific aspects of due process, and in particular the organization of the court system, appointment and/or election of judges, their independence and the conditions under which they could be removed from their position or excused from a particular case.

5.4.2 England and Wales

- 101 While due process has retained its importance in the UK constitutional order, it did not achieve the prominence it was afforded in the US. The evolution of the concept in the UK, since its entry into the European Union in the 1970s, refocused the approach in the direction of the ECHR and the EU. Access to justice has been recognized as one of the key constitutional rights in common law. Further, the constitutional framework of the right to access to justice is shaped by the Human Rights Act (implementation of the European Convention of Human Rights into the dualist system of the UK). Before its exit from the European Union, the UK was also bound by the access to justice requirements in the Charter of Fundamental Rights of the EU (Art 47), as well as the general principle of EU law – effective remedies.¹⁴³

¹⁴¹ W O Douglas, *The Court Years* (Random House 1980) 46

¹⁴² *Ibid.*

¹⁴³ *Johnston v Chief Constable of the Royal Ulster Constabulary* (n 112); see also *Unectef v Heylens*, Case C-222/86 (CJEU), Judgment 15 October 1987, 4097 [ECLI:EU:C:1987:442] and *Oleificio Borelli v Commission*, Case C-97/91 (CJEU), Judgment 3 December 1992, I-6313 [ECLI:EU:C:1992:491].

5.4.3 Brazil

- 102 In constitutional law, Brazil was inspired by the US common law system, establishing the possibility of judicial review. The Constitution of 1891 (the first Constitution Brazil had after becoming a Republic, in 1889) implicitly authorized every judge in the country to control the constitutionality of rules and explicitly created a Supreme Court ('Supremo Tribunal Federal') to give the last word on the topic.¹⁴⁴
- 103 As a consequence, Brazil has known for a long time the importance of constitutional rules and principles over the system as a whole and has a long tradition dealing with the importance of allocating in the Constitutional text some guarantees supposed to be particularly precious to the legal order.
- 104 Therefore, since that old Constitutional text, Brazil recognizes some fundamental rights of particular importance to procedural law, such as the right to equal protection (Art 72, para 2), the right not to be imprisoned except in observance of some requisites (Art 72, para 13 and 14), the right to an impartial judge (Art 72, para 15) or the right to a *habeas corpus* (Art 72, para 22).
- 105 Nowadays, Brazilian Federal Constitution (1988) offers a broader catalogue of fundamental guarantees and also sets a clear position of these rights in the normative hierarchy. Particularly in the field of Civil Procedure, Brazilian Constitution provides a very analytical and extensive list of fundamental guarantees, going from the idea of Access to Justice to the right to a reasonable delay.
- 106 The Brazilian Constitution offers an open door to allow the introduction of new fundamental guarantees, either included by Brazilian legislator or provided in international treaties. It also explicitly grants a special status to those rules forbidding changes that may undermine the extent of those rights.
- 107 Many of these 'procedural guarantees' are, of course, not limited to civil procedure. They also apply to criminal procedure (such as the right to *res judicata*, the right to a due process of law or the right to an impartial judge) and even to administrative proceedings (as the right to a fair defence or against unlawfully obtained evidence).¹⁴⁵

¹⁴⁴ H Zaneti Jr, *Processo constitucional* (Rio de Janeiro, Lumen Juris 2007) 30-31.

¹⁴⁵ Some opinions from Brazilian Supreme Court even extend those guarantees to the Legislative process of lawmaking, ruling, for instance, that this process must obey the due process clause (Case 5.127 (Supreme Court, Brazil), Judgment 15 October 2015 [Diário da Justiça, 11.05.2016]). See also M A C de Oliveira, 'Devido processo legislativo e controle jurisdicional de constitucionalidade no Brasil' in J A Leite Sampaio (org), *Jurisdição constitucional e direitos fundamentais* (Belo Horizonte Del Rey 2003) *passim*.

- 108 These fundamental guarantees play a special role, enlightening the interpretation of the whole legal system and protecting people from any kind of public (and even private) abuse.
- 109 It is said that, as a fundamental right the due process clause is multifunctional (integrative, interpretative, blocker and optimizer).¹⁴⁶ It is integrative because it imposes the *creation* of the necessary tools to implement this right. It is interpretative because it enlightens the *interpretation* of rules concerning general proceedings. It is a blocker, meaning that it prevents the use of rules (or the interpretation of rules) incompatible with the ideals embraced by the due process clause. And it is an optimizer because it helps to optimize the values, and the rights linked to the constitutional state.
- 110 In this sense, it is said that the fundamental guarantees require all branches of government (legislative, executive and judiciary), as a first aspect, to respect some space of freedom, allowing people to exercise their liberty that cannot be invaded by the state (negative effect of a fundamental guarantee). As a second aspect, they also demand the state (through all its branches) to act in a manner that maximizes those rights, either by creating legislation in accordance with them, or by promoting attitudes that may help flourishing the scope of those rights (positive effect of a fundamental guarantee).¹⁴⁷
- 111 In Brazil, both the courts and the academy conceive that the fundamental guarantees do not aim merely at the government. They may also be imposed to private entities, provided that there is a power relation between the subjects involved. As a consequence, for instance, the right to religious freedom (Art 5th, VI, of the Brazilian Constitution) requires, undoubtedly, that the government respects this space of liberty for all people; other than that, it also asks that companies let their employees exercise their religious freedom without any sort of interference.
- 112 For this reason, Brazilian courts have already ruled that the observation of procedural fundamental guarantees may also be demanded from private parties. As an example, one cannot be expelled from an organization (a club, an association or a trade union) without the observation of the due process clause or the right to be heard.

5.4.4 France

- 113 Even though the French Constitution does not provide for a precise and extensive list of fundamental procedural rights it is argued by many scholars that international and European law as well as the case law of the Constitutional Council (especially since 2010 and the introduction of the QPC) favour the emergence of a new procedural law, in the

¹⁴⁶ H Ávila, 'O que é devido processo legal?' (2008) 163 *Revista de Processo*, 50-59; I W Sarlet, L G Marinoni and D Mitidiero, *Curso de direito constitucional* (São Paulo, RT 2012) 622.

¹⁴⁷ L G Marinoni, S C Arenhart and D Mitidiero, *Curso de processo civil* (vol 1, 6th edn, São Paulo, RT 2021) 101-124; V P Ataíde Jr, 'O devido processo legal' in C M Clève (ed), *Direito constitucional brasileiro* (vol 1, São Paulo, RT 2014) 788.

sense of a set of fundamental procedural rights, fundamental guarantees of good justice that are intended to apply to all disputes. This procedural common ground is now apparent from the common inspiration of a few major principles (fairness, loyalty, freedom of access to justice and rights of the defence, etc) transposed into international commitments and constitutional jurisprudence. This is horizontal procedural law, which covers the entire trial horizon.

- ‘*direct constitutionalization*’ by reinstating part of civil procedure in the scope of application of Article 34 of the Constitution,
- ‘*indirect constitutionalization*’ which is occurring through the influence of fundamental rights protected by constitutional law as well as by some techniques making it possible to incorporate the constitutional law of fundamental rights into civil procedure,
- parallel evolution of *fundamentalization* of civil procedure mostly under Article 6 para 1 ECHR.¹⁴⁸

5.4.5 Germany

- 114 The GG – Basic Law for The Federal Republic of Germany – is the German Constitution and was approved in Bonn on 8 May 1949. Because it was originally intended to be only a transitory statute, the designation ‘Basic Law’ was chosen instead of ‘Constitution’. Since reunification, the term has lost its provisional character.¹⁴⁹
- 115 The GG consolidates in its very first provisions *Grundrechte* (fundamental rights). These are, according to the BVerfG ‘an inseparable part of the basic law’, ‘the very core of the liberal-democratic order of state life in the constitution’.¹⁵⁰ In literature, fundamental rights are commonly distinguished from the so-called *grundrechtsgleiche Rechte* (rights equivalent to fundamental rights)¹⁵¹ or *grundrechtsähnliche Rechte* (rights similar to fundamental rights)¹⁵². The former are those listed in the first section of the constitution, which is entitled ‘*Die Grundrechte*’ (fundamental rights, Art 1-19 GG). The latter, however, are to be found in further constitutional provisions but contain essential

¹⁴⁸ See S Guinchard, *Procédure civile* (29th edn, Dalloz 2008) 18 and 27.

¹⁴⁹ In general, on the development of the German Constitution: H D Jarass, ‘Einleitung’ in H D Jarass and M Kment (ed), *Grundgesetz für die Bundesrepublik Deutschland: GG* (18th edn, Beck 2024) mn 1 ff.

¹⁵⁰ Case 1 BvR 636/68 (BVerfG, Germany), Order 4 May 1971, BVerfGE 31, 58 (73); see also H Dreier, ‘Einleitung’ in H Dreier (ed), *Dreier, Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2013) mn 63.

¹⁵¹ For more references, cf Dreier (n 150) especially fn 282.

¹⁵² For instance, Case 2 BvR 1187/80 (BVerfG, Germany), Order 8 July 1982, BVerfGE 61, 82 (104) has employed this term when referring to Art 101 and 103 GG: ‘Das Bundesverfassungsgericht hat es allerdings als zulässig angesehen, daß auch juristische Personen des öffentlichen Rechts sich jedenfalls auf die grundrechtsähnlichen Rechte der Art 101 Abs. 1 Satz 2 und Art 103 Abs. 1 GG berufen können’ | Translation: ‘The BVerfG, however, has considered admissible that legal entities under public law may also invoke the rights similar to fundamental rights under Art 101 para 1 2nd sentence and Art 103 para 1 GG, in any case’.

guarantees that are comparable to those catalogued within the section dealing with fundamental rights (cf Art 20 para 4, Art 33, 38, 101, 103 and 104 GG). Both fundamental rights and rights equivalent to those are considered substantially equal so that provisions regarding the former (for instance, Art 19 para 1 and 2, Art 142 GG) should also be applicable to the latter.¹⁵³ Apart from such rights explicitly provided for in the GG, many guarantees – procedural guarantees included – have been acknowledged in case law by the BVerfG as fundamental rights derived from general principles and non-procedural fundamental rights. For instance, *Anspruch auf ein faires Verfahren* (the right to a fair trial) is considered to be *allgemeines Prozessgrundrecht* (a general procedural fundamental right) resulting directly from Art 2 para 1 GG¹⁵⁴ and the principle of the rule of law (Art 20 para 3 GG)¹⁵⁵.

- 116 Although some civil procedural guarantees have already developed in past constitutions, such as the right to *gesetzlicher Richter* (a lawful judge), procedural rights are undergoing a more recent and intensified process of constitutionalization and fundamentalization in Germany.

5.4.6 Spain

- 117 In Spain, the fundamentalization and constitutionalization of procedural guarantees took place at the same time. It should be remembered that Spain was a dictatorship at least until the first democratic elections of 1977. Only in 1978 did the constitutionalization of rights, including procedural rights, take place. Before that, the constitutional texts were either ephemeral or did not find direct application in the courts, and in any case, they had only very few references to procedural rights. Therefore, the history of the fundamentalization and constitutionalization of procedural guarantees begins only with the 1978 Constitution, despite the fact that a decisive fundamentalization only started after the Constitutional Court began to issue its judgments in 1981. In fact, since then, the vast majority of the Constitutional Court's case law focus on the protection of procedural rights derived from Art 24 of the Constitution.

- 118 This article refers to a very messy constellation of rights. Inspired by the 'effective remedy' of Art 8 of the Universal Declaration of Human Rights (1948) and by the 'protection' of Art 24 of the Italian Constitution, the Spanish Constitution speaks of the right to 'effective judicial protection', which seems, as we shall see, a general clause to

¹⁵³ Case 2 BvR 639/66 (BVerfG, Germany), Order 19 July 1967, BVerfGE 22, 267 (271); and also Dreier (n 150) mn 64.

¹⁵⁴ Art 2 para 1 GG: 'Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.' | Translation: 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.'

¹⁵⁵ Art 20 para 3 GG: 'Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.' | Translation: 'The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.'

refer to the right to free access to justice, the right to a hearing and in part to defence, remedies and enforcement. It also recognizes the right to the legal judge, the right to legal assistance, right to defence, right to be informed of the accusation, right to the public process, right to the process without undue delay, right to evidence, right against self-incrimination, right to the presumption of innocence and, finally, right to process with all guarantees which is an expression that alludes, once again, to due process, although using United Nations terminology and trying to make it a kind of closing clause. In fact, the Constitutional Court, within this last right, has included two additional *guarantees*: the right to equal treatment of the parties and the right to an impartial judge; rights that, as will be observed, are actually omissions - quite inexcusable - of Art 24.

5.4.7 Republic of Korea

- 119 The legal system of the Republic of Korea ('Korea') entails a vertically hierarchical system wherein the Constitution is the supreme law of the land prevailing over the remaining laws set forth in their respective order of priority, ie, the legislative codes/ acts enacted by the National Assembly which in turn supersedes the executive orders/decrees set forth by the Executive Branch. International treaties duly ratified and promulgated under the Constitution and the generally recognized rules of international law also have the same effect as domestic laws.
- 120 Promulgated on 17 July 1948, the Constitution of Korea in its Art 22 initially stipulated the rights and duties of citizens as follows, which is identical to the corresponding provisions in Art 27 of the Constitution (currently in effect and as amended): 'All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act'.
- 121 The fundamental right stipulated in Art 27(1) of the Constitution is called 'the right to request (demand, obtain) a trial' or 'the right to obtain justice in the court', which means the right to obtain judicial hearings (hereinafter 'the right to trial'). Art 27(1) of the Constitution is the starting point of the discussion on the constitutionalization of rights in the civil procedure of Korea. The article is similar to Art 24 of the former Japanese Constitution although its origin is not clearly known.¹⁵⁶
- 122 The modern judicial system was first implemented in Korea at the end of the nineteenth century. The civil trial system by an independent judicial institution remained even after the Japanese colonial period. The Korean Civil Procedure Code (hereinafter 'the KCPC') was enacted on 4 April 1960 by the National Assembly and has been in force since 1 July 1960 following an overall amendment in 2002. The Rules of Civil Procedure (hereinafter

¹⁵⁶ During the constitutional enactment process, various views were presented with reference to the constitutions of not only Japan but also the Republic of China and other countries, including the Constitution of the Provisional Government of the Republic of Korea established during the Japanese colonial period.

the 'RCP') has been promulgated by the Supreme Court of Korea and is serving as supplementary provisions to the KCPC. The Civil Execution Act was enacted in 2002 separately from the KCPC in order to regulate enforcement issues.¹⁵⁷

6 HIERARCHIES AND THE POSITION OF DUE PROCESS WITHIN CONSTITUTIONAL AND FUNDAMENTAL LEGAL FRAMEWORKS OF GLOBAL LEGAL SYSTEMS

6.1 Introduction

- 123 The general principles of civil procedure express the aims that societies seek civil procedure to fulfil, with specific levels of emphasis placed on different general principles, through more detailed principles and even more detailed rules of civil procedure. However, because of the importance attributed to justice and fairness, many guarantees are placed in fundamental and constitutional sources. Thus, they have become standards and principles of international or supranational law, as well as domestic constitutional law. Further, they are also part of the framework of fundamental and human rights, both at the international and domestic level. The current positioning of procedural guarantees throughout the entire hierarchies of sources of law in the global, international, supranational, national (federal and unitary) and even more local systems is the result of a historical transition and development both of our understanding of the importance and the necessary features of *due process*, and of an unprecedented transformation of those hierarchies themselves.
- 124 In the process of formulating and giving legal footing to these guarantees, legal systems created multi-tier hierarchies consisting of fundamental procedural guarantees (for instance judicial independence and impartiality, and procedural equality of the parties) at the top level, the more detailed but still leading principles 'concerning the style and course of procedure' (jurisdiction rules or judicial management of proceedings), as well as more incidental principles (such as security for costs) at lower levels.¹⁵⁸ These *tiers* tend to reflect the level of abstraction/specificity of the principles together with their overall importance.
- 125 The guarantees of procedural access, procedural fairness and procedural justice are very often laid down in constitutional/fundamental documents (either in national constitutions, international treaties or in supranational legal instruments). Further, the institutional aspects of justice systems, and in particular the organization of courts and

¹⁵⁷ Japan enacted its own Civil Procedure Code based on the German Civil Procedure Code in 1890, and Korea used the former Japanese Civil Procedure Code during the Japanese colonial period and afterwards until its own Civil Procedure Code was enacted. For this reason, the current civil procedure law system in Korea bears a number of resemblances to that of Germany.

¹⁵⁸ N Andrews, 'Fundamental principles of civil procedure: order out of chaos' in X E Kramer and C H van Rhee (ed), *Civil litigation in a globalising world* (Asser Press 2012) 23, also referring to the author's earlier writings. This paragraph uses the following work of M Tulibacka, M Sanz and R Blomeyer: 'Common Minimum Standards in Civil Procedure' (2016) Report for the European Parliament (European Added Value Unit 2016).

the position of the judiciary, also find their place within those instruments. The procedural arrangements, as well as more mundane, detailed aspects of institutional arrangements, rarely have constitutional or fundamental footing. They are obviously crucial, as organizational, administrative, and procedural instruments, principles and rules that ensure the fundamental guarantees have practical significance. However, they are regulated in acts of parliament, regulations, or even internal organizational statutes of specific bodies. Further, the general guarantees, the institutional aspects and the procedural arrangements are interpreted, developed and even (especially but not exclusively in common law systems) established in judgements of courts.

6.2 Umbrella Concepts like Due Process versus More Specifically Contoured Manifestations of Procedural Guarantees and Principles

126 Constitutions around the world may be divided between those that have an analytical list of fundamental guarantees (particularly in the procedural field) and those that prefer to preserve only some general principles, leaving to jurisprudence and non-constitutional law the role to detail the extent of procedural rights.

127 The US Constitution is an example of the latter approach. Its Fifth Amendment states the right to a due process of law, saying that no one shall be 'deprived of life, liberty, or property, without due process of law'. Reaffirming this idea, the Fourteenth Amendment mentions that

no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

128 From this general idea, as already seen, American jurisprudence deduces many other fundamental guarantees, such as the right to produce evidence, the right to an unbiased tribunal and the right to receive notice of the proposed action and its grounds.¹⁵⁹

129 France has a similar approach. Although the Constitution orders the President of the Republic to guarantee the independence of Judicial Authority (Art 64), it does not prescribe a list of fundamental rights to the parties in civil procedure.¹⁶⁰ These rights are

¹⁵⁹ H J Friendly, 'Some kind of hearing' (1975) 123(6) *University of Pennsylvania Law Review* 1267, 1279-1295.

¹⁶⁰ B Oppetit, 'Les garanties fondamentales des parties dans le procès civil en droit français' in M Cappelletti and D Tallon (ed), *Fundamental guarantees on the parties in civil litigation* (Giuffrè 1973) 483-484.

provided by the Code of Civil Procedure and other procedural laws or are deduced from general principles.¹⁶¹

- 130 The former group are systems like Germany, Korea and Brazil. Commonly, these systems tend to put emphasis on one basic principle (such as due process of law or access to justice) and then derive the other guarantees from it.
- 131 Actually, Germany does not emphasize either access to justice or due process of law principles. In fact, access to justice is not expressly guaranteed by the GG, and the due process clause is just vaguely deduced from Art 103 para 1 GG.¹⁶² German law mentions the existence of *Justizgewährleistungsanspruch*¹⁶³ (a right to access courts, although not for civil trials). Nonetheless, this right is only inferred from other constitutional rules and, although it includes the right to an effective trial, it plays a relatively insignificant role in the whole system¹⁶⁴, especially when compared to the importance of such clause in other countries legislation. The reason for this insignificance is commonly attributed to the presence of many other principles explicitly enlisted in the GG or derived from other constitutional norms, providing the same guarantees that would be extracted from the due process clause. As a consequence, German procedural law presents a large number of constitutional guarantees – either expressly written on the Constitution or derived from other constitutional principles, such as *Demokratieprinzip* (the principles of democracy, Art 20 para 1, para 2 GG¹⁶⁵) or *Rechtsstaatsprinzip* (the rule of law, Art 20 para 3, Art 1 para 3 GG¹⁶⁶) – that protect, as a whole, both the idea of access to justice and the due process of law clause.¹⁶⁷ In this sense, the right to an impartial judge is

¹⁶¹ The right of defence, for instance, can be seen as a natural right, recognized by the European Court of Human Rights (cf C Chainais, F Ferrand and S Guinchard, *Procédure civile* (36th edn. Dalloz 2022, no 806 et seq.) 619), while the right to juridical assistance is established by a regular law (Y Strickler, *Procédure civile* (8th edn, Bruylant 2018) 63).

¹⁶² Art 103 para 1 GG: ‘Vor Gericht hat jedermann Anspruch auf rechtliches Gehör.’ | Translation: ‘In the courts every person shall be entitled to a hearing in accordance with law’.

¹⁶³ The term ‘*Justizgewährleistungsanspruch*’ more closely means ‘Access to Justice’ when translated literally. However, the ‘*Justizgewährleistungsanspruch*’ cannot be equated with a comprehensive guarantee of ‘Access to Justice’.

¹⁶⁴ Zuck points out that the right to access court only has marginal importance insofar as shaping an already initiated procedure is concerned. R Zuck, ‘Die Gewährleistung effektiven Rechtsschutzes im Zivilprozess’ (2013) 66(16) *Neue Juristische Wochenschrift* 1132, 1134.

¹⁶⁵ Art 20 para 1, para 2: ‘(1) Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat. (2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.’ | Translation: ‘(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies’.

¹⁶⁶ See fn 155 for Art 20 para 3 GG; Art 1 para 3 GG: ‘Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.’ | Translation: ‘The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.’

¹⁶⁷ H-J Papier, ‘§ 176 Justizgewährungsanspruch’ in J Isensee and P Kirchhof (ed), *Handbuch des Staatsrechts Band VIII* (3rd edn, C F Müller 2010) mn 5 and Zuck (n 164) 1132 (1133), both in the context of the right to access court, describe the role of Art 2 para 1 GG. Because the principle of the

found not in a broad interpretation of a due process clause, but in Art 101, para 1, sec 2 GG.¹⁶⁸ The right to be heard is explicitly provided by Art 103 para 1 GG. The *prozessuale Waffengleichheit* (right to equality of arms) is extracted from the rule of law clause and from the right to equal treatment (Art 20 para 3, Art 3 para 1 GG¹⁶⁹).

- 132 It is also noted that the German Constitution does not favour access to justice over due process. Indeed, it both neglects the collective ways of access to justice and presents many restrictions when dealing with the right to a remedy (the right to access a higher court for a review), particularly if compared to other legal systems. One other way of considering the constitutionalization of procedural guarantees in Germany may be found in the application of non-procedural fundamental rights as a source for implicit procedural guarantees. While it is generally accepted that fundamental rights demand some possibility of implementation¹⁷⁰ and the constitutional court has derived certain procedural guarantees from other fundamental rights, the explicitly written procedural guarantees might override such developments and the derivation through other constitutional concepts is often preferred¹⁷¹. All the same, these non-procedural fundamental rights highlight and enforce the purpose of civil procedure as a means of effectively implementing material rights¹⁷².
- 133 In sum, the German legal system has managed to develop a very extensive debate on the sources for procedural fundamental rights, which also indicates a rapid development of the subject. From the multiple possibilities presented, procedural guarantees are in

rule of law is not a fundamental right, the fundamental right of Art 2 para 1 GG is necessary to produce a subjective guarantee for an individual. Zuck calls this a '*Transportgrundrecht*', a transporting fundamental right.

¹⁶⁸ Art 101 para 1 GG: ‚Ausnahmegerichte sind unzulässig. Niemand darf seinem gesetzlichen Richter entzogen werden‘. | Translation: ‘Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge’.

¹⁶⁹ See fn 155 for Art 20 para 3 GG; Art 3 para 1 GG: ‘Alle Menschen sind vor dem Gesetz gleich’. | Translation: ‘All persons shall be equal before the law.’

¹⁷⁰ Case 1 BvR 330/96 und 1 BvR 348/99 (BVerfG, Germany) Judgment 12 March 2003, BVerfGE 107, 299 (311) [ECLI:DE:BVerfG:2003:rs20030312.1bvr033096].

¹⁷¹ A Uhle, ‘§ 129 Rechtsstaatliche Prozeßgrundrechte und -grundsätze’ in D Merten and H-J Papier (ed), *Handbuch der Grundrechte in Deutschland und Europa Band V* (C. F. Müller 2013) mn 9 and 10 including references to cases of the constitutional court; further examples: D Hesselberger, ‘Der Einfluß der Verfassungsnormen auf das gerichtliche Verfahren in der Rechtsprechung des Bundesverfassungsgerichts’ in W Waldner (ed), *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Bodner 1990) 349, 353 and 354.

¹⁷² E Schumann, ‘Der Einfluß des Grundgesetzes auf die zivilprozessuale Rechtsprechung’ in C-W Canaris and K Schmidt (ed), *50 Jahre Bundesgerichtshof Festgabe aus der Wissenschaft* (vol 3, Beck 2000) 3, 24 ff.

constant evolution, giving rise to new ones¹⁷³ to an extent that has been received critically¹⁷⁴.

- 134 Some of these criticisms involve the idea that this excessive constitutionalization gives in to temptations of fleeting impulses.¹⁷⁵ As it is said, procedural law is a delicate system, whereas the Constitution does not primarily aim at regulating civil procedure, thus presenting a potentially problematic interference¹⁷⁶ and forfeiting the predictability that civil procedure depends on.¹⁷⁷ Furthermore, the rigidity of constitutional norms may antagonize some characteristics of civil procedure. And, the extensive development of jurisprudence necessarily corresponds with less flexibility in legislative activity, potentially petrifying certain aspects of civil procedure¹⁷⁸. The BVerfG itself often emphasizes that a simple infringement of procedural law cannot be equated with an infringement of constitutional law¹⁷⁹, but does not establish a clear differentiation¹⁸⁰.

¹⁷³ H Roth, 'Prozessmaximen, Prozessgrundrechte und die Konstitutionalisierung des Zivilprozessrechts' (2018) 131(1) *Zeitschrift für Zivilprozess* 3, 7 where it is suggested that many procedural guarantees emerged from hitherto non-constitutional concepts of civil procedural law (9, 10); Schumann (n 172) para 3 (41) describes the influence of the Constitution on civil procedure as the most important recent development in civil procedural law.

¹⁷⁴ For example, R Stürner, 'Verfahrensgrundsätze des Zivilprozesses und Verfassung' in W Grunsky (ed), *Festschrift für Fritz Baur* (Mohr 1981) 647, 647.

¹⁷⁵ R Stürner, 'Die Einwirkungen der Verfassung auf das Zivilrecht und den Zivilprozeß' (1979) 32 *Neue Juristische Wochenschrift* 2334, 2336.

¹⁷⁶ *Ibid* 2334 and 2338; Schumann (n 172), para 3 (22, 23) with some examples; Roth (n 173) para 3 (8).

¹⁷⁷ Schumann (n 172) para 3 (20) with respect to some judgements of the BVerfG.

¹⁷⁸ Schumann (n 172) para 3 (34-36).

¹⁷⁹ Case 2 BvR 878/74 (BVerfG, Germany), Order 25 July 1979, BVerfGE 52, 131 (164) a judgment with four dissenting opinions in a senate of eight judges: 'Das Bundesverfassungsgericht hat nicht zu prüfen, ob das Oberlandesgericht bei der Gestaltung seines Verfahrens und bei seiner Urteilsfindung allen Anforderungen gerecht wurde, die die Verfahrensordnung in ihrer zweckbedingten Ausrichtung auf die Verwirklichung des materiellen Rechts an den zur Entscheidung berufenen Richter stellt [...] Verfassungsrechtlich halten jedenfalls, wie dargelegt, die beanstandeten beweisrechtlichen Beurteilungen und Entscheidungen des Gerichts der Überprüfung stand'. / Translation: 'It is not up to the Bundesverfassungsgericht to assess whether the Oberlandesgericht has observed all the regulations that civil procedural law puts forth in order to fulfil its purpose of promoting the realisation of material law [...] From a constitutional standpoint, as mentioned, the legal assessment of the discovery proceedings and the corresponding decisions of the court are not objectionable'; Case 1 BvR 903/85 (BVerfG, Germany), Order 5 May 1987, BVerfGE 75, 302 (313, 314) [ECLI:DE:BVerfG:2018:rk20180918.2bvr074518]: '[Das BVerfG] prüft nur, ob die Rechtsanwendung Verfassungsrecht verletzt. Das ist insbesondere dann der Fall, wenn die Entscheidung darauf beruht, daß das Gericht Bedeutung und Tragweite eines Grundrechts verkannt hat [...] Verfassungsrecht ist also nicht schon dann verletzt, wenn eine Entscheidung am einfachen Recht gemessen objektiv fehlerhaft ist. Der Fehler muß gerade in der Nichtbeachtung von Grundrechten liegen...'. / Translation: '[The BVerfG] only examines whether the application of law violates constitutional law. This is especially the case when the court's decision is founded upon an erroneous assessment of the content and scope of a fundamental right [...] Constitutional law is thus not necessarily violated when the decision constitutes an infringement of non constitutional law. The error must pertain to the violation of fundamental rights...'.

¹⁸⁰ E Schumann, 'Keine Präklusion im Beschwerdeverfahren: Das Bundesverfassungsgericht als Bundesgerichtshof' (1982) 35(30) *Neue Juristische Wochenschrift* 1609; Roth (n 173) para 3 (15, 17, 18), both pointing out that the BVerfG risks becoming a regular court of appeal.

- 135 On the other hand, this dynamic development of fundamental guarantees presents unmistakable advantages as well. It is often necessary in order to account for divergences between the ECHR and the GG. This is the immediate result of the notion, that the ECHR is a living instrument, while at the same time, it is not granted constitutional stature in Germany. Moreover, under the 1871 *Reichsverfassung* (Imperial Constitution) there were no procedural guarantees at all, they existed only in procedural law itself.¹⁸¹ The 1919 *Weimarer Reichsverfassung* (Weimar Constitution) was unable to change the matter, its fundamental rights had little practical effect¹⁸², although some guarantees such as the right to a lawful judge were already existent. The BVerfG thus had to develop procedural guarantees with no existing jurisprudence to rely on and few explicit sources in the GG.
- 136 Brazilian Constitution is also lavish in offering an extensive list of fundamental rights. Actually, Art 5 establishes 78 fundamental rights, not to mention the so-called social and political fundamental rights. From this catalogue, it is possible to identify at least 45 fundamental guarantees related to civil or criminal procedure. Moreover, as previously warned, many other fundamental guarantees that impact Civil or Criminal Procedure are deduced, either by Courts or by Academics, from these previous ones.
- 137 In short, it is possible to classify all these rights into two main ideas: the right to effective and efficient judicial protection and the right to a due process of law. These core ideas may be decomposed into the other fundamental rights and, commonly, Brazilian authors tend to identify the first fundamental right with the plaintiff's position and the other with the defendant's condition. In other words, it is very common to suppose that while the plaintiff has the fundamental right to effective, speedy¹⁸³ and efficient protection from jurisdiction, the defendant has the right to due process of law. Furthermore, Brazilian authors also have long defended that those rights do not apply only to the judicial process but may also enlighten the whole legal system. In this sense, Brazilian authors follow the main ideas about due process of law used in other countries, particularly the original view developed in Anglo-American law, dealing with this clause in both a *procedural* and a *substantive* concept. In the same way, the right to efficient and effective protection is extended to cover administrative proceedings¹⁸⁴ and even private techniques of conflict resolution or private relations.¹⁸⁵ For this reason, it has become frequent, particularly in doctrine, to say that all these procedural guarantees –

¹⁸¹ Schumann (n 172) 3.

¹⁸² Schumann (n 172) 3, 4.

¹⁸³ Dealing with the right to a reasonable delay in Brazilian civil procedure, see M F Jobim, *O direito à duração razoável do processo* (2nd edn, Livraria do Advogado 2012) *passim*; E Venturi, 'Direito à duração razoável do processo' in C M Clève, *Direito constitucional brasileiro* (vol 1, RT 2014) *passim*.

¹⁸⁴ Case 32.559 (Supreme Court, Brazil), Judgment 9 April 2015 [Diário da Justiça, 09.04.2015]; Case 2.506 (Supreme Court, Brazil), Judgment 19 October 2016 [Diário da Justiça, 19.10.2016]. See also C R S Castro, *O devido processo legal e os princípios da razoabilidade e da proporcionalidade* (3rd edn, Forense 2005) 335-398.

¹⁸⁵ Case 158.215 (Supreme Court, Brazil), Judgment 07 June 1996 [Diário da Justiça, 07.06.1996]; Case 201.819 (Supreme Court, Brazil), Judgment 27 October 2006 [Diário da Justiça, 27.10.2006].

both concerning the plaintiff and the defendant – should be replaced by the notion of a ‘fundamental right to a fair trial’.¹⁸⁶ With this broad *umbrella guarantee*, the hard core of all those procedural fundamental rights earns a special *status*, deserving particular protection from the Constitution, in the sense that they cannot be violated *and* that they deserve an interpretation and an application that maximizes their practical force. Through this general idea, all those guarantees involved in the clause of a fair trial acquire a hierarchy that forbids ordinary legislation (and even amendments to the Constitution) to reduce or suppress their essence (Art 60 para 4, IV of the Constitution), and impose all the branches of Government to promote and to amplify their range of protection.

- 138 Although the fundamental right to a fair trial may be linked to a variety of other rights, it is, normally, associated at least with the following rights: a) right to be equal treatment; b) right to be heard; c) right to a full defence; d) right to produce evidence; e) right to an impartial judge; f) right to a foreseeable trustful and motivated judgment; g) right to a public and affordable and procedure, previously established by law; h) right to a reasonable delay; i) right to a full juridical assistance¹⁸⁷; j) right to the stability of the judgement (*res judicata*).¹⁸⁸ Many of these fundamental rights were reserved – by Brazilian former Constitutions – to criminal procedure. Nevertheless, the current Constitution expressly broaden the extent of these guarantees, to impact also the civil procedure and even the administrative proceedings.¹⁸⁹ On the other hand, as already mentioned, Brazilian courts give an even wider interpretation of these rights, imposing their observance including in private relations.

¹⁸⁶ Sarlet, Marinoni and Mitidiero (n 146) 615-617.

¹⁸⁷ This right includes the ideas of understanding one’s rights, the right to a public attorney (if one cannot pay the expenses of a private lawyer) and the right to judicial cost exemption, if needed.

¹⁸⁸ G F Mendes and P G G Branco, *Curso de direito constitucional* (16th edn, Saraiva 2021) 639; L G A Conci, ‘Comentário ao art. 5º, inc LIV ao LVII’ in P Bonavides *et al* (ed), *Comentários à constituição federal de 1988* (Forense 2009) 216-217. Many opinions from Brazilian Constitutional Court (*Supremo Tribunal Federal*) also include the right to an appeal in this list (vg, Case 35.054 (Supreme Court, Brazil), Judgment 09 May 2018 [Diário da Justiça, 09.05.2018]; Case 32.559 (n 184). In a very well known opinion, the Constitutional Court expressed that the due process clause includes ‘(a) direito ao processo (garantia de acesso ao Poder Judiciário); (b) direito à citação e ao conhecimento prévio do teor da acusação; (c) direito a um julgamento público e célere, sem dilações indevidas; (d) direito ao contraditório e à plenitude de defesa (direito à autodefesa e à defesa técnica); (e) direito de não ser processado e julgado com base em leis ‘ex post facto’; (f) direito à igualdade entre as partes; (g) direito de não ser processado com fundamento em provas revestidas de ilicitude; (h) direito ao benefício da gratuidade; (i) direito à observância do princípio do juiz natural; (j) direito ao silêncio (privilégio contra a autoincriminação); (k) direito à prova; e (l) direito de presença e de “participação ativa” nos atos de interrogatório judicial dos demais litisconsortes penais passivos, quando existentes’ (Case 111.567 (Supreme Court, Brazil), Judgment 30 October 2014 [Diário da Justiça, 30.10.2014]).

¹⁸⁹ The mention of ‘Administrative Proceedings’ in the text does not refer to any possible ‘judicial process’ involving Government. Brazil does not have an Administrative Jurisdiction separated from Civil Jurisdiction, as some other countries have. Those proceedings refer to the very typical administrative activities, which also have to obey those fundamental guarantees and may, in case of violation, be challenged in a civil action.

- 139 In Spain, Art 24 of the Constitution gave rise to a catalogue of rights. There is no doubt that all these rights are truly relevant. The right to defence is the first to admit a plurality of rights under its scope. The defence is unconceivable without effective judicial protection because otherwise, the defence is useless and irrelevant. A judge does not require that the parties actively intervene, because he/she could theoretically act on his own motion if the law didn't recognise the principle of disposition in a particular country. But if the parties actively intervene, which is desirable in a democratic state, defence is inseparable from judicial protection, being two sides of the same coin. Defence means protection, and protection means defence too. If judicial protection exists to prevent self-defence, it is obvious that judicial protection is the essential content of the right to defence of litigants. If only protection from tribunals can exist and not self-defence, judicial protection is the defence of the litigants before and by the judge.
- 140 In addition to this, it is clear that the defence needs evidence so that the judge can be convinced. As well as legal aid, taking into account that citizens are usually not familiar with either the law or the judicial process. Furthermore, the right to an interpreter also guarantees defence. Nobody can defend anything before a tribunal in a language that the judges cannot understand.
- 141 In addition, an adequate defence requires that both parties can use the same weapons in the judicial process. For this reason, the equality of the parties is an essential content of the right of defence. A defence in which one party has fewer opportunities than the other is not acceptable. Therefore, all these quoted rights can be covered by only one: the right of defence. And, of course, all these rights must exist when explaining the content of the right of defence.
- 142 Furthermore, the judge must not have external influences and has to be alien to the parties and also to the issue with which the proceeding is dealing. This is what the rights to an independent, impartial and established by the law judge are about. All this could be summarized as a sole right: the right to judicial independence. Independent from the other powers of the State (judge established by the law), from other judges or from the media or economic influence coming from relevant persons, and also independent from the parties (impartiality).
- 143 Finally, only three rights of the quoted twelve remain to be considered: the right to *res judicata*, the right to public trial and the right to trial without undue delay.
- 144 The right to *res judicata* is also a basic procedural right, although the constitutions have usually limited its recognition to the *non bis in idem* in the criminal process. Since ancient times – with the first legal precedent in the Code of Hammurabi it has been understood that jurisdiction should only be exercised once, out of respect for legal certainty. Appeals can be certainly established, but once a resolution is final, it is essential to preserve the legitimate confidence of whoever has won the process, assuring that the final ruling will

be by all means respected. For this reason, this right to the irreversibility of the judgment exists, as a prohibition of the repetition of judicial processes.

- 145 Dealing with the right to a public trial, it seems difficult to say that it is not an autonomous fundamental right, considering its enormous political significance from the historical point of view. It is a way to celebrate procedures that give transparency to justice, which is therefore highly desirable. But is also true that when it is restricted in an irrational way, it violates the right of defence, which redirects publicity to this last right. It is possible to conceive a trial held behind closed doors, or even with the concealment of some of the data out of respect, for example, for the right to privacy. But no adequate defence can be done if the judges do not disclose the data of the proceeding, in order to let the people control the regularity of it. Defence could be easily abolished if judicial processes were secret.
- 146 Finally, the right to a trial without undue delay is based on a wish, a desideratum, like so many others, such as a court without structural or personal deficiencies, or a process with a reasonable economic cost, or a not cumbersome drafting of judgments, or that the judicial facilities are built and conceived in a humane way for the litigants and those who work there, that is, that they are well communicated, safe and welcoming, with the basic services perfectly covered.
- 147 Spanish courts must respect these three rights: judicial independence, defence *and res judicata*. This is also, in part, the orientation of the Charter of Fundamental Rights of the European Union of 7 December 2000 (Art 47-50). A court in which these three basic rights are observed will be a court that may be perceived as *fair*.
- 148 Historical and political reasons also made many Latin American countries develop two sorts of fundamental rights, particularly in the procedural field. The first one refers to the main principles that are to govern the judicial process and have to be observed by legislators and by judges throughout the procedure (criminal, civil and, in some cases, even administrative procedures¹⁹⁰). These rights include the right to a fair trial, to due process of law, to be heard and the right to a speedy trial, among others.
- 149 But, aside from these traditional fundamental rights, Latin American constitutions also mention, as constitutional guarantees, some proceedings specially conceived to protect other basic rights. In fact, some countries reserve the term *guarantees* to those proceedings, established to offer judicial effective protection to rights, mainly to those expressed by the constitution.

¹⁹⁰ This is the case for Brazil, where Art 5, LV, of the Constitution states that ‘parties in judicial or administrative proceedings and defendants in general are ensured an adversary system and a full defense, with the means and resources inherent therein’.

- 150 This is the case not only of *habeas corpus*, known all over the world, but also of the Mexican *amparo*¹⁹¹ – reproduced in many other countries in South America, such as Argentina,¹⁹² Venezuela,¹⁹³ Colombia,¹⁹⁴ Chile¹⁹⁵ and Peru¹⁹⁶ – the Brazilian *mandado de segurança*¹⁹⁷ and some other specific figures, as the *habeas data*,¹⁹⁸ the *ação popular*¹⁹⁹ and the *mandado de injunção*.²⁰⁰
- 151 The need for these specific rules is commonly justified by the need to offer tools that turn really effective other fundamental rights. In the lack of these special proceedings, fundamental rights would be exposed to violation (mostly by the government); hence, stipulating these special proceedings directly in the constitutional text is considered to be a way to enforce other rights and to show their importance to the whole system.²⁰¹

7 SUBSTANTIVE/QUALITATIVE IMPACT OF THE CONSTITUTIONALISATION AND FUNDAMENTALISATION ON WELL-ESTABLISHED/TRADITIONAL PROCEDURAL GUARANTEES AND PRINCIPLES AND VICE VERSA

7.1 Introduction

- 152 The notion that human rights/fundamental guarantees involve a relation between the state and the citizen – in the sense that these guarantees offer some space of liberty or impose some duty to the state – is well known. On the other hand, particularly in procedural systems that are focused on dealing with private conflicts, it is very normal to think the civil procedural rules as a parties’ matter, meaning that those rules are offered to set the parties’ rights, duties and interest when in courts. This may point to the conclusion that fundamental rights and procedural rules operate in different fields and, therefore, don’t have any points of contact.

¹⁹¹ Art 25, the Constitution of Mexico (1917).

¹⁹² Art 43, the Constitution of Argentina (1853).

¹⁹³ Art 27, the Constitution of Venezuela (1999).

¹⁹⁴ In Colombia, it is called *acción de tutela* and is mentioned by Art 86, of the Constitution (1991).

¹⁹⁵ Art 21, the Constitution of Chile (1980).

¹⁹⁶ Art 200, II, the Constitution of Peru (1993).

¹⁹⁷ Art 5th, LXIX and LXX (collective writ of mandamus), the Constitution of Brazil (1988).

¹⁹⁸ Art 43, Constitution of Argentina; Art 5th, LXXII, the Constitution of Brazil.

¹⁹⁹ Art 5th, LXXIII of the Brazilian Constitution states that ‘any citizen has standing to file a popular action to annul an act injurious to the public property or to the property of an entity in which the State participates, to administrative morality, to the environment and to the historic and cultural heritage; except in the case of proven bad faith, the plaintiff is exempt from court costs and from the burden of paying the prevailing party’s attorneys’ fees and costs’.

²⁰⁰ Art 5th, LXXI, of the Constitution of Brazil mentions that ‘a writ of injunction shall be granted whenever the lack of regulatory provisions hinders the exercise of constitutional rights and liberties in addition to the prerogatives inherent in nationality, sovereignty and citizenship’.

²⁰¹ H Fix-Zamudio, ‘Les garanties constitutionnelles des parties dans le procès civil en Amérique Latine’ in M Cappelletti and D Tallon, *Fundamental guarantees of the parties in civil litigation* (Giuffrè 1973) 34-36; E Vescovi and E V Ferreira, ‘Les garanties fondamentales des parties dans la procédure civile em Amérique Latine’ in M Cappelletti and D Tallon, *Fundamental guarantees of the parties in civil litigation* (Giuffrè 1973) 103-107.

7.2 Basic Tension between a Principally Vertical Understanding of Constitutional and Human Rights and a Horizontally Shaped Party Process

- 153 For many countries, however, this is not an accurate conclusion. In fact, in Brazil – although this is a very controversial subject – it is very common to attach civil procedural rules with the idea of public law. Maybe it has to do with the fact that Brazil does not have an administrative jurisdiction; maybe it is related to the fact that some international movements (particularly from the 1960s and 1970s) – that defended the relation between procedural rules and the jurisdiction regulation – impacted Brazilian scholars. The fact is that, in Brazil, procedural rules are considered to be public law and are normally considered to be not a parties’ matter, but a state business. In this sense, recent procedural reforms created tools that allow case management by judges, stimulating the respect of precedents and amplifying the judge’s powers (Art 139 Brazilian Code of Civil Procedure, BRCCP) in conducting the case.
- 154 It is true that BRCCP states that parties may celebrate agreements to change the proceedings and even to change their burden, powers, rights and obligations.²⁰² Nevertheless, these agreements may not be considered valid if they violate a fundamental right, meaning that fundamental rights must be observed even against the parties’ will.²⁰³
- 155 As a consequence, it is difficult to see any incompatibility – at least in Brazil – between the horizontal orientation of human rights and the rules of civil procedure. Both are considered to deal with private and public interests. In fact, as we will see in the next topic, Brazilian law recognizes also the horizontal effect of fundamental rights, which turns the problem raised between the relation of human rights and procedural rules just an apparent contradiction.

²⁰² Art 190, BCCP: ‘when the action deals with rights that permit the resolution of the dispute by the parties themselves, the competent parties can lawfully stipulate changes in the procedure to adapt it to the specific requirements of the action and to agree upon their burden, powers, procedural rights and obligations, before or during the proceedings.

Sole paragraph. Whether *ex officio* or upon request, the judge shall control the validity of the agreements set forth in this article, denying their application only in the case of nullity or inclusion of unconscionable terms in adhesion contracts or in cases where any of the parties is in a manifest position of weakness’.

²⁰³ In this sense, see T N X Cabral, *Limites da liberdade processual* (2nd edn, Foco 2021) 145-146. Defending the preponderance of the parties liberty, see A P Cabral, *Convenções processuais* (JusPodivm 2018) 176 ff. Adopting an intermediate position, see R Godinho, *Negócios processuais sobre o ônus da prova no novo código de processo civil* (RT 2015) 251 ff. German law seems to present a different perspective. For further information, see H Quaritsh, ‘Der Verzicht im Verwaltungsrecht und auf Grundrechte’ in P Selmer and I von Münch (ed), *Gedächtnisschrift für Wolfgang Martens* (Berlin/New York, De Gruyter 1987) 407-417; G Robbers, ‘Der Grundrechtsverzicht’ (1985) Heft 25 *Juristische Schulung* 925 ff; G Sturm, ‘Probleme eines Verzichts auf Grundrechte’ in G Leibholz, H J Faller, P Mikat and H Reis (ed), *Menschenwürde und freiheitliche Rechtsordnung, Festschrift für Willi Geiger zum 65. Geburtstag* (Tübingen 197) 173 ff.

- 156 This seems to be, also, the Portuguese trend. As Professor Paula Costa e Silva points out, civil procedure was born as a matter for the parties (based on the idea of private autonomy) but developed towards the public field as state power grows. Despite this fact, as she concludes, ‘everything starts and always ends in bringing Justice to the case and for the individual case’.²⁰⁴ A clear consequence of this movement towards the public domain – while keeping the necessity to preserve the focus in the case – is that there is no incompatibility between a party shaped procedure and the incidence of fundamental rights in the proceedings’ development.
- 157 Therefore, the conflict between fundamental guarantees and a procedure focused on the parties’ autonomy seems to be more apparent than real. In fact, many systems, even presenting a clear inclination towards the prevalence of the parties leading, do not hesitate to impose fundamental guarantees during the proceedings.
- 158 Nevertheless, fundamental guarantees tend – overall in Europe – to be applied directly to the proceedings. They are commonly used as an interpretative guide that illuminates the best application of ordinary law. Since the proceedings are plainly regulated by law, the incidence of fundamental guarantees is mediated, serving primarily as an interpretative guide for this regulation. Yet, in some cases, in the absence of a specific rule to govern the proceedings, fundamental rights can be invoked as a master key, pointing out the correct direction that shall orientate the relation between parties and the judiciary. As a matter of fact, the French system authorizes the direct use of fundamental principles to grant access to justice. The *Conseil d’État* (Administrative Council, highest administrative court) ruled that in administrative matters by virtue of the general principles, *recours pour excès de pouvoir* (a court action for misuse of power) is always possible even if it is not provided for by a legal provision and even if the provisions exclude any appeal.²⁰⁵
- 159 Another interesting point in this field deals with the opposability of fundamental rights beyond the classical relation between the state and individuals. Some countries, indeed, recognize a *horizontal* effect of fundamental rights, considering that these guarantees may be applied in private relations or, in other words, that they are also binding between private parties in their private relations. In this sense, it is common to talk about the

²⁰⁴ ‘... fundado, na sua origem, em actos autónomos das partes, concebido como um domínio em que imperava a vontade das partes – basta recordar o pensamento de Josef Kohler que, numa visão que se diria, a partir das coordenadas de actualidade, muito moderna, fundava o processo na autonomia privada (*Dogma der Parteiherrschaft*) –, com o tempo o processo veio a estatizar-se, a publicizar-se, sendo compreendido como uma instância de funcionários, de altos funcionários, mas de funcionários. Muitas podem ser as causas deste fenómeno, mas, independentemente delas, uma circunstância resulta como impressiva: à medida que cresce e se concentra no Estado o poder das suas clássicas funções, na medida em que o aparelho estatal cresce e se burocratiza, a Justiça, mulher nascida da cabeça de um homem, parece transmutar a sua face: deixa de ser assunto das pessoas, daqueles que a ela acoem, para ser mais um assunto de Estado’ (P C e Silva, *Perturbações no cumprimento dos negócios processuais* (JusPodivm 2020) 28-29).

²⁰⁵ See Case 86.949 (State Council, France), Judgment 17 February 1950 [Recueil Lebon].

effects of fundamental guarantees in labour relations, in consumer relations and even in contract relations.

- 160 Brazil, following the example of Portugal,²⁰⁶ recognizes this horizontal effect of fundamental guarantees as a whole. Thus, procedural guarantees – such as the due process clause, the right to be heard or the right to a reasonable delay – may be imposed in private relations, such as corporate law²⁰⁷. These rights have also to be preserved in ‘private proceedings’, such as arbitration.²⁰⁸
- 161 In this sense, fundamental guarantees are to be applied *directly* to private relations, regardless of the absence of the state on this ground.
- 162 Other countries, such as Germany, work with a different approach. Since fundamental rights are thought to deal directly only with public entities, private relations are out of their scope. Nevertheless, fundamental guarantees present a *Ausstrahlungswirkung* (radiating effect) that affects *indirectly* private relations. This effect means that private rules have to be interpreted in accordance with fundamental rights, mainly when it is necessary to apply undetermined legal concepts and general clauses.²⁰⁹

8 FUNDAMENTAL GUARANTEES AS A NEVER-ENDING STORY

- 163 The relationship between civil procedure and fundamental rights is in constant reconstruction. Many fundamental principles changed their scope and focus, many others suffered from a process of deconstitutionalization (or defundamentalization) and new fundamental rights tend to be recognized.

8.1 The New Contours of Classic Fundamental Rights

- 164 In fact, one can easily realize that many concepts created in the past have a different meaning nowadays. For instance, the notion of due process of law changed radically over the years. From a simple requirement, presented by the Magna Charta, of a ‘lawful judgment of his peers or by the law of the land’, this fundamental guarantee evolved to

²⁰⁶ Portuguese Constitution (1976) prescribes, in its Art 18, that ‘the constitutional precepts with regard to rights, freedoms and guarantees are directly applicable and are binding on public and private entities’. Even though Brazilian Constitution does not have a similar rule, the Supreme Court has recognized, for a long time, the horizontal effect of fundamental rights *directly* applied to private parties (vg, Case 639.138 (Supreme Court, Brazil), Judgment 18 August 2020 [Diário da Justiça, 16.10.2020]; Case 1.008.625 (Supreme Court, Brazil), Judgment 17 March 2017 [Diário da Justiça, 19.04.2017]).

²⁰⁷ Brazilian Supreme Court ruled that it is illegal, for example, to exclude a business partner from a company without offering him the right to defence and the right to be heard (Case 201.819 (Supreme Court, Brazil), Judgment 11 October 2005 [Diário da Justiça, 27.10.2006]; Case 158.215 (n 185).

²⁰⁸ Brazilian Arbitration Act qualifies as void any arbitral award that disrespects the principles of ‘due process of law, equality of the parties, impartiality of the arbitrator and that of his judicial discretion’ (Art 21, para 2 and Art 32, VIII).

²⁰⁹ K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20 edn, C F Müller 1995) 155 ff.

embrace a number of specific requirements, extrapolating the burdens of civil procedure. In the US, for example, the due process clause is considered to have both a *procedural* and a *material* face. The former encompasses typical procedural rights, such as the right to an impartial judge or the right to be heard. The latter spreads its power beyond the procedural field, reaching the right to participate in the political process (right of voting, of association, and free speech),²¹⁰ the right to privacy²¹¹ and the right to marry an individual of the same sex.²¹²

- 165 Another important example of this resignification can be found in the right to be heard. In the past, it represented just the right to be informed and the possibility to react before a certain demand (*audiatur et altera pars*). Nowadays, however, this right is much more sophisticated and complex. It is considered to embody the right to influence, and, in some cases, it may even encompass the duty to cooperate.²¹³ Adopting explicitly this notion of the right to be heard, the Italian Code of Civil Procedure (Art 101 ITCCP) states that judges cannot decide any cause if the claim is not served on the defendant and if he is not confronted. It also mentions that even in relation to matters that judges could examine *ex officio*, they shall not decide these questions prior to listening to the parties. A similar rule can be found in the Portuguese Code of Civil Procedure (Art 3 no 3), in the French Code of Civil Procedure (Art 16) and in Brazilian Code of Civil Procedure (Art 9 and 10).
- 166 Something similar happened to the right to an impartial judge. In many systems, this guarantee includes the right to a judge previously designated by law and forbids the use of courts *ad hoc*.²¹⁴ Still, the use of technology in civil procedure brought a genuine revolution in this area. Physical frontiers disappeared and the notion of territory jurisdiction has radically changed. The growing importance of judicial cooperation and the general acceptance of the court's case management powers brought new light to this subject. The possibility to consolidate proceedings, to decide the order in which issues are to be tried,²¹⁵ or to transfer pretrial proceedings to a different judge or

²¹⁰ *US v Carolene Products*, No 640 (Supreme Court, US) [304 US 144 (1938)].

²¹¹ *Griswold v Connecticut*, No 496 (Supreme Court, US) [381 US 479 (1965)].

²¹² *Obergefell v Hodges*, No 14-556 (Supreme Court, USA) [576 US 644 (2015)].

²¹³ See, V Vigoriti, *Garanzie costituzionali del processo civile* (Giuffrè 1970) *passim*; A P Cabral 'Contraditório (princípio do)' in R L Torres, E T Kataoka and F Galdino (org), *Dicionário de princípios jurídicos* (Elsevier 2011) *passim*; D Mitidiero, *Colaboração no processo civil* (4th edn, RT 2019) 107. In fact, German jurisprudence from the *Bundesverfassungsgericht* considers that the *Anspruch auf rechtliches Gehör* (Art 103 *Grundgesetz*), in its modern approach, has to be understood as the right to influence judges on the matters of the case, avoiding any surprising judgements (Case 1 BvR 33/83 (BVerfG, Germany), Order 8 October 1985, *BVerfGE* 70, 288-293; U Battis and C Gusy, *Einführung in das Staatsrecht* (3rd edn, De Gruyter 1991) 363-364).

²¹⁴ Cf Art 24, Spanish Constitution (1978); Art 5th, XXXVII, Brazilian Constitution.

²¹⁵ As, for example, states English Civil Procedure Rules (Part 3).

judges²¹⁶ demonstrate that the right to an ordinary judge predetermined by law has to be revisited.²¹⁷

8.2 The Downgrade of Fundamental Guarantees

- 167 From another point of view, some principles that were considered fundamental rights have lost their rank, or, at least, have suffered from a significant devaluation.
- 168 This is the case of the right to a public trial. This is also the case of the right to a public hearing. With the progress of digitalisation and the use of technology in civil procedure, these rights tend to lose their significance. Even though many constitutions still preserve these rights as fundamental guarantees, the progressive use of digital files and the internet to perform hearings in civil procedure makes it almost impossible to preserve the original shape of the rights aforementioned. The need to be logged in the system and some specific requirements to use and to participate in this cybernetic universe turns impracticable to maintain the same publicity known before.
- 169 The concept of a public hearing and public proceedings, accessible to all, has suffered a major modification. And this transformation is not only a product of a new view about the role of publicity in civil procedure but also a consequence of this natural evolution of proceedings towards the *fourth industrial revolution* and the world that it created. Besides, the introduction of technology in civil procedure brings new concerns in countless fields, such as the protection of data and of privacy. Offering access to all claims through the internet means allowing people from all over the world to scrutinize other's life – and maybe some personal data or troubled matters, especially in family cases or business law –, regardless of any reasonable justification. This circumstance shows the necessity of a new view of the publicity principle, updated to current times.
- 170 In Brazil, for instance, the use of electronic records is a reality²¹⁸ and it is possible to examine almost every case or judicial record – in any jurisdiction in Brazil – just by accessing the proper court webpage. This circumstance generates an important conflict between the right to privacy and the right to public information and is not very easy to deal with. Balance between these two fundamental values demands a very precise approach and commonly tends to tip to one side of the scale or the other.
- 171 The use of electronic records also poses difficulties for the access to justice guarantee.²¹⁹ The use of videoconference tools for hearings and even the priority for electronic

²¹⁶ This is allowed, for example, by the Multidistrict Litigation Panel, used in USA (28 USC, para 1407). Something similar is authorized by Brazilian Code of Civil Procedure (Art 69).

²¹⁷ See, for instance, A P Cabral, *Juiz natural e eficiência processual* (RT 2021) *passim*.

²¹⁸ In 2018, 83.8% of all claims initiated in Brazilian Justice System were processed in electronic records. In 2019, this number increased to 90.0%. In 2019, only 27% of all causes still used physical records.

²¹⁹ Recently, the National Justice Council decided that, from 1st March 2022, only electronic records will be allowed in Brazilian Justice <https://www.cnj.jus.br/judiciario-vai-receber- apenas-processos->

procedure can make access to these instruments to some specific groups of people more complicated, particularly to those who have limitations in using computers and their resources. In fact, Brazil has an incredible number of lawyers²²⁰ – and the disparity among them is also great – and it is possible to say that part of them do not have adequate intimacy with computers or the internet. Moreover, the Brazilian population suffers from considerable social inequality²²¹, which also impacts, evidently, the way people have access and knowledge to use computers, the internet and, as a consequence, the judicial system. Other than that, Brazil, like many other poor countries, still has problems spreading internet access to all its territory, and vast portions of the country simply have no access at all to this technology.

- 172 In fact, the use of technology in civil procedure imposes several questions about the survival of some fundamental guarantees. Even when thinking about the participation of parties and their lawyers, technology may impose a significant change in the way legislation shapes this fundamental right.
- 173 As Brazilian authors²²² considered, in order to accelerate the cases, the judiciary has recently created the possibility of performing trial sessions without the immediate participation of parties and lawyers; the trials occur, in these sessions, through a mere internal discussion carried out by the judges about their decisions. This results in the direct non-compliance with the constitutional guarantee of publicity of trial sessions (Art 93 item IX of the Brazilian Constitution). Furthermore, still, according to the same authors, judges tend to avoid authorizing oral statements from lawyers, as well as to decline the use of testimonial evidence (often replaced by a recording or register of the statements).
- 174 These side effects are symptomatic of a tendency to rush over fundamental guarantees of the parties, jettisoning parties and lawyers from the judicial debate.
- 175 This absence of immediacy also brings the possibility that judges tend not to pay enough attention to arguments presented by parties and their lawyers. Since there is no real debate, the richness of this effective exchange of information and points of view tends to be lost, leading to poorer reasoning and bad decisions.

eletronicos-a-partir-de-marco-de-2022/ accessed 3rd July 2024. This means that only through this mechanism new cases will be presented to the Judicial system.

²²⁰ According to official data, Brazil has currently almost one million three hundred registered lawyers <https://www.oab.org.br/institucionalconselhofederal/quadroadvogados> accessed 3rd July 2024.

²²¹ Some researches mention that ‘Brazil’s six richest men have the same wealth as poorest 50 percent of the population; around 100 million people. The country’s richest 5 percent have the same income as the remaining 95 percent’ <https://www.oxfam.org/en/brazil-extreme-inequality-numbers> accessed 3rd July 2024.

²²² Cf H V M Sica, ‘The “new normal” of Brazilian justice: permanent impacts on the Judiciary and on procedures’ (2020) GENJURÍDICO <https://blog.grupogen.com.br/juridico/areas-de-interesse/processo-civil/impactos-atuais-futuros-pandemia/> accessed 3rd July 2024.

- 176 In this sense, although fundamental rights may benefit from the use of technology,²²³ it may also impose a severe restriction on the right to be heard and to participate effectively in the proceedings. This is a true master key for modern civil procedure and its restriction is, undoubtedly, a major concern.
- 177 Finally, one may easily question the subsistence of the right to a reasoned decision in a reality that deals much with artificial intelligence and other similar tools.
- 178 In fact, the right to know the grounding of a judgement has been undermined in many countries for different reasons – mainly the need to accelerate the proceedings. Germany (Section 313a of the Code of Civil Procedure), for instance, mentions situations in which reasons could be omitted in certain judgements.
- 179 Nevertheless, this new understanding of the importance of the reasons for a judgement presents a completely different perspective with the increasing use of artificial intelligence. In most countries, artificial intelligence (AI) is being used as an instrument to sort cases into categories or even as a means to suggest precedents or older opinions that may guide the decision.²²⁴ With time, the main purpose of these systems is to apply methods of machine learning, enabling the software, in the future, to suggest arguments for the decision. In such cases, is it still possible to think about the reasoning of a judgment? Could the grounds of a ruling be given by a computer? Can this machine be taken as the judge (the impartial judge) of the case?
- 180 Such questions, undoubtedly, demonstrate that some of the classical fundamental guarantees tend to lose their importance, or at least to radically reshape their substance. These changes, of course, have much to do with the course of history and society's yearnings, in a constant and endless movement of rethinking fundamental rights.

8.3 What Does the Future Hold? New Fundamental Guarantees?

- 181 It is always problematic to make predictions, particularly in the legal field. But, in the everlasting movement aforementioned, new fundamental rights may for sure emerge.

²²³ E Cabraser and S Issacharoff, 'The Participatory Class Action' (2017) 92(4) New York University Law Review 846, especially 856, 857.

²²⁴ See, among many others, J N Fenoll, *Inteligencia artificial y proceso judicial* (Marcial Pons 2018); M Dymitruk, 'The right to a fair trial in automated civil proceedings' (2019) 13(1) Masaryk University Journal of Law and Technology 27, *passim*; P H S Lucon, 'Procedural law and artificial intelligence' in P H S Lucon *et al* (ed), *Direito, processo e tecnologia* (RT 2020) 547-552.

- 182 Maybe in a few years it will become normal to hear about the right to an impartial *eCourt*,²²⁵ to an impartial machine²²⁶ or an impartial software.²²⁷ If these machines and this software, more and more, are used to help (and in some cases to substitute) the judge's work, it seems to be natural that their impartiality are to be challenged and needs to be preserved. Should not this neutrality be raised as a fundamental guarantee?
- 183 From another point of view, the increasing importance of mass society and the violation of its rights bring attention to collective rights and their protection. Many countries recently incremented the debate over collective redress, leaving the comfort of individualism in civil procedure as the only way to solve disputes. Whether through class action (or other similar proceedings) or through other instruments of collectivization,

²²⁵ About this subject, see R Susskind, *Online courts and the future of Justice* (Oxford University Press 2019) *passim*. See also L Fux, 'Juízo 100% digital e a vocação da moderna atividade jurisdicional' in L Fux, H Ávila and T N X Cabral (coord), *Tecnologia e justiça multiportas* (Foco 2021) *passim*; R V B Cueva, 'Integração dos meios de resolução de conflitos online (ODR) aos sistemas de justiça' in D Nunes, I Werneck and P H S Lucon (org), *Direito processual e tecnologia* (JusPodivm 2021) *passim*; G Paro, R D Marques and R Q Duarte, 'On-line dispute resolution (ODR) e o interesse processual' in P H S Lucon *et al* (coord), *Direito, processo e tecnologia* (RT 2020) *passim*; D Becker and B Feigelson, 'Acesso à justiça para além de Cappelletti e Garth: a resolução de disputas na era digital e o papel dos métodos online de resolução de conflitos (ODR) na mitigação da crise de justiça no Brasil' in P H S Lucon *et al* (coord), *Direito, processo e tecnologia*, (RT 2020) *passim*. The crescent use of *eCourts* is unquestionable, whether to adjudicate cases or to mediate disputes. In this field, it is very interesting the idea adopted by the Civil Resolution Tribunal, in Canada (<https://civilresolutionbc.ca/> accessed 3rd July 2024). It offers, as a first filter a 'Solution Explorer', which suggests ways to solve the dispute, offering legal information, and classify the controversy, presenting the correct online application form. Then, it conducts the claimant to the following steps, turning the proceeding into an understandable appliance and helping, with the use of AI, solve the dispute in the best way for parties.

²²⁶ As Brazilian former Supreme Court Chief Justice, Luiz Fux, stated, 'no doubt that the more autonomous the robot is, the less it can be seen as a simple instrument in the hands of other players, such as the manufacturer, the operator, the owner, the user, and others, when talking about civil liability'. Also, in his words, 'given that biases present themselves as an intrinsic characteristic of human thinking, it can be concluded, likewise, that an algorithm created by biased human beings will probably suffer from the same "evil", not on purpose, but due to the information provided to the system. In this way, so-called algorithmic biases arise when machines behave in ways that reflect the implicit human values involved in programming, thus skewing the results' <https://www.jusbrasil.com.br/noticias/fux-mostra-beneficios-e-questionamentos-da-inteligencia-artificial-no-direito/685433315> accessed 3rd July 2024. See also L E Fachin and R Z M da Silva, 'Direito, inteligência artificial e deveres: reflexões e impactos' in L Fux, H Ávila and T N X Cabral (coord), *Tecnologia e justiça multiportas* (Foco 2021) *passim*.

²²⁷ See, A Cabral, 'Processo e tecnologia: novas tendências' in P H S Lucon *et al* (coord), *Direito, processo e tecnologia* (Revista dos Tribunais 2020) 89 and 92. Resolution 332, from the National Justice Counsel, deals with AI in Judicial System. In its Art 25, it states that 'any computational solution from Judicial System that uses models of Artificial Intelligence shall assure total transparency in accountability, so as to reassure the positive impact to final users and society'. For a bird's eye view on this topic in other countries, see, for instance, B Barraud, 'Un algorithme capable de prédire les décisions des juges: vers une robotisation de la justice?' (2017) 1 Les Cahiers de la Justice 121, *passim*; T Sourdin, 'Judge v Robot? Artificial intelligence and judicial decision-making' (2018) 41(4) University of New South Wales Law Journal 41, *passim*. N B Martín, 'A « atuação judicial automatizada » em exame: juiz robô versus juiz humano' in D Nunes, I Werneck and P H S Lucon (org), *Direito processual e tecnologia* (JusPodivm 2021) *passim*.

the logic of dealing with mass violation with a collective technique gains a solid and indisputable space.

- 184 In accordance with this tendency, it is natural to think that collective redress assumes the rank of a constitutional guarantee, as much as the individual right to access to justice already is.²²⁸
- 185 Some constitutions seem to realize the importance of this fundamental right to a *collective access to justice*, mentioning some specific (or a more general) guarantee in this area. In Brazil, for example, Art 5, XXXV of the Constitution, states that ‘the law shall not exclude any injury of threat to a right from review by the Judiciary’. The text is considered to be a great evolution in comparison with the similar rule from the former constitution. According to Art 150 para 4 of this former constitution (from 1967), ‘the law shall not exclude from review by the Judiciary any injury to individual right’. As one can easily verify, the current rule excluded the expression *individual*, and this is understood as a clear intention to offer fundamental status to collective redress in Brazil.
- 186 Still more explicit are the Constitutions of Colombia (Art 88), Ecuador (Art 11, 1) and Paraguay (Art 38), for instance, where the right to a collective redress is already granted.
- 187 In any case, the presence of these rights in some constitutions, as an implicit or explicit guarantee, and the increased debate on the use of this technique, is a clear sign of the growing importance of this matter, which can shortly assume a fundamental rank.

²²⁸ In German law, the main concern regarding this whole idea is how to develop methods of collective redress in such a way, that is compatible with procedural guarantees, especially the right to be heard (Art 103 para 1 GG).

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BRCCP	Brazilian Code of Civil Procedure
BVErfG	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
Cass. Ass. Plén.	Court of cassation, Plenary Assembly [France]
Cass. Ch. mixte	Court of cassation, Mixed chamber [France]
Cass. Civ. 1	Court of cassation, 1st Civil Chamber [France]
CC	<i>Conseil Constitutionnel</i> (Constitutional Council) [France]
CE	<i>Conseil d'État</i> (Highest administrative court) [France]
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
CFEU	Charter of Fundamental Right of the European Union
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
coord	coordinator
CRPD	Committee on the Rights of Persons with Disabilities
DDH	Declaration of Human and Civic Rights (France)
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECTHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
<i>et al</i>	et alia
etc	et cetera
EU	European Union
EUR	Euro

ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
GG	<i>Grundgesetz</i> (German Federal Constitution)
ibid	<i>ibidem</i> (in the same place)
ICCPR	International Covenant on Civil and Political Rights (UN)
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
ITCCP	Code of Civil Procedure (Italy)
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
KPCP	Civil Procedure Code (Korea)
mn	marginal number
n	footnote (internal, ie, within the same chapter)
no	number/numbers
org	organiser
para	paragraph/paragraphs
<i>passim</i>	here and there
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
PRC	People's Republic of China
pt	part
RCP	Rules of Civil Procedure (Korea)
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
trans/tr	translated, translation/translator
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child (UN)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America

USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

- Charter of Fundamental Rights of the EU (2000), OJ C, 18. 12.2000 (2000/C 364/01)
- Convention on the Rights of Persons with Disabilities (2007), UN Treaty Series, Vol. 2515, 3
- Convention on the Rights of the Child (1990), UN Treaty Series, Vol. 1577, 3
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJ L 297, 4.11.2016, p. 1–8*
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14 (1950), Council of Europe, ETS 5
- International Covenant on Civil and Political Rights (1966), UN Treaty Series, Vol. 999, 171
- Statute of the International Court of Justice (1945), UN Treaty Series 33, 993
- Treaty on the Functioning of the European Union (Consolidated Version) (2007), 2008/C 115/01
- Universal Declaration of Human Rights (1948), UN 217 A (III)

National

- Arbitration Act 1996 (Brazil)
- Code of Civil Procedure 2015 (Brazil)
- Code of Civil Procedure 1877 (Germany)
- Code of Civil Procedure 1940 (Italy)
- Code of Civil Procedure 1960 (Korea)
- Code of Civil Procedure 1975 (France)
- Code of Civil Procedure 2013 (Portugal)
- Constitucion 1992 (Paraguay)
- Constitution 1789 (USA)
- Constitution 1853 (Argentina)
- Constitution 1891 (Brazil)

Constitution 1917 (México)
Constitution 1947 (Italy)
Constitution 1948 (Korea)
Constitution 1958 (France)
Constitution 1967 (Brazil)
Constitution 1976 (Portugal)
Constitution 1978 (Spain)
Constitution 1980 (Chile)
Constitution 1988 (Brazil)
Constitution 1991 (Colombia)
Constitution 1993 (Peru)
Constitution 1993 (Russia)
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Constitution 2008 (Ecuador)
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Human Rights Act 1998 (UK), C. 42
Magna Carta 1215 (England)
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Oleificio Borelli v Commission, Case C-97/91 (CJEU), Judgment 3 December 1992, I-6313 [ECLI:EU:C:1992:491].

Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal II), Case C-106/77 (CJEU), Judgment 9 March 1978 [ECLI:EU:C:1978:49].

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case C-11/70 (CJEU), Judgment 17 December 1970 [ECLI:EU:C:1970:114].

P v S and Cornwall County Council, Case C-13/94 (CJEU), Judgment 30 April 1996 [ECLI:EU:C:1996:170].

Lisa Jacqueline Grant v South West Trains Ltd., Case C-249/99 (CJEU), Judgment 17 February 1998 (ECR) [ECLI:EU:C:1998:63].

DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, Case C-279/09 (CJEU), Judgment 22 December 2010 (ECR) [ECLI:EU:C:2010:811].

Erich Stauder v City of Ulm – Sozialamt, Case C-29/69 (CJEU), Judgment 12 November 1969 (ECR) [ECLI:EU:C:1969:57].

Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne, Case C-673/16 (CJEU), Judgment 5 June 2018 [ECLI:EU:C:2018:385].

Yassin Abdullah Kadi and Al. Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Cases C-402/05P and C-415/05P (CJEU), Judgment 3 September 2008 [ECLI:EU:C:2008:461].

Lutticke v Commission, Case C-4/69 (CJEU), Judgment 28. April 1971 (ECR), [ECLI:EU:C:1971:40].

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Unectef v Heylens, Case C-222/86 (CJEU), Judgment 15 October 1987 [ECLI:EU:C:1987:442].

Flaminio Costa v E.N.E.L., Case C-6/64 (CJEU), Judgment 15 July 1964 [ECLI:EU:C:1964:66].

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J. Nold, Kohlen v Commission, Case C-4/73 (CJEU), Judgment 14 May 1974 [ECLI:EU:C:1974:51].

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HM Treasury and other appeals v Ahmed and others (No 1) (Supreme Court, UK) [2010] UKSC 2.

Súmula Vinculante, no 25 (Supreme Court, Brazil), Judgment 16 December 2009 [Diário de Justiça, Vol. 238, 2009, 1]).

NV Algemene transport-en Expeditie Onderneming van Gend & Loos v Netherlands, Case 26-62 (CJEU), Judgment 5 February 1963 [ECLI:EU:C:1963:1].

Case no 86-207 (Constitutional Council, France), Judgment 25 and 26 June 1986 [ECLI:FR:CC:1986:86207DC].

Case Sarran, Levacher et autres (State Council, France), Judgment 30 October 1998 (AJDA 1998, 1039).

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Griswold v Connecticut, No 496 (Supreme Court, US) [381 US 479 (1965)].

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International Shoe Co. v Washington (Supreme Court, US) [326 US 310, 319 (1945)].

Murray's Lessee v. Hoboken Land & Improvement Co. (Supreme Court, US) [59 US (18 How.) 272, 276].

Obergefell v Hodges, No 14-556 (Supreme Court, USA) [576 US 644 (2015)].

R v Lord Chancellor ex p Witham (QB, England) [1998] 575.

R v Secretary of State for the Home Department ex p Leech (QB, England) [1994 QB 198] 210 A.

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