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# SAFEGUARDS OF FAIR TRIAL IN CONSTITUTIONAL COURT PROCEEDINGS: EFFICIENT ACCESS TO JUSTICE AS A KEY FACTOR[1]

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*The right to fair trial, which is usually described as an essential starting point of the protection of human rights, as a basic safeguard of the rule of law, as a general principle of EU law and as a certain quality of procedure, plays a crucial role in defining the framework of judicial proceedings in the European states both in criminal and civil matters. The current paper examines how the concept of fair trial applies to constitutional court proceedings, with special regard to the safeguards of an efficient access to such procedures. The study raises questions like: What cornerstones for an efficient access can be identified in the case-law? What are the most typical obstacles of obtaining a decision by a constitutional court? How can a more efficient access to these procedures be promoted? The analysis offers a synthesis of the theoretical background and the general requirements identified by the relevant international and European fora (complemented by references to the related jurisprudence of the constitutional courts of certain EU Member States). This way the study can give useful insights not only into the understanding of the concept of fair trial but also into the possibilities of enhancing the efficiency of constitutional court proceedings.*

Keywords:
fair trial, constitutional court procedures, access to justice, efficiency, legal aid, admissibility

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## INTRODUCTION

The right to fair trial, which is usually described as an essential starting point of the protection of human rights,[2] as a general principle of EU law,[3] as a basic safeguard of the rule of law[4] and as "the right to a certain type of procedure – a fair procedure – when decisions affecting individuals in a certain way are taken",[5] is a basic point of reference that should guide any analysis of legal procedures or procedural laws. The reason for this central role of the right to fair trial is that "because without this one right, all others are at risk; if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights".[6]

Article 6 Paragraph (1) of the European Convention on Human Rights (hereinafter: ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) as well as the attached case-law by the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU), respectively, play a crucial role in defining the framework of judicial proceedings in the European states both in criminal and civil matters. The literature deals extensively with the question how international fora and national constitutional courts interpret and apply the safeguards stemming from this right;[7] and the compliance with the requirements of fair trial is a basic point of reference in the examination of specific (civil, criminal or administrative) procedural laws.[8] Due to recent developments, primarily the Covid–19 pandemic, the questions of applying or adapting the elements of fair trial to emergency situations seem to be in the centre of attention as well. [9]

Whether certain elements of fair trial are applicable – besides to ordinary court proceedings – also to constitutional court proceedings, and how the efficient access to

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2 Bårdsen 2007: 100–101. Similarly: Clayton–Tomlinson 2010.

3 "[T]he right to a fair trial, which derives inter alia from Article 6 ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU […]." CJEU, C-40/12 P, Gascogne Sack Deutschland GmbH v. European Commission, ECLI:EU:C:2013:768, para. 28.
"As regards the right to a fair trial, to which reference is made in the question referred, it must be recalled that that right results from the constitutional traditions common to the Member States […]" CJEU, C-619/10, Trade Agency Ltd v. Seramico Investments Ltd, ECLI:EU:C:2012:531, para. 52; Similarly, CJEU, C-682/15, Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes, ECLI:EU:C:2017:373, para. 44.

4 The Constitutional Court of the Republic of Croatia pointed out that the right to a fair trial guarantees the protection from the arbitrariness of the courts and other State bodies when deciding on a matter. Decision of the Constitutional Court of the Republic of Croatia U-III-3421/2021, 12 May 2022 [ECCN HR-0347]. The Hungarian Constitutional Court held that "[a] judicial judgement, which neglects the law in force without any due ground is arbitrary and conceptually unfair: it is incompatible with the principle of the rule of law". Decision of the Hungarian Constitutional Court 20/2017 (VII. 18.) AB [ECCN HU-0135], Reasoning [23].

5 Settem 2016: 11.

6 Robertson 2004: 86.

7 E.g. Grabenwarter 2022; Spano et al. 2020; Bobek – Adams-Prassl 2020; Kaufmann–Hausammann 2017; Peters–Altwicker 2012; Francioni 2007; Summers 2007.

8 E.g. Bell–Lichère 2022: 90–127; Kramer et al. 2021; Teleki 2021; Soyer 2019; Bright 2013; Rozakis 2004.

9 E.g. Matyas et al. 2022; Reiling–Contini 2022; Kamber 2022; ECLAC 2021.

such proceedings can be safeguarded, are rather seldom posed questions. Therefore, the current paper wishes to put forward these specific aspects of the implementation of the right to fair trial.

## BACKGROUND AND METHODOLOGY

The research question is based on the phenomenon that in the last couple of years growing attention is paid to constitutional court proceedings both at legal and political level. Firstly, the proper functioning of the judiciary (understood in a broader sense, including constitutional justice),[10] especially in emergency situations,[11] is crucial as it offers the necessary safeguards against infringement of rights and ensures the review[12] relating to the lawfulness of emergency measures.[13] Secondly, the growing role of efficient access to constitutional court proceedings, primarily constitutional complaint procedures, might also be based on the fact that they are often considered as preconditions of bringing a case to the ECtHR,[14] and thus they play an intensive role in the international system of human rights protection as well. Thirdly, international political mechanisms like the European Commission's Rule of Law Report[15] or the monitoring procedure in the framework of the Council of Europe[16] put significant emphasis on the role of constitutional courts in the

10 As the Venice Commission stated, "judicial review of emergency measures is another guarantee against the risks of the abuse of power by the executive. […] The judicial system must provide individuals with effective recourse in the event State authorities interfere with their human rights. Judicial review may be carried out by civil or administrative courts as well as criminal courts when dealing with penalised violation of emergency legislation/measures. The highest courts, especially the constitutional court (or a court with an equivalent jurisdiction), where these exist in the country, should also be involved." Venice Commission 2020a: 21.

11 In this regard, see e.g. Váradi 2022; Krans–Nylund 2021; Matyas et al. 2022; Rozhnov 2020.

12 As the Venice Commission stated, "[t]he concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive […]. However, emergency rule is a legal regime governed by the principles of legality of administration, based on the rule of law. The rule of law means a system where governmental agencies must operate within the framework of law, and their actions are subject to review by independent courts. In other words, the legal security of individuals should be guaranteed." Venice Commission 2020b: 18–19. Furthermore Council of Europe 2020: 3.

13 This role is not only important from the abstract constitutional point of view or from the point of view of human rights protection, but it has also economic relevance. As regards the specificities of the business sector, litigation related to contract breaches, employment issues, bankruptcy filings and tax payments and legal needs relating to the rapidly-evolving emergency regulations on business conduct trigger a growing need for an efficient adjudication of the constitutionality of the newly introduced measures. OECD 2020: 6.

14 E.g. in the *Szalontay v. Hungary* case [ECtHR, (71327/13), 12 March 2019], the ECtHR ruled that the constitutional complaint before of the Hungarian Constitutional Court can be seen as an effective domestic remedy that shall be exhausted before initiating a procedure at the Strasbourg court, as required by Article 35 of the ECHR.

15 European Commission 2022.

16 See e.g. the activities of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, like: https://pace.coe.int/en/news/8921/montenegro-a-fully-functional-constitutional-court-must-be-put-in-place-without-delay-say-pace-co-rapporteurs

system of checks and balances as indicators of the protection of democracy, rule of law and fundamental rights. Taking these tendencies into account, the question is even more justified, whether and how the safeguards derived from the right to fair trial apply to these proceedings, primarily to constitutional complaint procedures.

The current paper intends to give an overview on this question with special attention to the requirement of an efficient access to justice. The research is based on the examination of the relevant laws and of the case-law of the constitutional courts in Hungary, Slovakia, Romania, the Czech Republic and Croatia,[17] – completed with findings from the secondary literature. Firstly, the paper summarises the essential elements of the right to fair trial based on the case law of the ECtHR, CJEU as well as the above mentioned constitutional courts, and identifies the applicability of their findings with regards to the specificities of the constitutional court proceedings. The study raises the following questions: What cornerstones for an efficient access can be identified in the case-law? What are the most typical obstacles of obtaining a decision by a constitutional court? How can a more efficient access to these procedures be promoted? This way the study can give useful insights not only into the understanding of the concept of fair trial but also into the possibilities of enhancing the efficiency of constitutional court proceedings.

## THE CONCEPTUAL ELEMENTS OF FAIR TRIAL AND THEIR APPLICABILITY TO CONSTITUTIONAL COURT PROCEDURES

A basic feature of the right to fair trial is that it is comprised of several elements, which can be defined on the basis of the normative provisions of the ECHR and the Charter and which have been further elaborated in the relevant case-law, but which do not form a closed list:[18] e.g. the rights of the defence, the right of access to a tribunal[19] and the principle of equality of arms (also including a certain connection to the principle of respectful treatment),[20] the right to be advised, defended and represented, the adversarial principle, the independence and impartiality of the judiciary,[21] the right to a public procedure, right to a decision within a reasonable time or the right to a well-reasoned judgment.

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17 The analysis of the case-law is based on the database of the European Constitutional Communication Network (eccn.hu); therefore, the paper covers those EU Member States from which the database contains relevant decisions of constitutional courts.

18 Harris et al. 2023; Mrčela 2018, 16.; Settem 2016; Venice Commission 2016.

19 ECtHR, McVicar v. the United Kingdom (46311/99), 7 May 2002, § 46.

20 ECtHR, D.D. v. Lithuania (13469/06) 14 February 2012, §§ 118–119.

21 At this point it shall be mentioned that these elements are also strongly related to the principle of effective judicial protection. This aspect is primarily important in the context of EU law. As the CJEU concluded, "Article 6(1) ECHR, the second paragraph of Article 47 of the Charter, which corresponds to that provision of the ECHR, provides that '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. As the Court of Justice has held on several occasions, that article relates to the principle of effective judicial protection […]." CJEU, C-40/12 P, para. 75. Further elaborated in CJEU, C-216/18 PPU, LM., ECLI:EU:C:2018:586, paras. 51–58.

As the ECtHR stated, constitutional court proceedings do not in principle fall outside the scope of Article 6 Paragraph 1 of the Convention; [22] thus the requirements stemming from the right to fair trial – where applicable – shall be safeguarded in constitutional court proceedings as well. Some exceptions in this regard are: the principle of equality of arms, the rights of the defence, the right to a public procedure and the adversarial principle, as these are related to procedures between opponents. Due to the fact that constitutional court decisions are primarily based on an abstract argumentation, the right to a well-reasoned judgment does not seem to be a direct point of reference either. The main aim of these elements of fair trial, namely the substantive participation of the party in the proceeding, is applicable in the context of constitutional court proceedings rather through the concept of an efficient access to justice.

According to the general theory and case-law, the right to access to justice articulates at the level of fundamental rights the individual's claim to enforce his rights effectively and independently from his financial and material circumstances, legal knowledge or other possibilities. Nevertheless, access to justice is not limited to the right to institute proceedings before courts in civil matters.[23] Other particular aspects are the right to obtain a determination of the dispute by a court[24] as well as the requirement of the decision being able to remedy wrongs or asserting claims.[25] As these conceptual elements are undoubtedly transferable to constitutional court procedures, another basic element of the access to justice doctrine shall also apply to these procedures, primarily to constitutional complaints, namely that the access to such procedures cannot remain illusory.[26]

Paying attention to the fact that fair trial is a specific quality of the proceedings, which can be assessed only on the basis of all circumstances of the case,[27] the current analysis does not wish to single out certain points of the legal regulation concerned and compare these

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22 ECtHR, Ruiz-Mateos v. Spain (12952/87) 23 June 1993, §§ 59–60.; Kübler v. Germany (32715/06) 13 January 2011, §§ 47–48; Süßmann v. Germany (20024/92) 16 September 1996, § 39; Milatová and Others v. the Czech Republic (61811/00) 21 June 2005, §§ 58–66; Gaspari v. Slovenia (21055/03) 21 July 2009, §§ 50–53; Pinkas and Others v. Bosnia and Herzegovina (8701/21) 4 October 2022, § 37.

23 ECtHR, Nicolae Virgiliu Tănase v. Romania (41720/13) 25 June 2019, § 192; Naït-Liman v. Switzerland (51357/07) 15 March 2018, § 113; Brumărescu v. Romania (28342/95) 28 October 1999, § 59. Golder v. United Kingdom (4451/70) 21 February 1975, § 36.

24 ECtHR, Fălie v. Romania (23257/04) 19 May 2015, §§ 22; Brajović and Others v. Montenegro (52529/12) 30 January 2018, § 48; Kitanovska v. North Macedonia (53030/19 and 31378/20) 9 May 2023, § 52.

25 ECtHR, Cyprus v. Turkey (25781/94) 10 May 2001, § 236; Marini v. Albania (3738/02) 18 December 2007, § 122; Nicolae Virgiliu Tănase v. Romania, § 193; Dieudonné and Others v. France (59832/19 and 6 others) 4 May 2023, § 45.

26 ECtHR, Airey v. Ireland (6289/73) 9 October 1979, § 24.

27 ECtHR, Stran Greek Refineries and Stratis Andreadis v. Greece (13427/87) 9 December 1994, § 49. ECtHR, Salduz v. Turkey (36391/02) 27 November 2008, § 52.
The Hungarian Constitutional Court stated several times that "fair trial" "is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, a procedure may be 'inequitable', 'unjust' or 'unfair' even despite of lacking certain details or complying with all the detailed rules." Decision of the Hungarian Constitutional Court 20/2017 (VII. 18.) AB [ECCN HU-0135], Reasoning [16]; similarly, Decision 6/1998 (III. 11.) AB, Decision 3102/2017 (V. 8.) AB, Reasoning [17].

with the European and constitutional standards separately, but to identify on the basis of the relevant case-law some points where the judicature or the legislation could further promote an efficient access to constitutional court proceedings. The main questions can be summarised on the basis of a statement from a concurring opinion by István Balsai (member of the Hungarian Constitutional Court): "The effectiveness of judicial legal protection is affected by a number of detailed rules and other factors, such as the time limit for bringing an action, the limitation period, the formal rules for initiating proceedings, the conditions for access to legal aid, or the actual length and cost of proceedings. Refusal to seek recourse to the courts constitutes a complete lack of judicial legal protection."[28]

## REALISTIC CHANCE OF STARTING THE PROCEDURE: ADMISSIBILITY

The first element of this examination is related to the initiation of constitutional court procedures, primarily constitutional complaint procedures where the question of admissibility is a basic point of reference. It is namely a basic feature of constitutional court procedures that national laws define preconditions for accepting a case, which might include far more complex elements than those applied in ordinary court procedures. The Constitutional Court of Romania stressed that "pursuant to the established case law of the Constitutional Court and the European Court of Human Rights, the right of access to justice is not absolute. Thus, the Constitutional Court ruled that the establishment of procedural conditions for the exercise of the right to bring a case before the court does not amount to a violation of Article 21 of the Constitution on free access to justice. It was thus held that the establishment of conditions for bringing actions does not constitute a violation of the right of free access to justice".[29] This argumentation seems to be applicable to constitutional court proceedings as well.

At this point, it shall be recalled that the principle of access to justice cannot be interpreted as prescribing specific procedural measures:[30] the efficient and practical possibility of litigation shall be guaranteed in the complex system of procedural law. *A contrario,* it cannot be stated that certain criteria of admissibility or the regime of admissibility itself would run contrary to the principle of effective access to justice.[31] The right to an effective access

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28 Decision of the Hungarian Constitutional Court Decision 3/2013 (II. 14.) AB, Concurring reasoning by dr. István Balsai [ECCN HU-0155], Reasoning [81].

29 Decision of the Constitutional Court of Romania 566/2021 [ECCN RO-0401], 23 November 2021, Reasoning [28].

30 ECtHR, Avotiņš v. Latvia (17502/07) 23 May 2016, § 119.

31 *Per analogiam:* the Hungarian Constitutional Court has held that "it does not follow from the right to a fair and impartial trial that the courts may decide on the rights and obligations of a party only at a hearing in all ordinary and extraordinary appeal proceedings. It is not contrary to the principles of the right to a trial, to an oral procedure and to impartiality (as a principle of civil procedure and also a principle enshrined in a constitutional rule) if the law allows the court to hear the application out of court in certain appeal proceedings, in particular extraordinary appeal proceedings." Decision of the Hungarian Constitutional Court 3115/2013 (VI. 4.) AB [ECCN HU-0148], Reasoning [43].

to justice "may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed".[32]

The case-law of the examined courts shows that constitutional courts usually refrain from examining whether the evidence and arguments put forward in the statement of reasons of a judicial decision or a legal norm are well founded or correctly assessed,[33] and from "taking a position on the correctness or legality of issues of legal doctrine related to any branch of law or on problems which are purely questions of interpretation of law".[34] Focus is laid on questions, which might have a significant impact on the protection of human rights and constitutional principles in general.[35] Therefore, in the analysed countries the relevant acts contain preconditions for the substantive adjudication of the case, which go beyond formal criteria and include factors subject to interpretation, for example,[36] that the complainant must be affected,[37] the available legal remedies must have been exhausted or the complaint must address a question on constitutional law issues of fundamental importance.[38] In case of all these criteria (i.e. both as regards the definition and assessment

[32] CJEU, C-619/10, Trade Agency v. Seramico, ECLI:EU:C:2012:531, para. 55. Similarly: ECtHR, Foltis v. Germany (56778/10) 30 June 2016, § 37; Staroszczyk v. Poland (59519/00) 22 March 2007, § 124. Osman v. the United Kingdom (23452/94) 28 October 1998, § 147; Nicolae Virgiliu Tănase v. Romania, § 195.

[33] "*The mere fact that the petitioner considers the reasoning of the court's judgement to be erroneous and prejudicial to himself is not a constitutional issue, nor can it be made so by reference to the right to have the reasons for the decision set out in writing*." Decision of the Hungarian Constitutional Court 3305/2020 (VII. 24.) AB [ECCN HU-0575], Reasoning [56].

[34] Decision of the Hungarian Constitutional Court 3051/2016 (III. 22.) AB [ECCN HU-0218], Reasoning [32].

[35] *Per analogiam,* this approach is in line with the ECtHR case-law, which confirmed – primarily in the context of supreme court procedures – that the application of a statutory *ratione valoris* threshold for appeals to the supreme court is a legitimate and reasonable procedural requirement having regard to the very essence of the supreme court's role to deal only with matters of the requisite significance. ECtHR, Zubac v. Croatia (40160/12) 5 April 2018, § 83 and the case law cited therein.

[36] It is not the aim of the current paper to analyse all conditions of a constitutional complaint in detail. The following examples only aim to demonstrate the complexity of criteria, which will be decisive, primarily in the context of the need for specialised and good quality legal representation.

[37] The Hungarian Constitutional Court elaborated its understanding based on the case-law of the German Federal Constitutional Court on the so-called "Betroffenheitstrias" [e.g. BVerfG, no 2 BvR 2292/13 (15 July 2015), paras. 55–64]. The complainant shall be considered to be affected by the norm or legal decision, if a direct, actual and personal involvement can be confirmed. [Decision of the Hungarian Constitutional Court 3/2019 (III. 7.) AB, Reasoning [30]–[32]; 33/2012 (VII. 17.) AB, Reasoning [61]–[62], [66]. These criteria are evaluated on a case-by-case basis.

[38] According to Section 29 of the Hungarian Act CLI of 2011 on the Constitutional Court, the Hungarian Constitutional Court declares the constitutional complaint admissible if a conflict with the Fundamental Law significantly affects the judicial decision or the case raises constitutional law issues of fundamental importance. The lack of sufficiently coherent constitutional law reasoning leads to the inadmissibility of the complaint {Decision of the Hungarian Constitutional Court 3080/2019 (IV. 17.) AB, Reasoning [27]}. The Hungarian Constitutional Court does not carry out a substantial examination if the complaint only aims at the supervision of the evidentiary procedure {Decision 3080/2019 (IV. 17.) AB, Reasoning [30]; Order 3061/2016 (III. 22.) AB, Reasoning [31]–[33]}, or it is related to the interpretation of questions affecting a special field of expertise {Order 3038/2019 (II. 20.) AB, Reasoning [17]}.

of admissibility in constitutional court proceedings, primarily constitutional complaint proceedings) the national legislator and the constitutional courts have a considerable margin of appreciation. The ECtHR just recently confirmed that "it is not the Court's task to express a view on whether the policy choices made by the Contracting Parties defining the limitations on access to a court are appropriate or not; its task is confined to determining whether their choices in this area produce consequences that are in conformity with the Convention".[39] For the evaluation of these consequences – according to the ECtHR's case-law – not only the legislative framework, but also the interpretation of the constitutional courts, the coherent judicial practice is highly relevant.[40] And in latter context it is crucial that – while paying particular attention to the legitimate aims of restricting access to such procedures and to the foreseeable assessment of the conditions of admissibility – the aim of the procedures shall not be repressed. Access to such procedures shall be ensured in light of the fact that these are the last domestic legal resort in case of violation of fundamental rights. In this spirit, a recent decision of the ECtHR warned constitutional courts against excessive formalism when interpreting the conditions for accepting a case. The specific case concerned a decision of the Portuguese constitutional court, which had declared inadmissible a part of the applicant's appeal on the grounds that an incorrect subsection of the relevant provision was indicated. The Strasbourg court "noted that the Constitutional Court had been able to identify the two grounds of appeal submitted by the applicant. The inadmissibility decision had thus been based solely on the drafting error, as the ground of appeal had been clear from the applicant's memorial and had been identified by the judges. Consequently, and in accordance with its case-law, the Court held that the approach taken

In case of the Constitutional Act on the Constitutional Court of the Republic of Croatia this factor is decisive, when the constitutional complaint is filed before all remedies have been exhausted. According to Paragraph (1) Article 63 of the Act, the Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated. A similar provision is foreseen in § 75 of the Constitutional Court Act of the Czech Republic and § 132 of the Slovakian Constitutional Court Act.
The text of the Constitutional Court Act of the Czech Republic (182/1993 Sb.) in English is available: www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Constitutional_Court_Act_2024.pdf
The Constitutional Court Act of Slovakia (314/2018 Coll.) is available: www.zakonypreludi.sk/zz/2018-314.
The text of the Constitutional Court Act of Hungary is available in English: hunconcourt.hu/act-on-the-cc.
The text of the Constitutional Act on the Constitutional Court of the Republic of Croatia in English is available: www.usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf

39 ECtHR, Dragan Kovačević v. Croatia (49281/15) 12 May 2022, § 69.

40 "A coherent domestic judicial practice and a consistent application of that practice will normally satisfy the foreseeability criterion in regard to a restriction on access to the superior court." ECtHR, Zubac v. Croatia, § 88 and the case-law cited therein.

by the Constitutional Court had been excessively formalistic, having deprived the applicant of a remedy afforded by domestic law in respect of the matter at issue."[41]

From these examples – both from the national laws and the ECtHR case-law – it is apparent that the preconditions for admission of constitutional complaints elaborated in legal norms and in the case-law are usually complex, and are – at least in part – not directly derivable from the wording of the respective acts;[42] besides the normative provisions and the attached jurisprudence the requirements stemming from the ECtHR's case-law can be decisive. This is the reason, why an efficient support by a qualified lawyer and other elements of legal aid in constitutional court procedures might be considered as essential preconditions to promote an efficient protection of human rights.

## PRESENTING THE CASE EFFECTIVELY: LEGAL AID

As regards the availability of legal aid, both basic justifications for its necessity can be found in the case law of the examined constitutional courts: the procedural and the social approach. The Czech Constitutional Court held that the "meaning and purpose of the principle of equality of arms, equal rights and obligations in civil (and other) proceedings before a public authority is to guarantee the conditions for a fair outcome of the proceedings; this could be absent if one of the parties is disadvantaged in the proceedings (typically by being unable to present its own arguments and evidence, etc.)".[43] A similar argumentation appears in the case law of the Constitutional Court of Slovakia stating that "the rationale for increased protection of litigants is the need to balance the procedural position of the weaker party in order to preserve functional procedural equality".[44] Thus, these courts relied on a rather procedural approach by using an argumentation closely related to the efficient access to justice[45] and to the principle of fair trial. As, however, it was mentioned in the introductory part, the principle of equality of arms is not applicable to constitutional court proceedings in strict sense. Therefore, it might be questionable, whether this argumentation is also applicable to justify the need for legal aid in constitutional court procedures.

Consequently, the more extensive argumentation used by the Constitutional Court of Romania can be a more proper point of reference. It stated namely that "free access to

41 ECtHR, Dos Santos Calado and others v. Portugal (55997/14 and 3 others), 31 March 2020, §§ 116–117. ECtHR: *Press release. The excessive formalism of the Constitutional Court deprived the applicants of their right of access to a court*. ECHR 106 (2020), 2.

42 For a detailed examination of the admissibility criteria – in Hungarian context – see e.g. Bitskey–Török 2015.

43 Decision of the Czech Constitutional Court Pl. ÚS 2/10 [ECCN CZ-0190], 30 March 2010, Reasoning [51].

44 Decision of the Constitutional Court of Slovakia I. ÚS 382/2019 [ECCN SK-0411], 28 January 2010, Reasoning [77].

45 Article 47 Paragraph (3) of the Charter of Fundamental Rights of the European Union states in a similar way that "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". Charter for Fundamental Rights of the European Union [2012] OJ C 326/391.

justice implies access to the procedural means by which justice is administered. It is true that the rules governing the conduct of proceedings before the courts are the exclusive competence of the legislature the principle of free access to justice implies the unrestricted possibility for those concerned to use these procedures in the forms and in the manner established by law, but in compliance with the rule enshrined in Article 21 (2) of the Constitution, according to which no law may restrict access to justice, which means that the legislator may not exclude any category or social group from exercising the procedural rights it has established."[46] This approach includes, besides the procedural dimension, also an aspect of social support and equality.[47]

The Hungarian Constitutional Court used a similar interpretation in its leading Decision 42/2012 (XII. 20.) AB. It stressed that in the case of compulsory legal representation, the lack of legal aid in constitutional court procedures violates the general principle of equality as foreseen in Article XV Paragraphs (1) and (2) of the Fundamental Law. In another decision[48] from 2008,[49] the Hungarian Constitutional Court concluded that the right to efficient access to justice is not hindered by the compulsory legal representation, provided legal aid is available for those in need. This decision seems to confirm that legal aid should be interpreted as an institution safeguarding equal and efficient chances of bringing a case to court. Thus, the legislator cannot and should not exclude the possibility that certain groups of litigants can be considered as being in need in relation to their chances of bringing their case to court: the provisions on legal aid serve to enforce human rights even in the case of a lack of income and wealth. This way, such an interpretation can be derived, that is definitely applicable to constitutional court proceedings, where the underlying aim is the efficient protection of human rights.

When defining the scope and forms of legal aid, attention should be paid to the fact that due to the abstract nature of constitutional complaint procedures, the compound of the normative legal provisions and the attached case law, there is a realistic chance that a party not supported by a lawyer cannot present his case in a comprehensive, clearly understandable manner which also includes proper legal arguments. Thus, the role of legal aid is not only related to financial need but to the lack of legal knowledge.

Therefore, the costs of the procedure itself (court fees) and the costs related to the compulsory legal representation are just one dimension that makes efficient legal aid schemes in constitutional court procedures necessary. Even in this regard, largely different models exist. The procedures before the Czech Constitutional Court[50] and the Constitutional Court of Slovakia[51] are not subject to court fees, but legal representation is

46 Decision of the Constitutional Court of Romania 208/2022 [ECCN RO-0444], 24 May 2022, Reasoning [31].

47 For the relevance of neediness (means test) in legal aid schemes, see: Váradi 2016; Váradi 2014.

48 Decision of the Hungarian Constitutional Court 685/B/2001 AB, 11 November 2008.

49 As regards the reference to the decisions of the Hungarian Constitutional Court made prior to the entry into force of the Fundamental Law, see: Decision 21/2014 (VII. 15.) AB [ECCN HU-0558], Reasoning [53]; Decision 7/2013 (III. 1.) AB, Reasoning [24].

50 §§ 29, 30, 62 and 83 of the Constitutional Court Act of the Czech Republic.

51 §§ 34, 37, 71 of the Constitutional Court Act of Slovakia.

mandatory for natural and legal persons in which context legal aid (reimbursement of costs or appointment of legal representative by the constitutional court, respectively) is possible based on the personal situation or financial means of the complainant. Meanwhile, the Hungarian Act on the Constitutional Court stipulates in its Section 54 Paragraph (1) that proceedings of the Constitutional Court are free of charge and there is no obligation of legal representation; in such proceedings extrajudicial legal advice might promote the submission of an admissible complaint.[52]

From a recent judgement of the ECtHR, however, an even more extensive interpretation of legal aid might be derived in constitutional court procedures. The specific case was related to the provision of the Act on the Constitutional Court of Croatia, which states that every participant in the Constitutional Court proceedings shall pay his/her own expenses unless decided differently by the Constitutional Court. The ECtHR concluded that "this exception not only provides a necessary flexibility allowing the Constitutional Court to adapt its decisions on costs to the circumstances of each case, it also suggests that in certain cases application of the default rule may not be justified […]".[53] The fact that the Constitutional Court of Croatia did not apply the exception in the case of a low-income person in a highly vulnerable situation without a meaningful justification amounted to a violation of fair trial rights under the Convention. This decision leads to a similar conclusion as described at the end of Part IV, namely that despite the specificities of the constitutional court proceedings, the vulnerability of the person concerned – both in legal and social terms – shall be carefully assessed, and the respective national laws shall be interpreted in a way that enables the efficient access to justice in cases directly and seriously relevant for the protection of fundamental rights and freedoms.

## EFFECTIVENESS OF THE DECISION: LENGTH AND OUTCOME OF PROCEEDINGS

The final element, which shall be examined as part of the analysis about access to constitutional court procedures (as a basic element of fair trial in these proceedings), is how these proceedings, primarily the constitutional complaint procedures can contribute to remedying wrongs or asserting claims in the field of human rights protection. In this regard, the length and the outcome of the proceedings are crucial.

[52] Court fees are not applicable and legal representation is not mandatory in constitutional court procedures in Romania either, but due to the specificities of the procedure most similar to constitutional complaint procedures (settlement of the exception of unconstitutionality raised before courts of law or courts of commercial arbitration), the legal aid scheme for ordinary court procedures might only be relevant. §§ 13, 29–31 of Law No. 47 of 1992 on the Organisation and Operation of the Constitutional Court. Legal aid applications cannot be addressed to the Constitutional Court itself.
The text of the law is available in English at www.ccr.ro/wp-content/uploads/2020/11/LAW-No47.pdf. See further: www.ccr.ro/intrebari-frecvente/

[53] ECtHR, Dragan Kovačević v. Croatia § 78.

The acts regulating the constitutional court procedures in the examined countries usually do not contain strict deadlines for the adjudication of the cases, particularly as regards the constitutional complaint procedures. When evaluating the fulfilment of the requirement of a decision within a reasonable time, in general, the constitutional courts of the examined states stress the need for the assessment of the complexity of the case[54] as well as the urgency of the legal protection to be offered.[55] The ECtHR's basic approach as regards the length of proceedings – in connection with the right to fair trial – is that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute".[56]

These factors are transposable to the constitutional court proceedings as well. The ECtHR recalled in its case-law that it "accepts that the Constitutional Court's role of guardian of the Constitution sometimes makes it particularly necessary for it to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms".[57] Thus, the fact that no strict deadlines appear in the respective acts or that different types of

[54] In a specific case, the Hungarian Constitutional Court found that under certain circumstances even a procedure lasting 22 years can be considered as complying with the requirement of a decision within a reasonable time, as "the Constitutional Court found that six proceedings had been conducted in the twenty-two years, three before the Office and three before the courts. The Constitutional Court held that, under the provisions of the relevant substantive rules, the main proceedings could not continue at the administrative stage until the preliminary questions had been clarified in law. The Constitutional Court held that the authority and the courts had each taken their decisions within a reasonable time, so that the petitioner's right to a fair trial as a right to have the case decided within a reasonable time had not been infringed." Decision of the Hungarian Constitutional Court 3115/2013 (VI. 4.) AB [ECCN HU-0148], Reasoning [32].

[55] The Constitutional Court of Slovakia found in a recent decision that "the procedure of the District Court and the court proceedings as a whole did not comply with the requirements laid down in Article 46 (1) of the Constitution and Article 6 (1) of the Convention, since the complainant's application for the lifting of the restraining order imposed on him or for the amendment of his contact with his daughters was never finally decided, and the unreasonably lengthy court proceedings were terminated instead of a judicial decision only as a result of the mere lapse of time". Decision of the Constitutional Court of Slovakia I. ÚS 414/2021 [ECCN SK-0499] 2 June 2022, Reasoning 34. The same constitutional court referred to the case-law of the ECtHR as it underlined the need for an assessment of the need for legal protection. "The Constitutional Court also referred to the Judgement in Perhacs v. SR of 24 September 2020, in which the ECtHR found a violation of the right under Article 6 (1) of the Convention in the part of the reasonableness of the length of the proceedings conducted by the administrative court of first instance, which lasted 3 years and three months in the case of free access to information. In this context, the ECtHR realised that, if the time-limits laid down by national law for the provision of the information requested are so short (8 days at first instance and 15 days at appeal), they indicate an intention on the part of the legislature to ensure the individual's prompt and effective access to information, which at the same time precludes it from being acceptable that the subsequent stage of the review proceedings before an administrative court at first instance lasted more than three years." Decision of the Constitutional Court of Slovakia II. ÚS 518/2021 [ECCN SK-0501], Reasoning 27.

[56] ECtHR, Pustovit v. Ukraine (34332/03), 18 November 2010, § 22; similarly: Bieliński v. Poland (48762/19), 21 July 2022, § 42.

[57] ECtHR, Oršuš and Others vs. Croatia (15766/03) 16 March 2010, § 109; similarly: Shorazova v. Malta, (51853/19), 3 March 2022, § 135; Gast and Popp v. Germany (29357/95), 25 February 2000, § 75.

complaints are adjudicated in a different speed is acceptable. However, the fact „what was at stake" makes a more nuanced approach necessary: the same duration of the procedure in a case which by its nature requires urgency in decision-making and of a more abstract dispute, can lead to a violation of the applicant's right to trial within a reasonable time.

Taking into account the findings on the proper assessment of admissibility criteria and legal aid schemes in constitutional court procedures, as regards the requirement of a decision within a reasonable time, the same conclusion can be derived, namely that: a) the legislator (when defining the legal provisions) and the constitutional courts (when applying these provisions) have a broad margin of appreciation; but b) the constitutional courts should apply the flexibility at their disposal in order to enable the most efficient protection of fundamental rights.

## CONCLUSIONS

The current analysis did not aim to single out certain elements of national laws, and compare these with the European and constitutional standards separately, but it was intended to establish a framework for the best possible interpretation of national laws in constitutional court procedures and for the further development of the legislative provisions in line with the requirements of fair trial and with special regard to access to justice.

Considering the role of constitutional court proceedings in safeguarding fundamental rights, democracy and rule of law, as well as based on the relevant case-law and legal literature it has been concluded that a) the concept of fair trial is and should be applicable to constitutional court proceedings, primarily constitutional complaint proceedings in general; b) apart from certain elements of the concept of fair trial, which are inherently linked to the specificities of ordinary (contradictory) court procedures, the majority of the conceptual elements are applicable to the constitutional court procedures; c) the basic standard for measuring the efficient implementation of the right to fair trial in constitutional court procedures, primarily in constitutional complaint procedures, is the efficiency of access to such procedures; and d) as regards the safeguards of an efficient access to justice in constitutional court proceedings, a strong interconnection between the different elements can be witnessed: the application of the admissibility criteria, the applicability of legal aid schemes, the length and outcome of the proceedings are only in compliance with the principle of fair trial if, despite the specificities of the constitutional court proceedings, the vulnerability of the person concerned (applicant, complainant) is carefully assessed, and the respective national laws are interpreted in a way that enables the efficient protection of fundamental rights and freedoms.

All these findings can contribute to a better understanding of the right to fair trial in constitutional court procedures (primarily constitutional complaint procedures). At the same time they can support the elaboration of a legislative framework and case-law, where a proceeding related to an issue of fundamental importance about the protection of human rights or other basic constitutional principles can be initiated in front of the constitutional court

without undue difficulties, the arguments of the complainants can be presented in an appropriate manner and they are answered in a specific and express manner so that the decision can – at the end of the day – result in an efficient remedy in the field of human rights.

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