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

“The role of constitutional courts in shaping the procedural fairness in criminal cases”

Editorial of the dossier "*The role of constitutional courts in shaping procedural fairness in criminal cases*" – *Constitutionalisation of the right to a fair criminal trial as a process inspired by constitutional courts*[1]

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

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

[1] This publication has been developed as part of a research project supported by programme Excellence initiative - research university for years 2020-2026 for University of Wrocław.

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

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

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

Palavras-chave: *Tribunais constitucionais; constitucionalização do devido processo; direitos do justo processo penal.*

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

"We are under a Constitution, but the Constitution is what the Judges say it is..."[3]

Charles Evans Hughes, 1907

1. Introduction

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

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

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

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

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

2. The notion of a constitutional court

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

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

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

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

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

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

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

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

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

[9] *Ibid.*

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

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

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

3. The powers of constitutional courts and their influence on the legal system

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

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[11] *Ibid*.

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

[13] DYEVRE, Arthur. The French Constitutional Council. In: JAKAB, András; DYEVRE, Arthur; ITZCOVICH, Giulo (eds.). *Comparative Constitutional Reasoning*. Cambridge: Cambridge University Press, 2017, p. 326.

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

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

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

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[15] GARLICKI, Lech. *Sądownictwo konstytucyjne w Europie Zachodniej*. Warszawa: Państwowe Wydawnictwo Naukowe, 1987, p. 175.

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

[17] *Ibid.*, p. 1444.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] The Court may decide on the "direct action of unconstitutionality" (ADIs); the "direct action of unconstitutionality due to omission" (ADCs) and the claim of "noncompliance with a fundamental norm" (ADPF).

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

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

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

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

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

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

4. The constitutionalisation of procedural fairness

A "constitution" in the modern sense of the term is a set of legal norms which regulate the establishment and exercise of public power.[28]

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[27] See, however, the implementation powers of the German Federal Constitutional Court and the additional powers conferred on the Spanish Constitutional Court in 2015.

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

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

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

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[29] CLAYTON, Richard; TOMLINSON, Hugh. *Fair Trial Rights*. Oxford: Oxford University Press, 2010, p. 1.

[30] BUMKE Christina; VOßKUHLE, Andreas. *German Constitutional Law. Introduction, Cases and Principles*. Oxford: Oxford University Press, 2019, p. 557.

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

[32] BUMKE Christina; VOßKUHLE, Andreas. *German Constitutional Law. Introduction, Cases and Principles*. Oxford: Oxford University Press, 2019, p. 557.

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] This provision reads: "Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution".

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

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

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

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

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[42] Decision no. 2006-540 DC of 27 July 2006, § 11.

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

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

5. The alchemy of (constitutional) right to a fair trial in criminal cases[48]

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

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[44] This was the first of two amendments to the 1997 Constitution made since its enactment.

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

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

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

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

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

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

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

[50] CLAYTON, Richard; TOMLINSON, Hugh. *Fair Trial Rights*, Oxford: Oxford University Press, 2010, p. 1.

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

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

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

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

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

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

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

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

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

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

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

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

58 LIND, E. Allan; TYLER, Tom R. *The Social Psychology of Procedural Justice*. New York: Plenym, 1988.

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

60 *Ibid*.

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

62 *Ibid*., p. 26.

63 *Ibid*., p. 26.

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

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

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

[65] CLAYTON Richard; TOMLINSON Hugh. *Fair Trial Rights*. Oxford: Oxford University Press 2010, p. 2.

[66] *Ibid.*

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

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

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

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

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[68] See *Ibid.*, pp. 32-53. See also: TRECHSEL, Stefan, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press, 2005.

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

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

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

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

[71] SAKOWICZ, Andrzej, The impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland, *in this dossier.*

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

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

Characteristically, constitutional courts in their judgments usually do not comment on what a "fair trial" is, although they emphasize the concept's relevance and significance for democracy and the rule of law.[77] In fact, constitutional courts are more willing to indicate what is or is

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[73] BORGES, Ademar, Presunção de inocência e a doutrina da prova além da dúvida razoável na jurisdição constitucional, *in this dossier*.

[74] MARCIA, Michalina, The role of constitutional courts in taming adverse impact of new technologies in the criminal proceedings, *in this dossier*.

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

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

[77] See The 2018 Yearbook of Constitutional Court of the Czech Republic, https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Rocenky/Ustavni_soud_Rocenka_2018_AJ_fin.pdf, p. 71. The Czech Republic Constitutional Court in its decision 1994/10/12 - Pl. ÚS 4/94 stated that: "The goal of a criminal proceeding is not merely the "just punishment of a perpetrator"; the goal of a criminal proceeding is also to have a fair procedure. The existence of due process is an indispensable condition of the existence of a democratic, law-based state". https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%204-94.pdf.

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

6. Conclusions

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

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

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

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

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

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The impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland

O impacto da jurisprudência do Tribunal Constitucional nos parâmetros de prisão cautelar na Polônia

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Abstract: Detention on remand is intrinsically linked to the fundamental rights and freedoms of the individual and, in particular, to personal freedom, the right to a fair trial and the principle of the presumption of innocence. This paper explores the constitutional dimension of the application of detention on remand in Poland. Its first part outlines the constitutional values that are violated as a result of detention on remand. The status of the principle of proportionality is pointed out, both in constitutional law and in the criminal law procedure. In further parts, the article presents the role of the Constitutional Tribunal in Poland and analyzes its case law on detention on remand. The jurisprudence of the Constitutional Tribunal in Poland emphasizes the directive to minimize the duration and the principle of proportionality of preventive measures, which imply that detention on remand may only be used *ultima ratio*. In particular, the paper focuses on the rulings concerning the premises for detention on remand, the access to the file of the pre-trial proceedings in the part concerning the decision to apply detention on remand, the access of the persons detained on remand to defense counsels, the duration of detention on remand, and the contact of the persons subject to the most severe preventive measure with their loved ones.

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Keywords: detention on remand; the Constitutional Tribunal; criminal proceedings; access to a lawyer; access to the file of pre-trial proceedings; Poland.

Resumo: *Prisão cautelar é intrinsicamente relacionada aos direitos e liberdades individuais do indivíduo e, em particular, com a liberdade pessoal, o direito ao devido processo e o princípio da presunção de inocência. Este artigo explora a dimensão constitucional da aplicação da prisão cautelar na Polônia. Sua primeira parte destaca os valores constitucionais que são violadas em consequência da prisão cautelar. O status do princípio da proporcionalidade é ressaltado, tanto no direito constitucional como no direito processual penal. Posteriormente, o artigo apresente o papel do Tribunal Constitucional da Polônia e analisa a sua jurisprudência sobre prisão cautelar, que enfatiza a diretiva para minimizar a duração e o princípio da proporcionalidade das medidas cautelares, o qual determina que a prisão cautelar pode ser utilizada como como ultima ratio. Em particular, a pesquisa analisa decisões que tratam do acesso aos autos da investigação na parte relacionada à prisão cautelar, do acesso da pessoa detida ao advogado, da duração da prisão cautelar e do contato do preso com seus familiares.*

Palavras-chave: *prisão cautelar; Tribunal Constitucional; processo penal; acesso à defesa técnica; acesso aos autos da investigação; Polônia.*

I. Introduction

The issue of detention on remand continues to arouse interest among legal scholars and poses numerous questions for practitioners of the justice system[2]. These questions concern the role of detention on remand,

[2] In this paper, I use the term "detention on remand" because it better reflects its scope of application of this institution. I am aware that some authors, when analyzing the criminal process institution under examination, use the term "pre-trial detention"; KLEPCZYŃSKI, Adam; KŁADOCZNY, Piotr; WIŚNIEWSKA, Katarzyna. The Trials of Pre-trial Detention. Report. A review of the existing practice of application of pre-trial detention in Poland. Warsaw: The Helsinki Foundation for Human Rights, 2019, pp. 7-32; MORGENSTERN, Christine; Chapter 21 Poland. In: VAN KALMTHOUT, Anton; KNAPEN, Marije; MORGENSTERN, Christine (eds.). Pre-trial Detention in the European Union An Analysis of Minimum Standards in Pre-trial

the rationale for its application, its duration, and the contacts between the detainees and their lawyers or family members. This is not surprising, since detention on remand is one of the preventive measures provided for by the Polish Code of Criminal Procedure (CCP)[3]. Detention on remand has always been viewed by the doctrine as a dangerous and tempting instrument of executive state power[4]. It is an isolating measure that deeply interferes with rights and freedoms of detainees. The grievousness of detention on remand is due to its direct interference in the sphere of human freedoms. The degree of the interference is so high that it leads to a complete abolition of the detainees' personal freedom. This makes it necessary to indicate precisely who, for what period of time, and according to what rules makes decisions on the application of detention

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Detention and the grounds for Regular Review in the Member States of the EU. Nijmegen: Wolf Legal Publishers, 2009, pp. 717-752; MCSHERRY, Bernadette. Pretrial and Civil Detention of "Dangerous" Individuals in Common Law Jurisdictions. In: BROWN, Darryl K.; TURNER, Jenia Iontcheva; WEISSER, Bettina. The Oxford Handbook of Criminal Process. Oxford: Oxford University Press, 2019, pp. 522-540, https://doi.org/10.1093/oxfordhb/9780190659837.013.28. I believe that the latter term does not fully reflect the meaning of the institution under examination. The term "pre-trial detention" refers only to preliminary proceedings, i.e. the first stage of criminal proceedings in Poland, while the term "detention on remand" also covers depriving the accused of his or her liberty for a predetermined period of time during court proceedings.

3 The Polish Code of Criminal Procedure provides for the following types of preventive measures: (1) detention on remand; (2) financial surety; (3) surety of a social organization; (4) surety of a trustworthy person; (5) police supervision; (6) order to temporarily leave a premises; (7) suspension of the execution of official duties, and (8) prohibition to leave the country. On the preventive measures in the Polish Code of Criminal Procedure, see: JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, pp. 208-281-297. The Practice of pre-trial detention in Poland Research Report, Helsinski Foundation for Human Rights, Warsaw. 2015, p. 25-43, https://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf; -WILIŃSKI, Paweł; Proces karny w świetle Konstytucji [Criminal Trial in the Light of the Constitution]. Warszawa:Wolters Kluwer Polska, pp. 202-220, 2011.

4 MORGENSTERN, Christine; KROMREY, Hans. Towards Pre-trial Detention as *Ultima Ratio*. Available at: https://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf. Accessed on March 12, 2022.

on remand[5]. It is therefore important that the grounds for deprivation of an individual's freedom are clearly defined and that the application of a given legal provision is foreseeable. This is a fundamental requirement resulting from the principle of legal certainty and the application of the principle of proportionality expressed in Article 31(3) of the Polish Constitution[6]. It boils down to an examination of whether a particular legal provision meets the following three requirements: usefulness, necessity, and proportionality in the strict sense of the word. These requirements are met if: (1) the legal provision introduced is capable of producing the effects it is intended for (the principle of utility); (2) the provision is necessary for the protection of the public interest to which it is linked (the principle of necessity); and furthermore (3) its effects are in proportion to the burdens it imposes on the citizen (the principle of proportionality in the strict sense of the word)[7]. The third principle is of particular importance. It indicates that if it is possible for the legislator to achieve its objective with a less painful measure, then the legislator's use of a significantly more painful measure that leads to a significant restriction of rights and freedoms violates the constitutional principle of proportionality[8].

The above assumption is extended by Article 257 of the CCP, which expresses the directive to minimize detention on remand (the principle of *ultima ratio*), which means that detention on remand should be used as a last resort when other (non-custodial) preventive measures cannot secure the proper course of criminal proceedings. Consequently,

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5 See: Resolution of the Supreme Court (7) of 30 October 1997, I KZP 26/97, OSNKW 1997/11-12, item 89, as well as Resolution of the Supreme Court of 23 April 1998, I KZP 2/98, OSNKW 1998/5-6, item 24.

6 ŚLEDZIŃSKA-SIMON, Anna; Proportionality Analysis by the Polish Constitutional Tribunal. In KREMNITZER Mordechai; STEINER Talya; LANG Andrej (eds.). Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice. Cambridge: Cambridge University Press, 2020, pp. 385-457.

7 Cf.: judgments of the Constitutional Tribunal of 11 April 2006, ref. SK 57/04, OTK ZU no. 4/A/2006, item 43, and of 11 April 2000, ref. K. 15/98, OTK ZU no. 3/2000, item 86.

8 Cf.: judgments of the Constitutional Tribunal of 11 May 1999, ref. K 13/98, OTK ZU no. 4/1999, item 74, and of 29 June 2001, ref. K. 23/00, OTK ZU no. 5/2001, item 124.

a conclusion that a non-custodial preventive measure is sufficient in a criminal case requires prohibition of the use or continuation of detention on remand[9]. This solution refers to the constitutional principle of proportionality. To be proportionate, detention on remand must be necessary to ensure the presence of the concerned person at the trial and detention must be the only way to achieve that aim. Hence, whenever other, less stringent measures are sufficient for that purpose, detention is not proportionate[10]. Such an assumption is consistent with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that detention on remand can either be based on reasonable suspicion of that person having committed an offense or "when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so."[11]. Undoubtedly,

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[9] The directive to minimize detention on remand is emphasized in the case law of the ECtHR, see, the ECtHR judgement of 4 October 2005 in the case of *Kankowski v. Poland*, application no. 10268/03, https://hudoc.echr.coe.int/eng?i=001-70368; the ECtHR judgement of 13 September 2005 in the case of *Skrobol v. Poland*, application no. 44165/98, https://hudoc.echr.coe.int/eng?i=001-70114; e ECtHR judgement of 28 July 2005 in the case of *Czarnecki v. Poland*, application no. 75112/01, https://hudoc.echr.coe.int/eng?i=001-69978. In its case law, the ECtHR emphasizes the obligation to consider the use of measures alternative to detention on remand in order to secure the proper course of criminal proceedings. The judgements of the ECtHR related to "Polish" applications indicate that the practice of use and extension of detention on remand in Poland is assessed critically from the point of view of the standards set out in Article 5(3) of the ECHR. The most frequent criticisms of the courts in these judgements include their failure to examine whether the application of another, non-custodial preventive measure would be sufficient in the case to secure the proper course of the proceedings.

[10] MERKEL, Grischa. Detention before Trial and Civil Detention of Dangerous Individuals. In: BROWN, Darryl K.; TURNER, Jenia I.; WEISSER, Bettina. The Oxford Handbook of Criminal Process. Oxford: Oxford University Press, 2019. p. 508.

[11] The directive to minimize detention on remand is emphasized in the case law of the ECtHR, See, see, the ECtHR judgement of 4 October 2005 in the case of *Kankowski v. Poland*, application no. 10268/03, https://hudoc.echr.coe.int/eng?i=001-70368; the ECtHR judgement of 13 September 2005 in the case of *Skrobol v. Poland*, application no. 44165/98, https://hudoc.echr.coe.int/eng?i=001-70114; e ECtHR judgement of 28 July 2005 in the case of *Czarnecki v. Poland*, application no. 75112/01, https://hudoc.echr.coe.int/eng?i=001-69978. In its case law, the ECtHR emphasizes the obligation to

the requirement of legitimate purpose serves the principle of *ultima ratio* but also the presumption of innocence: requiring detention on remand to serve a specific purpose is key to avoiding a situation where deprivation of liberty is used as an "anticipation of punishment."[12] Therefore, justifying detention on remand appears crucial for its rational use.

The aforementioned directive is a consequence of the fact that the Constitution of the Republic of Poland gives a high priority to personal freedom. Pursuant to Article 41(1) of the Constitution, everyone is guaranteed personal inviolability and personal freedom, and deprivation or restriction of freedom may take place only according to the principles and in the manner specified by a statute. Article 41(1) of the Constitution is applicable to the assessment of both the provisions specifying the prerequisites for the use and extension of detention on remand and the provisions on the possibility of repealing or changing this measure to one that is less severe.

The constitutional standard for a decision to deprive a person of his or her freedom is not limited to Article 41(1) of the Constitution. In its further parts, Article 41 of the Constitution guarantees to the person deprived of freedom, and therefore also to the person detained on remand, the right to review the legality of the deprivation of freedom[13].

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consider the use of measures alternative to detention on remand in order to secure the proper course of criminal proceedings. The judgements of the ECtHR related to "Polish" applications indicate that the practice of use and extension of detention on remand in Poland is assessed critically from the point of view of the standards set out in Article 5(3) of the ECHR. The most frequent criticisms of the courts in these judgements include their failure to examine whether the application of another, non-custodial preventive measure would be sufficient in the case to secure the proper course of the proceedings.

[12] MARTUFI, Adriano; PERISTERIDOU Christina. The Purposes of Pre-Trial Detention and the Quest for Alternatives, European Journal of Crime, Criminal Law and Criminal Justice, vol. 28, n. 2, p. 155, 2020. https://doi:10.1163/15718174-bja10002. For the *ultima ratio* principle in the use of preventive measures, see: MORGENSTERN, Christine, KROMREY, Hans. Towards Pre-trial Detention as *Ultima Ratio*, available at: https://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf, accessed on March 12, 2022.

[13] MORGENSTERN, Christine. Chapter 21 Poland. In VAN KALMTHOUT, Anton; KNAPEN, Marije, MORGENSTERN, Christine (eds.). Pre-trial Detention

The review of the legality of the deprivation of freedom must cover not only the legality of the very decision to deprive the person of freedom, its rationale, and the manner in which it was taken, but also the manner in which it was carried out and the duration of the deprivation of freedom. The right to appeal implies that the court is given appropriate powers to conduct evidentiary proceedings to comprehensively examine the circumstances of the deprivation of freedom. The primary purpose of this arrangement is to bring about the release of a person unlawfully deprived of freedom as quickly as possible.

The provisions of Article 41 of the Polish Constitution are supplemented by Articles 45, 78, and 176(1) of the Constitution. The first of the above-mentioned articles was inspired by the content of Article 14 of the International Covenant on Civil and Political Rights and of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It provides that everyone is entitled to a fair and public hearing of his or her case without undue delay by a competent, independent, impartial, and independent court[14]. In accordance with Article 78 of the Constitution, each party has the right to appeal against judgments and decisions issued in the first instance, while Article 176(1) of the Constitution indicates the two-instance nature of court proceedings.

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in the European Union An Analysis of Minimum Standards in Pre-trial Detention and the grounds for Regular Review in the Member States of the EU. Nijmegen: Wolf Legal Publishers, 2009, p. 720.

[14] Due to Poland's membership in the European Union, the use of detention on remand should be compliant with EU law. For information on this standard, see: BAKER, Estella; HARKIN, Tricia; MITSILEGAS, Valsamis; PERŠAK, Nina. The Need for and Possible Content of EU Pre-trial Detention Rules, *Eucrim*, n. 3, pp. 221-229, 2020, https://doi.org/10.30709/eucrim-2020-020; MANCANO, Leandro. The Use of the Charter and Pre-trial Detention in EU Law: Constraints and Possibilities for Better Protection of the Right to Liberty. *European Papers*. vol. 6. n. 1, pp. 125-139, 2021, https://doi.org/10.15166/2499-8249/457; SKORUPKA, Jerzy. Standard dostępu do informacji o podstawie dowodowej tymczasowego aresztowania w prawie unii europejskiej i prawie polskim (Standard of Access to Information about the Evidential Base of Provisional Detention in European Union and Polish Law). Przegląd Prawea i Administracji, v. CXX, n. 2, pp. 241-253, 2020. https://doi.org/10.19195/0137-1134.120.66.

In terms of the legal situation of a person detained on remand, the right to defense, which is set out in Article 42(2) of the Polish Constitution, cannot be overlooked. Pursuant to this provision, everyone against whom criminal proceedings are conducted has the right to defense at all stages of those proceedings. The provision of Article 42(2) of the Polish Constitution is the standard of review of the applicable provisions of the CCP insofar as those provisions impose restrictions on the confidentiality of contacts between an accused detained on remand and his or her counsel, and restrict access to the file of the pre-trial proceedings.

The indicated provisions set out the constitutional framework for the protection of a person detained on remand. They are also a model for the legislator for adoption of laws that concern deprivation of freedom. However, the constitutional standard for deprivation of liberty has not always been upheld by the legislature. In several rulings, the Constitutional Tribunal found the provisions of the CCP regarding detention on remand to be contrary to the Polish Constitution. . The reason for such decisions of the Tribunal was either the lack of precision of the provisions of the CCP or the occurrence of disproportionate interference with the freedoms and rights set forth in the Polish Constitution. However, the Constitutional Tribunal has not always challenged the existing legislation. It sometimes recognized the legitimacy of a limitation of a constitutional value because of the need to safeguard the proper course of the proceedings and, exceptionally, to prevent the defendant from committing a new, serious crime. In these situations, the Tribunal not only indicated the compatibility of the provisions of the CCP with the Constitution, but also specified the interpretation. Following such actions, the Constitutional Tribunal set the constitutional standard for detention on remand in Poland and for protection of rights of individuals in criminal proceedings. Such activity by the Constitutional Tribunal demonstrates that modern criminal law procedure is inextricably linked to constitutional law. This observation is not in doubt because the idea of a constitutional structure for understanding legal systems is important for the shaping of the criminal process[15].

[15] As John Rawls rightly note the use of political power is fully proper only when "it is exercised in accordance with a constitution the essentials of

The aim of the paper is to present the impact of the Constitutional Tribunal's case law on the regulations concerning detention on remand in Poland. The judgments passed so far by the Constitutional Tribunal include judgments that pertain to detention on remand, as well as judgments that pertain to the evaluation of relevant provisions of the CCP. They relate primarily to the assessment of the current legislation from the point of view of the guarantee of constitutional rights and freedoms. In carrying out a critical analysis of the case law of the Constitutional Tribunal, I will strive to show that the Constitutional Tribunal has had a significant impact on the current shape of the detention on remand procedure. I will also try to show the conservative attitudes of the Tribunal, which has had a negative impact on the duration of detention on remand and the possibility of unrestrained contacts between the detainee and his or her attorney.

II. Tasks of the Constitutional Tribunal

The legal basis for the functioning of the Constitutional Tribunal (the CT) is set forth in Chapter VIII of the Polish Constitution, which was adopted in 1997. The role of the Constitutional Tribunal is to examine the compliance of legal norms with norms of higher rank and, where necessary, to eliminate those incompatible from the legal system. The Constitutional Tribunal, in accordance with its powers set forth in Article 188 of the Constitution, was not established to administer justice. Its essential role boils down to the control of compliance of norms of a lower order with the Constitution, including those concerning fundamental rights and freedoms of individuals that are specified in the Constitution. To better understand the binding effect of the Constitutional Court's decisions, it is necessary to briefly describe the relevant types of proceedings.

which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason", see RAWLS, John. *Political Liberalism*, New York: Columbia University Press, 1996, p. 137; HERLIN-KARNELL, Ester. The Power of Comparative Constitutional Law Reasoning in European Criminal Law Procedure. *Vienna Journal on International Constitutional Law* 2019, vol. 13, p. 2.

According to Article 188 of the Constitution, the CT adjudicates in cases involving: 1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of statutes to ratified international agreements whose ratification required prior consent granted by a statute; and 3) the conformity of legal provisions issued by central state organs to the Polish Constitution, ratified international agreements, and statutes. The result of a violation of a norm of a higher order that is identified in a judgment of the CT is the loss of validity of the act or provision of a lower order that contains the incompatible norm[16].

As part of the hierarchical review of norms, the CT operates on the principle of complaint. It examines cases in response to petitions lodged by authorized bodies: the President of the Republic of Poland, the Speakers of the two chambers of the Parliament (Sejm and Senat), a group of members of each chamber of the Parliament, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor General, the President of the Supreme Audit Office, and the Commissioner for Human Rights. Thus, it cannot act on its own initiative (*ex officio*).

The review of the constitutionality of a normative act, which is the basis of a final judgment issued by a court in a particular case, may also be initiated by a constitutional complaint. Pursuant to Article 79(1) of the Constitution, every person whose constitutional freedoms or rights have been violated by a statute or another normative act on the basis of which a court or a public administration body has decided on his or her freedoms or rights or on his or her obligations set forth in the Constitution has the right to lodge a constitutional complaint. In contrast to the abstract review carried out by the CT, which does not concern specific cases where the examined regulation is applied, the review carried out on the basis of a constitutional complaint is of a concrete nature, since its subject matter is the regulations that have been applied to the complainant. Pursuant to Article 79 (1) of the Polish Constitution, anyone whose constitutional freedoms or rights have

[16] More information can be found in JAMRÓZ, Lech. The Constitutional Tribunal in Poland in the Context of Constitutional Judiciary, Białystok: Wydawnictwo Temida 2, 2014, p. 43.

been violated is entitled, in accordance with the appropriate provisions of the statutory regulation, to lodge a complaint to the Constitutional Tribunal in the matter of a bill's conformity with the Constitution, as well as other normative act, on the basis of which a court or a body of public administration had ultimately ruled about the Constitutionally guaranteed freedoms and rights[17].

The last task of the Tribunal is to answer a question of law posed by a court. Pursuant to Article 193 of the Constitution, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements, or a statute, if the answer to such question of law will determine an issue currently before such. The purpose of a legal question is to obtain an answer regarding the conflict of laws or lack thereof. A legal question serves the purpose of reactive control, i.e. control carried out after a legal act enters into force, which is in a way in opposition to forms of preventive control carried out at the time of enactment of a law under review. In doing so, the court posing the question also seeks a ruling that satisfies the constitutional standard.

However, regardless of the manner in which the proceedings were initiated, the ruling issued as a result of the review of constitutionality always has a general and abstract effect. The Tribunal is bound by the content of the petition or constitutional complaint and may not modify it.

In addition to the powers indicated, the CT may signal to the Parliament and other law-making bodies the existence of inconsistencies and gaps found in the law, the removal of which would be indispensable to ensure the integrity of the legal system of the Republic of Poland. The signaling function is exercised in addition the Tribunal's primary role, which is to review the constitutionality of normative acts. In this regard, the Tribunal issues the so-called signaling decisions[18].

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[17] WICZANOWSKA, Hanna. The Adequacy of The Constitutional Complaint as Extraordinary Means of Human Rights Protection - A Comparison of Polish and German Solutions. *Torun International Studies*. v. 11, n. 1, pp. 5-23. 2018, http://dx.doi.org/10.12775/TIS.2018.00

[18] More information about the signaling function of the Constitutional Tribunal can be found in: JAMRÓZ, Lech. The Constitutional Tribunal in Poland in

III. Grounds for detention on remand in Poland

An analysis of the impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland should begin with a brief description of the grounds for the application of this preventive measure. Detention on remand in Poland may be used if the general premise for detention on remand and at least one special premise are fulfilled. The general premise is indicated in Article 249(1) of the CCP, which states that this measure may be applied "(...) only if the evidence gathered indicates a high probability that the accused has committed the crime." It follows from the essence of this premise that the likelihood of the perpetration of a crime must be determined by the evidence existing at the time of the decision to apply detention on remand. Moreover, the likelihood of the perpetration of crime must be high, which means that for any average person the possibility of a conviction must be substantially greater than that of an acquittal or dismissal[19].

At least one of the four special premises must be fulfilled for detention on remand to be applied in Poland. These are listed in Article 258 of the CCP. These premises indicate that detention on remand may be applied:

> a) if there is a justified concern of the accused absconding or hiding, especially when his or her identity cannot be established or he or she has no permanent residence in the country;
>
> b) if there is a reasonable fear that the accused will induce false testimony or explanations, or otherwise unlawfully obstruct the criminal proceedings;

the Context of Constitutional Judiciary, Białystok: Wydawnictwo Temida 2, 2014, pp. 138-140.

[19] WALTOŚ, Stanisław; HOFMAŃSKI, Piotr. Proces karny [Criminal process], Warszawa: WoltersKluwer, 2020, p. 449; JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, pp. 100-101.

c) if the accused has been charged with an indictable offence [20] or a summary offence[21] punishable by imprisonment of at least 8 years, or if the court of first instance has sentenced him or her to imprisonment of at least 3 years, the need to use detention on remand in order to secure the proper course of the proceedings may be justified by the threat of a severe punishment against the accused (Article 258(2) of the CCP);

d) Exceptionally, also when there is a well-founded fear that the accused charged with the perpetration of a crime or an intentional offense will commit a crime against life, health, or public safety, especially when he or she has threatened to commit such a crime (Article 258(3)).

The catalog of these circumstances should be interpreted restrictively. Each of the aforementioned grounds for the application of detention on remand expresses, in essence, an agreement to limit the detainee's rights and freedoms. This interpretation of the premises for detention on remand was noted by the Constitutional Tribunal in its judgment of 24 July 2006, SK 58/03. While the Tribunal recognized that the constitutional right to freedom may be restricted according the terms and in the manner prescribed by a statute, that restriction may not impair the essence of constitutional freedoms and rights.[22] The lack of precision of the premises for application of the measure in question deprives the accused of effective guarantees of protection of his or her constitutional right to freedom, since it does not specify the limits of the possible interference with the sphere of this right. Thus, the presence of indefiniteness in the interpretation of the premises for detention on remand is not acceptable. Only completeness and precision of the statutory provisions that interfere with the rights of individuals do not

[20] According to Article 7(2) of the Polish Criminal Code, a indictable offence is a prohibited act punishable by imprisonment for a term of not less than 3 years or by a more severe punishment.

[21] A summary offence is a prohibited act punished by a fine higher than 30 times the daily rate, the restriction of liberty or imprisonment exceeding one month (Article 7(3) of the Polish Criminal Code.

[22] Judgment of the Constitutional Tribunal of 8 December 1998, K. 41/97, OTK ZU no. 7/1998, item 117.

allow the authorities applying the law any discretion in determining the final shape of the restrictions. The unambiguity of the provision will therefore exclude arbitrariness that allows for the rights of participants in criminal proceedings to be overly restricted[23]. In particular, the legislator is obliged to pass laws that do not raise doubts among their addressees as to the content of the obligations imposed on them and the rights granted to them. This is because such an expectation of citizens towards a rational legislator stems from the principle of trust in the state and the law adopted by it. Thus, the presence of indefiniteness ambiguity in the interpretation of the premises for detention on remand is not acceptable.

Moreover, the requirement of completeness means that the practice of deciding on a restriction or deprivation of personal freedom by application of any analogy is prohibited. A constitutionally compatible regulation must allow the limits of the court's power to apply detention on remand to be defined in a manner that both is predictable to the accused and takes into account events whose occurrence affects its application. This statement is based on the proposition that detention on remand is, next to imprisonment, the most rigorous restriction of freedom that results in its deprivation.

Among the indicated special premises, the most controversial one is the premise that allows the use of detention on remand due to the severity of the punishment that may be imposed on the accused. The question that arises in connection with Article 258(2) of the CCP is whether the mere consideration of the severity of the threatened penalty of imprisonment can justify the application of detention on remand. This issue has not been clearly resolved in judicial decisions and the doctrine. On the one hand, there are opinions that since the accused is facing a severe prison sentence, he or she will certainly obstruct the criminal proceedings against him or her. This opinion allows the use of detention on remand without having to show a real need to secure the proper course of criminal proceedings. This opinion emphasizes the punishment faced by the accused and does not require demonstration of a genuine need to safeguard the

[23] See the judgments of the Constitutional Tribunal dated: 26 April 1995, ref. K. 11/94, OTK in 1995, part I, item 12; 12 January 2000, ref. P. 11/98, OTK ZU no. 1/2000, item 3; 30 October 2001, ref. K. 33/00, OTK ZU no. 7/2001, item 217; and 26 April 2004, ref. K 50/02, OTK ZU no. 4/A/2004, item 32.

proper course of criminal proceedings[24]. This means that the court only examines the correctness of the legal classification of the act allegedly perpetrated by the accused. On the other hand, it is argued that a mere reference to the upper limit of the statutory penalty is insufficient and it must be determined, based on the credible circumstances in the particular case, that the accused actually does face a severe penalty. Additionally, the general premise for the application of preventive measures, set out in Article 249(1) of the CCP, must be fulfilled[25].

The very occurrence of the indicated discrepancies demonstrates a lack of precision of this premise. However, the shortcomings of Article 258(2) of the CCP are more numerous. As for this ground for detention on remand, it is actually difficult to identify the interest that could justify the restriction of human rights and freedoms in this case. Since Article 258(2) of the CCP is the basis for decisions on the application of detention on remand in situations where there is no reasonable concern that the accused will abscond or hide or that the accused will induce false testimony or otherwise unlawfully obstruct the criminal proceedings, it can be assumed that the indicated grounds for detention on remand only serve the repressive function. In this situation, detention on remand does not serve the preventive function and is rather a measure that anticipates the punishment. According to this approach, Article 258(2) of the CCP is in conflict with the presumption of innocence. This is because the level of the penalty is predicted before all the evidence has been gathered. .

Objections to Article 258(2) of the CCP were also shared by the Constitutional Tribunal in its decision of 17 July 2019 (S 3/19)[26]. Firstly, in the Tribunal's opinion, pursuant to the current wording of Article 258(2)

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[24] Decision of the Court of Appeal in Katowice of 14 December 2005, II AKz 748/05, LEX nr 164607; Decision of the Court of Appeal in Wrocław of 14 December 2006, II AKz 635/06, LEX nr 203405.

[25] Resolution of Criminal Chamber of the Supreme Court of 19 January 2012, I KZP 18/11, OSNKW 2012/1, item 1.; HERMELIŃSKI, Wojciech; NITA-ŚWIATŁOWSKA, Barbara. Tymczasowe aresztowanie ze wzgl5du na grożącą oskarżonemu surową karę (Provisional detention due to the potential severity of penalty). *Palestra*. n. 6, pp. 14-24. 2018.

[26] Decision of the Constitutional Tribunal of 17 July 2019, S. 3/19, OTK ZU - A 2019, item 41;NITA-ŚWIATŁOWSKA, Barbara. Tymczasem aresztowanie. Glosa do postanowienia Trybunału Konstytucyjnego z 17.07.2019, S 3/19

of the CCP, it cannot be ruled out that the severity of the penalty faced by the accused is treated as an almost objective circumstance, clearly determining the need for detention on remand in every case where the charges so warrant. Viewed in this way, it can be concluded that Article 258 (2) of the CCP contains a special kind of a legal presumption, which makes it possible to detain the accused even when no other considerations (the circumstances of the act, the objective possibilities of interference of the accused in the course of the proceedings, his or her past behavior towards law enforcement and the justice system, or the degree of progress of the evidentiary proceedings, etc.) indicate that his or her obstruction of the proceedings is likely.

Secondly, Article 258(2) of the CCP significantly weakens the assumption that preventive measures are to be applied only as long as it is necessary in a given case to secure the proper course of the proceedings. Unless in a given case there is a change in the legal classification of the act or a disclosure of previously unknown circumstances affecting the penalty, the original charge against the accused and the resulting potential penalty remain valid throughout the proceedings. As a result, there is a risk that detention on remand applied on the basis of Article 258(2) of the CCP will be extended automatically until the final closure of the case, even when there are no real and concrete fears that the accused will obstruct the proceedings.

The Constitutional Tribunal noted that the current wording of Article 258(2) of the CCP, allowing to disregard the real need to secure the proper course of the proceedings in a given case, does not meet the criteria concerning the necessity to restrict the rights and freedoms resulting from Article 31(3) of the Polish Constitution. It also limits the judicial review of the correctness of the application of this measure, as required by Article 41(3) in conjunction with Article 45(1) of the Constitution. A reduction of the issue of detention on remand to a mere assessment of the correctness of the legal qualification of the act charged against the accused is in contradiction to Article 257(1) of the CCP. This provision requires the court imposing detention on remand (as well as the court

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[*Detention on Remand. Comment on the Constitutional Tribunal Decision on 17 July 2019, ref. S 3/19*]. *Przegląd Sądowy*. n. 4, p. 105-112. 2021.

extending it) to consider whether the use of this custodial measure is necessary to secure the proper course of criminal proceedings or whether another non-custodial measure is sufficient. Thus, the court's focus on the legal qualification of the act charged against the accused and its disregard of other grounds for detention on remand constitutes an unwarranted interference with the individual's personal freedom and dignity, which is protected by Article 30 of the Polish Constitution. Human dignity dictates that the criteria for deprivation of liberty should be particularly carefully examined and reviewed, without any exception for preventive measures. Consequently, allowing detention on remand to be imposed without any reasonable threat to the criminal proceedings may lead to the belief that human subjectivity is thereby violated.

In addition, the Constitutional Tribunal, in making objections to Article 258(2) of the CCP, referred to the case law of the European Court of Human Rights. In the context of the cases against Poland, the Tribunal aptly pointed out that while the threat of severe punishment is rightly a relevant factor in assessing the risk of absconding or recidivism, this cannot justify long periods of detention without reference to specific facts supporting the risk of obstruction of the proceedings[27].

The criticism of the premise for detention on remand based on the severity of the punishment that results from the Tribunal's decision of 17 July 2019 did not lead the Constitutional Tribunal to the conclusion that it is contrary to the Constitution. The Constitutional Tribunal issued

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[27] See, the ECtHR judgments of 4 May 2006 in case of *Michta v. Poland*, application no. 13425/02, § 49; https://hudoc.echr.coe.int/eng?i=001-75311; the ECtHR judgments of 16 October 2007 in case of *Malikowski v. Poland,* application no. 15154/03, § 54-56, https://hudoc.echr.coe.int/eng?i=001-82734; the ECtHR judgments of 3 February 2009 in the case of *Kauczor v. Poland*, application no. 45219/06, § 44-46; https://hudoc.echr.coe.int/eng?i=001-91115; the ECtHR judgments of 24 March 2015 in the case of *Stettner v. Poland*, application no. 38510/06, §. 80, https://hudoc.echr.coe.int/eng?i=001-153019. For information on the practice of application of detention on remand in Poland, see: PILITOWSKI, Bartosz. Current practice of applying pre-trial detention in Poland. Report from empirical research, Court Watch Poland Foundation. Available at: https://courtwatch.pl/wp-content/uploads/2019/12/fcwp_PTD_en.pdf Access on: March 13, 2022; A Measure of Last Resort? The practice of pre-trial detention decision making in the EU. Available at: https://fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf, pp. 67-71. Access on: March 13, 2022.

a signaling ruling in this case, in which it drew the attention of the Sejm (the lower chamber of the Polish Parliament) to the need for clarification of Article 258(2) of the CCP in such a way that this provision cannot constitute a basis for detention on remand in the absence of a real fear of obstruction of the criminal proceedings by the accused. Since the decision of 17 July 2019 (S 3/19), the legal situation in Poland has not changed. Thus, there is a risk in Poland that detention on remand may be used solely on the basis of the penalty faced by the defendant.

III. Access to the file of pre-trial proceedings by person detained on remand

Proceedings concerning detention on remand should ensure the possibility of access to a defense counsel and his or her access to the file of the pre-trial proceedings to review the information on the decision concerning the detention on remand. This is a condition for due process and the implementation of equality of arms. Without ensuring access to the evidence that forms the basis for detention on remand, it is also impossible to speak of ensuring an adversarial nature of the proceedings[28]. This is particularly important in the case of appeals against detentions decisions in the course of criminal proceedings (Article 5(1)(c) of the ECHR), because they take place where there is a reasonable suspicion that a punishable act has been committed and this suspicion must be verified in an adversarial procedure in the course of the review proceedings. In the case *Lamy v. Belgium*, a violation of Article 5(4) of the ECHR was found due to the fact that the defense counsel was not allowed to verify the evidentiary value of the materials collected in the course of the investigation on which the decision concerning detention on remand was based[29].

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[28] About the right to defenses at an early stage of criminal proceedings, see: SAKOWICZ, Andrzej. Suspect's access to a lawyer at an early stage of criminal proceedings in the view the case-law of the European Court of Human Rights. *Revista Brasileira de Direito Processual Penal*, vol. 7, n. 3, pp. 1979-2009, set./dez. 2021. https://doi.org/10.22197/rbdpp.v7i3.565.

[29] See, the ECtHR judgement of 30 March 1989 in the case of *Lamy v. Belgium*, application no. 10444/83.

In the Polish CCP, access to the pre-trial proceedings files is only regulated by Article 156(5) of the CCP[30]. According to this provision, "unless otherwise provided for by law, in the course of pre-trial proceedings, parties, counsels, attorneys, and statutory representatives shall be given access to files, allowed to make copies and photocopies, and issued certified copies or photocopies against payment only with the consent of the person conducting the pre-trial proceedings. With the permission of the prosecutor, in the course of pre-trial proceedings, the file may be made available to other persons in exceptional cases." This solution is general in nature. However, when the accused submits a motion for access to the file in connection with a motion for application of detention on remand or its extension, denial of access has specific procedural consequences. The limitation of procedural rights, such as the right to defense and the right to know the charges, is significant. The Act, on the other hand, does not set forth any criteria for determining the scope and grounds for denying access in this particular situation. Such broad discretion and the lack of specific grounds for refusal have raised constitutional doubts, particularly in terms of the right to defense (Article 42(2) of the Constitution). In its judgment of 3 June 2008,[31] the Constitutional Tribunal found that Article 156(5) of the CCP, to the

[30] It should be explained that pre-trial proceedings, also referred to as preliminary proceedings, are the first stage of criminal proceedings in Poland. Their aim is the preliminary preparation of the case, which leads to the determination of whether the case should be prosecuted or concluded in some other form. Moreover, during preliminary proceedings, evidence is gathered in a very formal way to be later introduced during the trial. In Poland, preliminary proceedings can be conducted in two forms: investigation or inquiry. The main points of difference between them are the following: the type of offences that are the subject of these proceedings, the level of involvement of the prosecutor in the conduct of the preliminary proceedings, and the level of formality of the investigative actions: see: JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, pp. 208-209.

[31] Judgment of the Constitutional Tribunal of 3 June 2008, ref. K 42/07, OTK ZU 2008, 5A, item 77; KARDAS, Piotr; WILIŃSKI, Paweł: O niekonstytucyjności odmowy dostępu do akt sprawy w postępowaniu w przedmiocie tymczasowego aresztowania (Concerning the Unconstitutionality of the Refusing to Inspect Files in the Proceeding in Order to Issue a Preliminary Detention). *Palestra*. n. 7-8, pp. 23-35, 2008.

extent to which it allows arbitrary exclusion of the openness of those pre-trial proceedings materials that justify the prosecutor's motion for detention on remand, is inconsistent with Article 2 and Article 42(2) in conjunction with Article 31(3) of the Polish Constitution.

Several factors contributed to this conclusion by the Constitutional Tribunal. The starting point for assessing the constitutionality of Article 156(5) of the CCP was the conclusion that, generally rightly, pre-trial proceedings - unlike court proceedings - are not based on the principle of full openness of files. The ability to achieve the objectives of pre-trial proceedings depends, among other things, on the secrecy of certain information, evidence, etc. Consequently, the principle of access to files in court proceedings is replaced by the principle of optionality in pre-trial proceedings. This conclusion should not come as a surprise, as pre-trial proceedings, in the course of which evidence is collected and prepared for evaluation by the court, should be carried out in conditions that enable the body conducting the proceedings to operate effectively.[32]

At the same time, it should also be borne in mind that refusal to grant access to files clearly encroaches on the right to defense, which becomes particularly important in the event of application (extension) of detention on remand. A reduction of the procedural guarantee in this regard puts the bodies conducting pre-trial proceedings in a privileged position. Noting these issues, the Constitutional Tribunal held that Article 156(5) of the CCP violates the right to defense in a disproportionate manner, as it allows the body conducting the proceedings to "arbitrarily decide" whether to allow access to files in such important matters as the application and extension of detention on remand. At the same time, the Constitution requires that the prerequisites for limiting constitutional rights be exhaustively regulated by a statute and thus be subject to "objective verification."

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[32] See, WILIŃSKI, Paweł: Odmowa dostępu do akt sprawy w postępowaniu przygotowawczym [Refusal to grant access to case files in pre-trial proceedings]. *Prokuratura i Prawo*, n. 11, p. 79, 2006; SKORUPKA, Jerzy. Standard dostępu do informacji o podstawie dowodowej tymczasowego aresztowania w prawie unii europejskiej i prawie polskim (Standard of Access to Information about the Evidential Base of Provisional Detention in European Union and Polish Law). Przegląd Prawea i Administracji, v. CXX, n. 2, pp. 241-253, 2020. https://doi.org/10.19195/0137-1134.120.66.

In its judgment of 3 June 2008, the Constitutional Tribunal decided on the adoption of the principle of internal openness of the part of the proceedings file that is the basis for a motion for application or extension of detention on remand. It literally concluded that "the scope of the file that should be made available to the detained person and his or her defense counsel should be determined by the effectiveness of the right of defense. Thus, all materials of the pre-trial proceedings that justify the prosecutor's motion for application or extension of detention on remand must be made public."[33] The Constitutional Tribunal justified this conclusion not only by referring to the provisions of the Constitution that regulate the principle of proportionality and the right to defense and personal freedom, but also to the case law of the ECtHR[34]. As a consequence of

[33] A similar opinion was also expressed by the Supreme Court which held that, when filing a motion for application or extension of detention on remand, the prosecutor should ensure that the suspect or his or her defense counsel is acquainted with at least the part of the pre-trial proceedings file that contains the materials intended to justify the motion, as this is necessary to ensure an effective exercise of the right to defense; see the decision of the Supreme Court of 11 March 2008, WZ 9/08, OSNKW 2008/7, item 55.

[34] As a side note, it should be pointed out that the European Court of Human Rights in Strasbourg has repeatedly referred to the issue of secrecy of materials on the basis of which decisions on detention on remand are made during pre-trial proceedings. It took the prevailing view that when the defense counsel of a detained person is denied access to the pre-trial proceedings file, which is essential in order to effectively challenge the legality of the detention, this constitutes a violation of the principle of equality of arms. Although the Court recognized the need to keep secret some of the evidence gathered during the investigation in order to prevent suspects from interfering with that evidence, it emphasized that this could not be achieved at the expense of a substantial limitation of the right to defense, see, among others, the ECtHR judgement of 30 March 1989 in the case of *Lamy v. Belgium*, application no. 10444/83, https://hudoc.echr.coe.int/eng?i=001-57514; the ECtHR judgement of 13 February 2001 in the case of *Lietzow v. Germany*, application no. 24479/94, https://hudoc.echr.coe.int/eng?i=001-59209; the ECtHR judgement of 13 February 2001 in the case of *Schoeps v. Germany*, application no.25116/94, https://hudoc.echr.coe.int/eng?i=001-59210; the ECtHR judgement of 18 January 2005 in the case of *Kehayov v. Bulgaria*, application no. 41035/98, https://hudoc.echr.coe.int/eng?i=001-67982. And in the following cases involving Poland: the ECtHR judgement of 25 June 2002 in the case of *Migoń v. Poland*, application no. 24244/94, https://hudoc.echr.coe.int/eng?i=001-60535; the ECtHR judgement of 24 April 2007 in the case of *Matyjek v. Poland*, application no. 38184/03, https://hudoc.echr.coe.

the judgment of the Constitutional Tribunal of 3 October 2008, ref. K 42/07, the regulations governing criminal proceedings were amended. The amending Act of 16 July 2009 added Article 156(5a) of the CCP. The new provisions introduced the rule t that in the course of pre-trial proceedings, the suspect and his or her defense counsel should be given access to the case file in the part containing the evidence indicated in the motion for application or extension of detention on remand. If other evidence is presented to the court in addition to the evidence described in the motion, the prosecutor is not required to inform the suspect and his or her counsel about that evidence. The existence of such evidence and its submission to the court together with the motion for detention on remand may only be made known to the suspect and his or her counsel if it concerns circumstances favorable to the suspect. In such an event, the court is obliged to take these circumstances into account ex officio, having warned the prosecutor of this fact. The only exception provided for in this respect concerns the testimony of a witness if there is a justified concern about danger to the life, health, or freedom of the witness or a person close to the witness (Article 250(2b) of the CCP). This evidence is not presented in the motion for detention on remand, but is attached to that motion. The fact that the mentioned evidence is not presented in the motion for detention on remand, raises doubts in the light of the view expressed by the Constitutional Tribunal in its judgment of 3 June

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int/eng?i=001-80219; the ECtHR judgement of 6 November 2007 in the case of *Chruściński v. Poland*, application no. 22755/04, https://hudoc.echr.coe.int/eng?i=001-83087 and the ECtHR judgement of 15 January 2008 in the case of *Łaszkiewicz v. Poland*, application no. 28481/03, https://hudoc.echr.coe.int/eng?i=001-84361. For example, in its judgment of 25 June 2002 in the case *Migoń v. Poland* (application no. 24244/94), the Court held that the information contained in the written reasoning for the motion for detention on remand was not sufficient for the applicant to conduct an effective defense in the detention proceedings, since his defense counsel had not obtained the prosecutor's consent to review the case file. The Court further emphasized that information that is relevant to the assessment of the validity of detention on remand imposed on the suspect should be made available in an appropriate manner to the suspect's defense counsel; cf.: WĄSEK-WIADEREK, Małgorzata. Zasada równości stron w polskim procesie karnym w perspektywie prawnoporównawczej [The principle of equality of arms in the Polish criminal process from a comparative-law perspective], Kraków: Zakamycze, 2003, p. 245.

2008. This is because the intention of the Constitutional Tribunal was to grant the suspect and his or her defense counsel access to those materials (evidence) that constitute the basis for the ruling on the application or extension of detention on remand, regardless of whether they are presented in the motion or merely attached to it.

Despite the existence of doubts about the "secrecy" for the suspect and his or her defense counsel of the testimony of a witness if there is a justified fear of danger to the life, health, or freedom of the witness or a person close to him or her (Article 250(2b) of the CCP), it should be pointed out that the judgment of the Constitutional Tribunal of 3 June 2008 had a positive impact on the feasibility (effectiveness) of defense in proceedings concerning detention on remand. The Tribunal proved that the right of access to evidence is a fundamental prerequisite for real participation in ongoing proceedings and its exercise is impossible or at least extremely difficult if the accused or suspect is deprived of access to the evidence gathered in his or her case.

IV. Access of an accused detained on remand to a defense counsel in private

In its judgment of 17 February 2004,[35] the Constitutional Tribunal addressed the issue of access of a person detained on remand to a defense counsel. It should first be noted that according to Article 73(1) of the CCP, an accused who is detained on remand may communicate with his or her defense counsel in the absence of other persons and by mail. The right of the accused to freely communicate with a defense counsel in the absence of third parties is one of the basic requirements of a fair trial. Allowing such contact to the accused gives him or her the opportunity to prepare his or her defense and pursue it during the proceedings[36].

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[35] Judgment of the Constitutional Tribunal of 17 February 2004, ref. SK 39/02, OTK ZU 2004, 2A, item 7.

[36] See JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, p. 204.

Article 73(1) of the CCP ensures the right of the accused to communicate in a free and uncontrolled manner with his or her defense counsel. It guarantees the person detained on remand contact in person and by mail with his or her counsel in both pre-trial and court proceedings. This principle is fully applicable in court proceedings. In pre-trial proceedings, the public prosecutor could, when granting permission to communicate, in particularly justified cases, stipulate that he or she or a person authorized by him or her must be present during the communication. This possibility also applied to the control of the suspect's mail exchanged with his or her defense counsel (Article 73(2 and 3) of the CCP). These restrictions may not be maintained after the expiry of the period of 14 days from the date of detention on remand.

In a constitutional complaint lodged in the case that gave rise to the judgment of the Constitutional Tribunal of 17 February 2004, the complainant argued that Article 73(2) of the CCP violates the principles of the right to defense and deprives the accused of the possibility to appeal against the decision limiting his unrestrained contacts with his defense counsel. In his opinion, the lack of appellate review creates the potential for excessive discretion and arbitrariness.

The Constitutional Tribunal did not share the applicant's position and ruled on the compatibility of the challenged provision with Article 42(2) and Article 78 of the Constitution. The Tribunal found that limiting the contacts with a lawyer during 14 days of detention on remand did not violate the principle of proportionality in the exercise of freedoms and rights. It based this position on its finding that "the restriction of the accused's right to communicate with his counsel in the absence of other persons - as governed by the provisions of the Code - does not constitute an excessive interference with the right to defense." In the opinion of the Constitutional Tribunal, this is due to the short - only 14-day - period during which the prosecutor may limit the freedom of contacts of the accused with his or her defense counsel. This limitation, as the Tribunal pointed out, cannot therefore have a fundamental effect on the procedural situation of the accused and does not constitute an obstacle to the preparation of the defense.

One cannot agree with the view expressed by the Constitutional Tribunal. The presence of a third party (usually a police officer) during

a conversation between an accused detained on remand and his or her defense counsel is not indifferent. I believe that it not only adversely affects the line of defense at this stage of criminal proceedings, but also prevents unrestrained possibility to agree with the defense counsel on the exercise of the procedural rights. Nor is it appropriate to justify such a restriction by asserting that "an order restricting an accused person's freedom to communicate with his or her defense counsel in the absence of others must be justified by a compelling interest of the pending proceedings." It should be noted that the above view is based on the unfounded belief that the actions of a defense counsel at the initial stage of detention on remand do not serve the interests of preliminary proceedings. It is even suggested that a restriction of such contacts is due to the fact that defense counsels obstruct the proper course of pre-trial proceedings. If such situations have actually taken place, consideration should be given to holding the defense counsels who engage in such conduct criminally or disciplinarily accountable, rather than supporting a claim that nullifies the right to defense at the early stage of a suspect's detention.

It is clear that depriving the suspect of unrestrained contacts with a defense counsel, in particularly justified cases, means that the value of the assistance provided by the counsel is significantly reduced. In this context, one must not ignore contacts by mail between a suspect detained on remand and the defense counsel, which should be particularly privileged because of the guarantees arising from the right to obtain professional legal advice[37].

The shape of solutions related to control of mail exchanged between a suspect detained on remand and his or her defense counsel was also the subject of the judgment of the Constitutional Tribunal of 10 December 2012 (K 25/11)[38]. When examining the compatibility of

[37] It should be added that in the judgment of 25 March 1983 issued in case of Silver *and Others v. the United Kingdom* (application no. nr 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 i 7136/75, https://hudoc.echr.coe.int/eng?i=001-57577) the ECtHR held that whatever the nature of the mail of the person detained on remand, it should not be opened, except in such situations where there is a reasonable suspicion that the mail is being used for an unlawful purpose or contains objects the mailing of which is prohibited.

[38] Judgment of the Constitutional Tribunal of 10 December 2012, ref. K 25/11, OTK ZU 2012, 11A, item 132.

Article 73(3) of the CCP, which provides that "the prosecutor may also stipulate control of the mail exchanged between the suspect and his or her defense counsel" for a period not exceeding 14 days, the Constitutional Tribunal held that this provision does not specify the circumstances in which it is possible for the prosecutor to exercise the option to limit the right to defense by controlling mail. The provision lacked any rationale that would limit the prosecutor's discretion to undertake mail control.

In order to implement this ruling, the legislator amended Article 73(2 and 3) of the CCP in such a way that "in pre-trial proceedings, when granting permission to communicate, the prosecutor may stipulate in particularly justified cases, if the interest of the pre-trial proceedings requires it, that the prosecutor himself or a person authorized by him shall be present at the communication" (Article 73(2)). For the same reasons, it is possible to stipulate control of the suspect's mail exchanged with his or her defense counsel (Article 73(3)). When comparing the current and previous wordings, one should first of all note that the premises to be met for the prosecutor to be able to make a decision on limiting unrestrained contacts of a suspect detained on remand with his or her defense counsel were made more specific. In this regard, a double quantification of the circumstances justifying a limitation of such contacts was introduced by using the criterion of "particularly justified cases, if the interest of the pre-trial proceedings requires it."

Despite the fact that the adopted wording of Article 73(2 and 3) of the CCP emphasizes the exceptionality of situations in which it is permissible to limit the unrestrained contacts between a suspect detained on remand and his or her defense counsel, it still uses a phrase characterized by excessive vagueness and capacity. In essence, this is a vague concept that is "filled" at the stage of application of the law, i.e. during the prosecutor's decision-making process. This allows us to assume that Polish legislation is still not conducive to the full implementation of the right to defense at the early stage of detention on remand. This is because it is impossible to create an atmosphere of mutual trust between a defense counsel and a suspect when they do not have the opportunity to communicate freely in person if the conversation takes place in the presence of a prosecutor or a police officer. In addition to providing psychological support to the accused, it is necessary to explain the charges

to him or her, address the evidence, inform him or her of the legal steps taken, and agree on the line of defense. After all, it is difficult to expect a suspect to provide the defense counsel with all the information required for an effective defense in a situation where their conversation is not confidential. In other words, the contacts between the accused and his or her defense counsel must be unrestricted, because only such contacts guarantee the proper functioning of the defense relationship. It is for this reason that it is impossible to share the position of the Constitutional Tribunal regarding the access of an accused detained on remand to a defense counsel.

V. Duration of detention on remand

The Polish criminal procedure doctrine considers the duration of detention on remand, which is set forth in Article 263 of the CCP, as controversial. According to section 1 of that article, detention on remand may be applied for a period not exceeding three months. However, pursuant to Article 263(2) of the CCP, if the pre-trial proceedings in a case could not be completed within three months, at the request of the prosecutor, the court of first instance competent to hear the case may extend the detention on remand for a period that may not exceed 12 months in total. On the other hand, pursuant to Article 263(3) of the CCP, the total period of detention on remand until the court of first instance issues a judgment may not exceed two years. However, these are not absolutely the maximum periods which, if exceeded, make void further application of this measure. Pursuant to Article 263(4) of the CCP, an appellate court may extend detention on remand for a further specified period beyond the period of 12 months in pre-trial proceedings and 2 years when the case is pending before a court of first instance[39].

[39] In Poland, there is no maximum duration of detention on remand. This issue is not uniform across European countries. Time limits vary with some countries recognizsing maximum limits (e.g. Italy 6 years, and Spain 4 years), and others do not provide for maximum limits and, at least in practice, pre-trial detention can be renewed for undetermined periods (e.g. Netherlands, Germany, Hungary), see MARTUFI, Adriano; PERISTERIDOU Christina. The Purposes of Pre-Trial Detention and the Quest for Alternatives. European

Such an extension may occur at the request of the court before which the case is pending or, in pre-trial proceedings, at the request of the competent prosecutor who is the direct superior of the prosecutor conducting or supervising the investigation - if such a need arises in connection with the suspension of criminal proceedings, activities aimed at establishing or confirming the identity of the accused, the performance of evidentiary activities in a case of particular complexity or outside the country, as well as deliberate protraction of the proceedings by the accused. Moreover, the special possibility to extend detention on remand is allowed after the first judgment of the first instance court. Pursuant to Article 263(7) of the CCP, where there is a need for detention on remand after the first judgment of the court of first instance, any extension may be granted for a period of not more than six months.

The latter provision has been the object of evaluation by the Constitutional Tribunal. In its judgment of 20 November 2012[40], the Tribunal held that Article 263(7) of the CCP, insofar as it does not clearly specify the prerequisites for extending detention on remand after the judgment issued by the first instance court in the case, violates the personal freedom of the accused in a disproportionate manner and may lead to "inhumane treatment" of the person detained on remand. In the opinion of the Constitutional Tribunal, "the norm limiting the extension of detention on remand to no more than six months at a time is unquestionably a guarantee; however, this guarantee is considerably weakened by the fact that both the number of decisions issued on this basis and the total length of time the accused is detained on remand are not only not limited in any way, but (....) are not subject to scrutiny from the point of view of what conduct by the accused which impedes the criminal proceedings can be expected with a high degree of probability under the circumstances in place, at a particular stage of the proceedings."[41]

Journal of Crime, Criminal Law and Criminal Justice, vol. 28, n. 2, p. 156, 2020. https://doi.org/10.1163/15718174-bja10002.

[40] Judgment of the Constitutional Court of 20 November 2012, ref. SK 3/12, OTK ZU, no. 10/A/2012, item 123.

[41] Ibid.

The Tribunal rightly saw that a prolonged and unpredictable restriction of the defendant's ability to contact his or her family and engage in religious practices, and his or her detention in almost complete isolation from the outside world (censorship of correspondence, prohibition to use means of remote communication) become inhuman treatment over time. What is important, however, is not just the restrictions that affect the person detained on remand. The absence of a maximum period of time for which a court may grant an extension is not in itself inconsistent with the constitutional rights to freedom and definitiveness of law.[42] What raises doubts in terms of compliance with the Constitution is the failure to define the prerequisites for extension of detention on remand. On the one hand, the law makes it impossible for the person detained on remand to predict how long this measure will be imposed on him or her and, on the other hand, it leads to a potential risk of abuse.

The judgment of the Constitutional Tribunal of 20 November 2012 imposed an obligation on the legislator to adopt such amendments to the law that would lead to clearly defined prerequisites for extending detention on remand after the first instance court issues a judgment in the case. Unfortunately, ten years later, the legislator has not yet

[42] In its judgment of 10 July 2019 (ref. K 3/16), the Tribunal held that the failure to specify the maximum total duration of detention on remand after the first judgment of the court of first instance is consistent with Article 41(1) in conjunction with Article 31(3) of the Polish Constitution; see: OTK ZU – A 2019, item 41. In the opinion of the Constitutional Tribunal, the legislator is not obliged to introduce into the system of law a normative provision that specifies the maximum and non-extendable duration of detention on remand. An absolute requirement to release an accused person from custody could, in many cases, prevent the achievement of some the fundamental objectives of criminal proceedings, i.e. detection of the perpetrator of a crime and holding him or her criminally responsible. It would be particularly difficult to accept if it was the accused who, by his actions, sought to prolong the proceedings in order to force his or her release on the grounds that the permissible duration of detention on remand is exceeded. Besides, no provision of the Polish Constitution expressly establishes the requirement to introduce a limit on the maximum duration of detention on remand. Article 41(1) (personal freedom) of the Constitution imposes only "directional" limitations: the adopted solutions must not violate the essence of the right to personal freedom and be disproportionate. All in all, the legislator has a relatively wide margin of freedom to choose solutions that define the duration of detention on remand.

implemented the judgment of the Constitutional Tribunal of 20 November 2012. The provision in question still does not define the prerequisites for an extension of detention on remand and, consequently, still does not make it possible to foresee the maximum time limits for application of this preventive measure after the first judgment issued by the court of first instance. Consequently, on 17 July 2019 (ref. no. S 3/19)[43], the Constitutional Tribunal issued the so-called signaling decision in which it indicated to the lower chamber of the Polish Parliament (Sejm) the need for a legislative intervention due to the lack of clearly defined prerequisites for an extension of detention on remand. To date, that decision has not been implemented. This leads to the conclusion that, with regard to an extension of detention on remand after the first judgment issued by the court of first instance, there is no compliance with the standards of the rule of law and fair trial. A possible restriction or deprivation of freedom pursuant to a statute must also be understood as an obligation on the part of the legislator to establish comprehensive regulations covering all situations in which the restriction or deprivation of freedom is permissible, and not merely an obligation to indicate a general basis for such actions. Only in this way is it possible to define the limits of the court's power to impose detention on remand in a way that is predictable to the accused.

VI. The right of the persons detained on remand to contact their loved ones

The Constitutional Tribunal has played an important role in improving the standard concerning the ability of persons detained on remand to contact their loved ones. This issue is addressed in Article 217 of the Executive Penal Code[44]. According to its original wording, a person detained on remand could be allowed a visit by his or her loved ones after the authority at whose disposal the detainee is issued an order stating a permission for the visit. This provision clearly stipulated that

[43] Decision of the Constitutional Tribunal of 17 July 2019, S. 3/19, OTK ZU - A 2019, item 41.

[44] Journal of Laws no. 90, item 557, as amended; hereinafter referred to as EPC.

the contact between a person detained on remand and his or her family members and loved ones is possible only after the competent authority has issued an order stating its permission for the visit. On the other hand, it did not specify the criteria that the authority should use when refusing to issue a permission for a visit. As a consequence, the legal situation of a person detained on remand with regard to visits of relatives and loved ones differs significantly from that of a convicted person. A person detained on remand may obtain a permission for a visit of family members and loved ones only after the court or the prosecutor's office gives its consent, while a person sentenced to imprisonment has the right to such visits guaranteed by law.

The Commissioner for Human Rights, questioning the constitutionality of Article 217 of the EPC, presented two objections. The first objection concerns the lack of precise premises that would limit the authority's discretion in deciding whether to refuse to grant to a person detained on remand a permission for a visit. The second objection concerns the lack of possibility to appeal the prosecutor's decision not to allow a visit. This means that neither the person detained on remand nor his or her relatives and loved ones are entitled to appeal such a decision

In its judgment of 8 July 2009 (ref. K 1/09)[45], the Constitutional Tribunal supported the aforementioned objections. In its opinion, Article 217(1) of the EPC makes the possibility of exercising the essential elements of the constitutional right to protection of private and family life an exception for persons detained on remand and their family members and loved ones, while the exclusion of this possibility becomes the rule. This even allows one to argue that a visit of a person detained on remand by a family member automatically jeopardizes the objectives of the ongoing criminal proceedings. Meanwhile, interference with the right to protect private and family life is allowed only if the existence of an important public interest justifying it *in concreto* is demonstrated. Consequently, the Tribunal concluded that the premises limiting the ability of a person detained on remand to obtain permission for visits must be clarified at the level of a statute.

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[45] Judgment of the Constitutional Tribunal of 2 July 2019, K 1/07, OTK-A 2009, no. 7, item 104.

Regarding the objection concerning the lack of possibility to lodge a complaint against a prosecutor's decision to refuse to grant a permission for a visit, the Tribunal stated that in the case under examination the legislator exceeded the constitutional limits of permissible restrictions on the exercise of the right to appeal against judgments issued in the first instance (Article 78 of the Constitution). Indeed, it is impossible to show the reasonableness of such a restriction in the case of a prosecutor's decision, especially since a court's order refusing to grant a permission for a visit could be appealed against. The legislator should have guaranteed a procedure for reviewing decisions concerning granting permissions for visits regardless of the entities that made such decisions.

It did not take long for the legislator to make a decision. Just four months after the judgment of the Constitutional Tribunal, a law was passed that amended the wording of Article 217 of the CCP. The law added a new paragraph stating that a person detained on remand is entitled to at least one visit of his or her loved one per month. However, there are exceptions to this rule. A person detained on remand may be refused a permission for a visit if there is concern that the visit will be used to unlawfully obstruct the criminal proceedings or to commit a crime, in particular to incite committing a crime. The new law also introduced the possibility to appeal against a prosecutor's decision to refuse to grant a permission for a visit of a loved one to a person detained on remand. The appeal in such cases is reviewed by a superior prosecutor. The newly adopted provisions should be approved of. The ability to appeal against such decisions, combined with the requirement to indicate in the justification the reasons for refusal to grant a permission for a visit, will make it possible to fulfill the requirement, identified by the Constitutional Tribunal, to define clear premises limiting the right of persons detained on remand to be visited by their loved ones at the level of a statute.

VII. Conclusion

This paper presents the importance of the case law of the Constitutional Tribunal in Poland to the determination of the standard of detention on remand. The analysis carried out proved the special

importance of the principle of proportionality when assessing the constitutionality of the provisions of law on the application of detention on remand. On the one hand, this principle requires the legislator (lawmaker) to always ascertain the actual need for interference with the scope of an individual's right or freedom in specific circumstances. On the other hand, it should be understood as a requirement to apply legal measures that are effective, i.e. that actually serve the purpose intended by the legislator. An interference with the sphere of an individual's status must therefore be in reasonable and appropriate proportion to the objectives whose protection justifies the restriction imposed.

The case law of the Polish Constitutional Tribunal also points out that only completeness and precision of the statutory regulation of detention on remand can limit the arbitrariness of courts in their application of this preventive measure. This comment was made on the basis of the considerations of the Constitutional Tribunal carried out in the context of the premise for application of detention on remand based on the severity of the penalty. The Tribunal ruled out the possibility to use this measure merely by reference to the severity of the penalty facing the accused. It correctly concluded that the severity of the penalty faced by the accused could at most make it more likely for the accused to obstruct the criminal proceedings. A clear standard has been set by the Constitutional Tribunal concerning the duration of detention on remand. In particular, the failure to specify the premises for extension of detention on remand may result in prolonged detention, the duration of which cannot be predicted, which may be considered as inhumane treatment.

The paper points out that the case law of the Constitutional Tribunal has had a significant impact on the form of the provisions concerning access by suspects and their defense counsels to the files of the pre-trial proceedings in the parts concerning the decisions to apply detention on remand. Following a decision of the Constitutional Tribunal, the legislator adopted provisions stating that materials from pre-trial proceedings that justify the prosecutor's request to apply or extend detention on remand should be disclosed to suspects and their defense counsels. The case law of the Constitutional Tribunal has also clearly contributed to an improvement of the situation of persons detained on remand with regard to their contacts with their loved ones. The

introduction of the rule that persons detained on remand are entitled to at least one visit per month by their loved ones has undoubtedly improved the protection of the suspects' private and family lives.

Not every position of the Constitutional Tribunal concerning evaluation of the legal provisions that govern detention on remand should be agreed with. What raises doubts is the opinion that limiting the suspect's contacts with a lawyer during the first 14 days of detention on remand does not violate the principle of proportionality in the exercise of freedoms and rights. It is unreasonable to agree that this legal solution does not affect the procedural situation of the suspect and does not hinder the preparation of his or her defense. It seems that the situation should be evaluated quite differently. I believe that legal assistance cannot be effective when the suspect does not have the opportunity to freely consult with a defense counsel. In particular, it is not permissible to restrict in advance confidential contacts between a suspect and his or her defense counsel in order to safeguard the proper course of the criminal proceedings. This is because not every defense counsel acting in the interest and on behalf of his or her client acts outside the boundaries of law.

Despite the latter issue, the case law of the Constitutional Court in Poland on detention on remand has proven that constitutional principles are *sine qua non* for a criminal justice system that respects the rule of law, human rights, and democratic principles.

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The (lack of) consequences of reasonable doubts on the independence of the judiciary system on cooperation in criminal matters in the EU[1]

A (ausência) de consequências em caso de dúvida razoável sobre a independência do sistema judicial na cooperação em matéria penal na União Europeia

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Abstract: The article analyses the consequences of the violation of judicial independence in the cooperation in criminal matters. The right to an independent court is not only a fundamental value in the rule of law (Article 2 TEU, Article 19(1)), but also one of the fundamental rights (Article 47 CFR). Jeopardising the independence of the judiciary in one of the EU countries should have an impact on the possibility of cooperation in criminal matters. Leaving the standard of independence of the judiciary resulting from the ECHR jurisprudence, the article summarises the current jurisprudence of the CJEU concerning the independence of the judiciary and the impartiality of judges at two levels: general (or systemic), and in connection with the operation of the EAW. The article analyses present situation in Poland and recent judgments of the CJEU in "Polish cases" – about the problem of executing the EAW and evaluating the independence of the judiciary system in Poland.

Keywords: rule of law in Poland; judicial cooperation in criminal proceedings; EAW; independence of judiciary; the CJEU jurisprudence.

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[2] PhD in law, assistant professor at the Department of Criminal Procedure, Faculty of Law, Administration and Economics, University of Wrocław.

Resumo: *O artigo analisa as consequências da violação à independência judicial no caso de cooperação em matéria criminal. O direito a um juízo independente não é somente um valor fundamental do Estado de Direito (art. 2, Tratado da União Europeia, art. 19(1)), mas também um dos direitos fundamentais (art. 47, Carta dos Direitos Fundamentais da União Europeia). A violação da independência do Judiciário em um país da UE deve impactar na possibilidade de cooperação em matéria criminal. Considerando o standard de independência do Judiciário a partir da jurisprudência do TEDH, o artigo resume a atual jurisprudência do TJUE relacionada à independência do Judiciário e à imparcialidade dos juízes em dois níveis: geral (ou sistêmico), e em conexão com a operação do mandado de detenção europeu. O artigo examina a situação na Polônia e os julgamentos recentes do TJUE nos "casos da Polônia" – sobre o problema de executar o mandado de detenção europeu e avaliar a independência do sistema judicial na Polônia.*

Palavras-chave: *Estado de Direito na Polônia; cooperação judicial em processo penal; mandado de detenção europeu; independência do Judiciário; jurisprudência do TJUE.*

1. Introduction

Judicial cooperation in criminal matters is based on mutual trust in respect of the rule of law principle, democracy and fundamental rights[3] by all European Union countries. Mutual trust, however, is not a 'blind trust' given to the EU countries once and for all[4]. To build an area of freedom, security and justice, where the rights and freedoms are

[3] The European Commission refers to these values in the proposal for a regulation on the rule of law. See: Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States; COM/2018/324 final - 2018/0136 (COD).

[4] Agnieszka FRĄCKOWIAK-ADAMSKA, *The Limits of Mutual Trust in the Area of Freedom, Security and Justice,* European Judicial Review, 2014, no. 2, p. 20; K. LENAERTS, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust,* Common Market Law Review, 2017, No. 3, p. 811; Agnieszka GRZELAK, *Mutual trust as a basis for judicial cooperation between EU Member States in criminal matters (remarks on the margin of the preliminary reference in Case C-216/18 PPU Celmer*), State and Law, 2018, No 10, p. 59.

respected, it should be possible to verify, whether a country complies with the obligations of being a Member State of the EU. M. Kusak states that, although the introducing of the principle of mutual trust was accompanied by optimism, from the very beginning the concept was in crisis[5]. The differences in the level of protection of fundamental rights have been evident in the early phase of the EAW being in force[6], but the CJEU - until the *Aranyosi and Caldararu judgment*[7] - had given priority to the principle of mutual recognition[8]. V. Mitsilegas observes that the EU institutions sometimes sacrificed the protection of fundamental rights for the effective implementation of the principle of mutual recognition[9]. However, is this thesis still valid? Or maybe, the development of human rights law has made the protection of individual rights more important than the functioning of the principle of mutual recognition?

In recent years, the principle of mutual recognition and mutual trust has been at the greatest crisis. The threats of violations of the principle of the rule of law, interference in the independence of the judiciary system and, as a result, violation of the right to a fair trial, raise questions about the future of the EU's cooperation in criminal matters.

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[5] Martyna KUSAK, *Zasada wzajemnego zaufania a kryzys praworządności,* [in:] Dominika CZERNIAK, Jerzy SKORUPKA, *Europejskie gwarancje prawidłowego wymiaru sprawiedliwości w sprawach karnych,* C.H. BECK, Warszawa 2021, p. 49.

[6] Martyna KUSAK, *The principle of mutual trust,* p. 50-55. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1–20, hereinafter: the EAW.

[7] COURT OF JUTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 5 April 2016*, C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru. See also: Georgios ANAGNOSTARAS, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldararu,* Common Market Law Review, 2016, v. 53, No. 6, p. 1675 – 1704*;* Koen BOVEND'EERDT, *The Joined Cases Aranyosi and Caldararu. A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice¸ Utrecht* Journal of International and European Law, 2016, v. 32, p. 112-122.

[8] COURT OF JUTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 26 February 2013,* C-399/11, Stefano Melloni v Ministerio Fiscal.

[9] Valsamis MITSILEGAS, *EU Criminal Law after Lisbon,* Bloomsbury Publishing 2016, p. 141.

The question arises as to whether it is possible to continue to "turn a blind eye" to violations of the fundamental values in the European Union to preserve the integrity of the principle of mutual recognition of judgments. To maintain the coherence of the European community, EU institutions must balance the interests of various parties. Also the CJEU, in its judgments, also considers the possible political effects. The question is, whether the limit of tolerance for violating the values on which the EU is based, has already been crossed.

2. The right to effective legal protection (Article 19(1) TEU) and independence of the judiciary

The Article 19(1) TEU[10] obliges the EU Member States to establish the measures necessary to provide effective legal protection in the areas covered by the Union law. The scope of Article 19(1) TEU is potentially unlimited[11]. Indeed, this provision covers all national laws and practices which may violate the obligation of Member States to establish effective legal remedies necessary to ensure effective judicial protection[12]. It therefore makes no difference whether the national courts are dealing with a matter within the scope of Union law or only a domestic matter[13]. In any case, the possibility of effective judicial protection of the rights of

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[10] Treaty on European Union; hereinafter: TEU; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT (accessed: 27.03.2022)

[11] The indefinite scope of Article 19(1) TEU does not mean that a national court may submit a question for a preliminary ruling in every case. The possibility depends on whether there is a connection between the case at issue and European Union law. See: COURT OF JUTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 26 March 2020, C-558/18 and C-563/18, Miasto Łowicz,* § 48-52 with further reference to the CJEU case law. COURT OF JUTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 23 November 2021, C-564/19, IS,* § 141-146.

[12] OPINION OF ADVOCATE GENERAL MICHAEL BOBEK delivered on 4 March 2021; C-357/19 and C-547/19; § 71.

[13] Currently, it is difficult to find an area of law that is entirely free from the influence of the EU law. The development of the human rights in the EU law means that most areas of law are more or less changed by the EU standards. This does not mean, however, that in every case the national courts apply acts of EU law.

the person must be ensured. The principle of effective judicial protection is also one of the elements of the rule of law, one of the values on which the Union is founded in Article 2 TEU[14]. After all, only in the State that fulfil the rule of law principle, the rights and freedoms of individuals can be effectively ensured[15]. Undermining this principle may constitute a systemic (structural) threat to the independence of judiciary[16]. The

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[14] Maciej TABOROWSKI, Piotr BOGDANOWICZ, *Lack of independence of national courts as a fault obligation within the meaning of Article 258 TFEU (Part I),* European Judicial Review, 2018, No, 1, p. 5; Armin von BOGDANDY, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace*, European Constitutional Law Review 2018, Volume 14, Issue 4, pp. 675 – 699; Armin von BOGDANDY and Luke DIMITRIOS SPIEKER, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, European Constitutional Law Review 2019, Volume 15, Issue 3, pp. 391 – 426 COURT OF JUTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of March 282017*, *C-72/15, PJSC Rosnefit Oil Company v. Her Majesty's Treasury and others,* § 72.

[15] Przemysław MIKŁASZEWICZ, *Independence of courts and independence of judges in the context of the rule of law - an essential element of the functioning of the EU in the light of CJEU case law,* State and Law, 2018, No. 3, p. 41.

[16] Ireneusz C. KAMIŃSKI, Uniajna zasada praworządności (państwo prawa) i uprawnienia uprawnienia sądów, [in] Łukasz BOJARSKI, Krzysztof GRAJEWSKI, Jan KREMER, Gabriela OTT, Waldemar ŻUREK, Konstytucja, praworządność, władza sądownicza, Wolters Kluwer, 2019, Warszawa, p. 37-64. There is no common definition of the "rule of law" but most of authors underline four crucial elements of "rule of law":

1. "rule by law (legal basis of any actions)

2. state actions are subject to law;

3. formal legality (law must be clear and certain in its content, accessible and predictable for the subject, and general in its application)

4. democracy (consent determines or influences the content of the law and legal actions)".

See definition's problem in: Adriaan BEDNER, *An Elementary Approach to the Rule of Law*, Hague Journal on the Rule of Law, 2010, v. 2., No 1, p. 48-74. See also: Robert SPANO, *The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary,* European Law Journal, 2021, https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12377 (accessed: 6.02.2022); Andrzej Marian ŚWIĄTKOWSKI, *The EU concept of the rule of law. Judgment of the Court of Justice of the European Union in Case C-791/19 - Effective judicial protection - European Commission v. Republic of Poland,* Przegląd Sądowy, 2021, No. 10, p. 5-24. It is worth to mentioned that sometimes the fourth element is contested. G.

right to an independent court is also one of fundamental right (Article 47 of the CFR)[17].

The CJEU highlights the link between Article 19(1) TEU and Article 47 CFR[18]. Effective judicial protection is only possible before an independent and impartial tribunal[19], and the right to an independent and impartial tribunal is one of the human rights (Article 47 CFR, Article 6(1) ECHR)[20]. There is an inseparable link between effective judicial protection, judicial independence, the rule of law principle and respect for fundamental rights. Only in a state, where the rule of law principle

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Palombella observes that there is no inextricable relationship between the rule of law and democracy, and the first three elements (especially the structure of the state) are more important. The Author emphasises that: "The long history of the rule of law has many incarnations, and this final absolute identification with the latest version would fail to grasp the general and non-contingent sense of this normative concept, which developed even before the emergence of the constitutional state and its organisation. Finally it does not stand for some fixed perennial rules or substantive contents, and cannot be equated with the requirements of, "democracy" or the democratic state: the nature of the political structure of the sovereign is not, strictly speaking, the most important question here". See: Gianluigi PALOMBELLA, *The Rule of Law and Its Core* [in:] Gianluigi PALOMBELLA, Neil WALKER (eds.), *Relocating the Rule of Law*, Hart Publishers, 2009, p. 21. See also: Martin KRYGIER, *The Rule of Law: Legality, Teleology, Sociology,* [in:] Gianluigi PALOMBELLA, Neil WALKER (eds.), *Relocating the Rule of Law*, Hart Publishers, 2009.

17 Charter of Fundamental Rights of the European Union; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT (accessed: 27.03.2022).

18 See COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses,* § 35; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 21 December 2021*; *Criminal proceedings against PM and Others,* C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, § 219 and the CJEU judgment mentioned in this paragraph. See also: Michał KRAJEWSKI, *Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma* European Papers Vol. 3, 2018, No 1, pp. 395-40.

19 Also: Agnieszka GRZELAK, Andrzej SAKOWICZ, *The requirement of the independence of the national court as an element of effective judicial protection (remarks against the background of the CJ judgment of 19.11.2019 for the Polish judiciary,* State and Law 2020, No. 5, pp. 59-76.

20 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses*; § 35.

is respected, courts may be independent and guarantee effective judicial protection. The European Union does not require the Member States to adopt a specific organisational model for the judiciary system[21] to ensure, in particular, that the requirement for independence is met[22]. The principle of loyalty (Article 4(3) TEU) only requires states to take measures which would guarantee the effectiveness of the EU law[23]. While it does not interfere with the traditions of the Member States, the EU only imposes a requirement that the judicial system as a whole must be independent and guarantee the effective protection of the rights of the individual. The discretion to create their own systems and procedures of the states of the European Union is limited - as to the result - by the provisions of the TEU and the CFR. Whether a court is independent depends on both institutional factors (the court as a public authority deciding on the rights and obligations of the individual; the external aspect of independence) and personal aspects related to the individual judge (the internal aspect of independence, impartial).

The CJEU - as a rule - is not to assess the structure of national courts, judicial institutions and the competences of national authorities, in particular: those of the executive. However, in exceptional situations, where the entire judiciary system of a state no longer fulfils the requirements of the rule of law, the Court has the right to intervene[24]. In its case law, the

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[21] See also some interesting remarks: Jerg GUTMANN, Stefan VOIGT, *Judicial independence in the EU: a puzzle,* European Journal of Law and Economics, 2020, v. 49, p. 83-100.

[22] Those are arguments of the Polish Government in the proceedings in the CJEU. The Government points out that the EU is exceeding its powers and the judicial organisation is one of the exclusive competence of the EU member states.

[23] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 18 May 2021, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, IS,* § 176. Besides taking steps to ensure the effectiveness of the EU law, states are obliged to resolve any unlawful consequences of a breach of the EU law.

[24] In the opinion, the advocate general M. Bobek said: "I must emphasise that, in my view, it is not the role of this Court to assess, in a general manner, the structure and competences of national (judicial) institutions. With the exception of the extreme and unfortunate scenarios in which an entire judicial institution (or even parts of the judicial system) no longer satisfy the

CJEU has developed criteria to assess whether the courts of a Member State are independent (externally and internally) within the meaning of Article 47 of the CFR and whether they guarantee effective legal protection under Article 19(1) TEU.

As regards "external independence"[25], the Court observes whether the body concerned (the court) acts with complete autonomy, without hierarchical subordination, and free from instructions or guidelines from any source[26]. It is important to ensure institutional protection against direct or indirect influence on a decision/judgments[27]. Indirect interference means a situation, where a judge is threatened with disciplinary consequences as a result of the judgment, e.g. as a result of a reference to

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systemic requirements of the rule of law and thus can no longer be referred to as an independent court, and when the institutional analysis of a national judicial actor becomes inevitable, the Court has always limited its analysis to substantive issues raised by a referring court. It is true that within such a discussion, the previous decision of another, even a higher judicial institution within the same legal order, might be indirectly called into question. However, the subject matter of that discussion was always primarily the substance of that decision, not an abstract assessment of the competences or the general authority of a national institution issuing it". OPINION OF ADVOCATE GENERAL MICHAEL BOBEK delivered on 4 March 2021; C-357/19 and C-547/19; § 198.

25 The concepts of independence (of the judiciary; *independence*) and judicial *autonomy/independence* (independence) are distinguished in the Polish legal sciences. Independence is connected with the court as an institution. Judicial autonomy/independence is an attribute of a certain judge. Maciej TABOROWSKI, Piotr BOGDANOWICZ, *Lack of independence of national courts as a breach of an obligation within the meaning of Article 258 TFEU (Part I),* European Judicial Review, 2018, No, 1, p. 7.

26 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 20 April 2021, C-896/19 Repubblika,* § 55. A phrase "any source" referes also to e.g. guidelines made by the other courts or a president of a court. See: European Commission for democracy through law (Venice Commission). Rule od law checklist p. 33; https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf (accessed: 27.03.2022).

27 See also: COURT OF JUSTICE OF THE EUROPEAN UNION. Judgment (Grand Chamber) of 27 May 2019, C-508/18 and C-82/19 PPU, OG and PI, § 65-74.

EU law in a judgment or as a result of the erroneous application of national law. For the assessment of external independence[28], important factors are:

1. the procedure for the nomination of judges[29],
2. the period of judicial mandate (term of judge's office)[30], as well as whether the term of mandate may be terminated by legislative or executive authority[31];

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[28] The criteria for assessing the independence of the judiciary have been developed in the jurisprudence of the ECtHR. They have been implemented in EU law. See: EUROPEAN COURT OF HUMAN RIGHTS. Judgment of 28 June 1984, Campbell and Fell v. UK, no. 7819/77 7878/77; Jutta LIMBACH *Judicial Independence: Law and Practise and Appointments to the European Court of Human Rights;* Interights 2003.

[29] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 2 March 2021, C-824/18, AB and the Others*, § 115. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 20 April 2021, C-896/19 Repubblika,* § 53-57. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 November 2019, C-585/18, C-624/18 and C-625/18, A. K.,* § 133-150. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 15 July 2021, C-791/19, European Commission v. Poland.* See also Anna RAKOWSKA-TRELA, *The National Council of the Judiciary after the entry into force of the amendment of 8.12.2017. - organ still constitutional or extra-constitutional,* [in] Łukasz BOJARSKI, Krzysztof GRAJEWSKI, Jan KREMER, Gabriela OTT, Waldemar ŻUREK, Konstytucja, praworządność, władza sądownicza, Wolters Kluwer, 2019, Warsaw, p. 107-122.

[30] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 September 2006, C-506/04, Wilson,* § 53 and judgments mentioned in this paragraph. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of* 25 *July 2018*, *C-216/18 PPU*, *LM*, § 66 and judgments mentioned in this paragraph.

[31] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 24 June 2019, C-619/18, European Commission v Republic of Poland* (lowering of the retirement age of Supreme Court judges; possibility of continuing to carry out the duties of judge beyond that age subject to obtaining authorisation granted by discretionary decision of the President of the Republic). See: Piotr BOGDANOWICZ, Maciej TABOROWSKI, *Retirement regulations as a tool for removing a certain group of judges from holding office as a judge of the Supreme Court - remarks against the background of the judgment of the Court of Justice of 24.06.2019, C-619/18,* European *Commission v. Republic of Poland,* European Judicial Review, 2019, No. 12, p. 15-26; Paweł FILIPEK, The *irremovability of judges and the limits of a Member State's competence to regulate the national judiciary - remarks in light of the judgment of the*

3. the absence/presence of institutional safeguards to protect against a judge influence from other body/authority[32], the possibility of his/her delegation to another position by representatives of the executive;
4. the general reputation of the judicial authorities - whether the society considers the courts to be independent and impartial and whether their work evokes trust in the society[33].

It is worth mentioning: the fact that the executive or legislative authorities are involved in the process of the appointment of judges, does not in itself cause an automatic interdependence between the judge (court) and representatives of the executive. If, after their appointment, judges are not exposed to any pressure, do not receive instructions or demonstrate by their behaviour any association with a particular political option (the ruling party), then there are no grounds for supposing that they are not independent. On the other hand, the existence "on paper" of any institutional guarantees that should protect the court (judge) from external pressure is insufficient. The system of disciplinary liability, which was intended to be one of the guarantees of their independence, may be designed in such a way, that it will become one of the method of repression against judges or a political control instrument over jurisprudence in some state[34].

Court of Justice of 24.06.2019, C-619/18, European *Commission v. Republic of Poland,* European Judicial Review, 2019, No. 12, p. 4-13.

[32] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 2 March 2021, C-824/18, AB and the Others*, § 119, 134.

[33] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 15 July 2021, C-791/19, European Commission v Republic of Poland,* § 165-168. See also: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 26 March 2020,, C-542/18 RX-II and C-543/18 RX-II Simpson/Council and HG/Commission*, § 57.

[34] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 21 December* 2021; *Criminal proceedings against PM and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19*, § 227; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 18 May 2021, C-83/19 etc, Forum of Romanian Judges*, § 199-206 and 213-222. The disciplinary proceedings for implementing the EU law (the primacy of the EU law), requesting for preliminary ruling can have a "freezing effect" among the judges. See: Aneta ŁAZARSKA, *Reflections on factors "freezing"*

However, with regard to internal independence, the CJEU emphasises a need of appropriate distance from the parties to the proceedings, the matter at issue and the absence of any interest in the merits of the case[35]. In opinion to the case *Criminal proceedings against PM and Others*[36], The Advocate General also noted the "so-called doctrine of pretence". This is because, irrespective of a judge's individual conduct, ascertainable circumstances may cause reasonable doubts to his/her impartiality. For example, if the judge-appointment procedure has been organised in such a way that the public is likely to have well-founded concerns as to the impartiality of the newly-appointed judges[37].

It is occasionally argued that the internal independence (impartiality) of a judge is not verified[38]. A judge can also be internally independent (impartial) when the independence of the courts as a body is compromised or - when the courts as such do not meet the standard of independence - because it is to the judge to decide how to behave. Of course it is possible for a judge to be faithful to his or her judicial oath even

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the European *preliminary ruling dialogue,* European Judicial Review, 2019, No. 12, p. 7-9; Laurent PECH, Dimitry KOCHENOV, *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid,* https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf (accessed: 6.02.2022). Media informed about the disciplinary proceedings initiated against judges Synakiewicz and Pilśnik for following the principle of priority of the EU law; https://www.rp.pl/sady-i-trybunaly/art19006211-izba-dyscyplinarna-ma-zdecydowac-o-losie-sedziow-synakiewicza-i-pilsnik (accessed: 6.02.2022).

35 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 November 2019*, C-585/18, C-624/18, C-625/18, *AK and Others*, § 121-122.

36 OPINION OF ADVOCATE GENERAL MICHAEL BOBEK *delivered on 4 March 2021*; C-357/19 and C-547/19, § 212.

37 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 19 November 2019*, C-585/18, C-624/18, C-625/18, *AK and Others*, § 134.

38 Paweł SKUCZYŃSKI, *Lawyers' attitudes towards the constitutional crisis and judicial independence,* National Council of the Judiciary, [in:] Grzegorz BORKOWSKI (ed.), *Granice niezawisłości sędziów i niezależności sądów?,* Warsaw-Toruń 2016, p. 149-166. See also: Wojciech JASIŃSKI, *Bezstronność sądu i jej gwarancje w polskim procesie karnym,* Wolters Kluwer, Warszawa 2009.

under adverse circumstances. But, no one can be expected to demonstrate a kind of heroism by, for example, ruling in defiance of pressure from his or her superiors, the executive, etc. The role of the legislature and the executive is to create such an institutional "environment" that a judge can - without fear of possible professional or disciplinary consequences - resolve conflicts between parties involved in proceedings. Moreover, a judge can hardly be considered to have no interest in the *meritis* of a case if he or she is aware about possibility of a disciplinary responsibility for e.g., applying the EU law to the case or ask a for a preliminary ruling. The independence of the judiciary (external independence) ensures that the judge can be impartial (internal independence). In order to guarantee the "effective legal protection" of the Article 19(1) TEU, the internal and external independence of the court (Article 47 CFR) should not be considered separately and the two values should not be treated as partly distinct from each other. The real, practical right to effective judicial protection and the right to a fair trial cannot depend on the courage of particular judge and whether or not, at the risk of possible negative consequences, he or she will rule without regard to external pressure, political influence and orders from his/hers superiors.

Analysing the case-law of the CJEU, it appears that the Court – as to the integrity of the European Union and the efficient application of the principle of mutual recognition - requires national judges to be internally independent to apply the EU law; to judge in accordance with their own beliefs and within the limits of the law, even when the structure of the judiciary and the system of disciplinary responsibility violates the EU standard of independence. Domestic courts are obliged to apply the provisions of the EU law and to ensure their full effectiveness, with the consequence that they may have to disapply provisions of national law that are contrary to them. Any practice or provision limiting the effectiveness of the EU law is incompatible with the longstanding case-law of the CJEU, and the same applies to constitutional norms and decisions[39]. In *Criminal Proceedings against PM and Others,* the CJEU stated that "the principle of the primacy of European Union law must be interpreted as preventing

[39] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 June 2019, C-585/18, C-624/18 and C-625/18, A.K. and others,* § 155.

national legislation or practice which provides that courts and tribunals are bound by the decisions of a national constitutional court and cannot therefore, under the risk of a disciplinary offence, derogate from the case-law of those courts and tribunals where they consider that that case-law is incompatible with Article 19(1) TEU"[40]. This has the effect of transferring the burden of being considered a "court" within the meaning of the EU law[41] to the judge in the specific case. If there are structural doubts about the independence of the judiciary, but in a particular case a judge demonstrates internal independence by his or her behaviour, then he or she meets the standard arising from Article 19(1) TEU and Article 47 CFR. In providing such a solution, the EU institutions will not help to resolve the structural problem of judicial independence. By focusing on the individual case, the more general problem of the EU Member State creating the proper conditions for a judge, without fear of disciplinary consequences, to be genuinely independent is evaded.

3. Refusal to execute the EAW because of real risk of violation of right to an independent court

3.1 The *LM test*

The lack of judicial independence as a ground for refusal to execute the EAW was first considered in the *LM* case *(Artur Celmer)*[42]. The Irish

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[40] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 21 December 2021*; *Criminal proceedings against PM and Others,* C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, § 262.

[41] The definition of the term "judicial authority" see: COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 27 May 2019, C-508/18 and C-82/19 PPU, OG and PI,* § 65-74. See also: Marcin MROWICKI, *Independence from the executive as a condition for recognition as a 'judicial authority' - gloss to the judgment of the Court of Justice of 24.11.2020, C-510/19, Openbaar Ministerie, YU, ZV v. AZ,* European Judicial Review 2021, no. 6, p. 19-28; Tomasz OSTROPOLSKI, The *concept of a judicial authority in the framework of judicial cooperation in criminal matters,* European Judicial Review 2019, no. 9, p. 21-30.

[42] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM.*

court in its preliminary question had doubts as to whether the judicial system in Poland, following the changes introduced between 2015 and 2018[43], met the EU standard of independence. The CJEU introduced a three-stage test[44] to assess whether concerns about judicial independence are genuine in a specific case:

> 1. the court of the executing state has verifiable information in its possession about systemic, general malfunctions in the judicial system of the other EU Member State, e.g. on the basis of opinions of independent bodies (the Venice Commission), information from studies by non-governmental organisations, or the initiation of a procedure under Article 7 TEU[45], and there is a real risk of a breach of the right to a fair trial
>
> 2. it is the obligation of the court executing the EAW to determine whether a systemic threat to the independence of the judiciary and the independence of the judiciary applies to the court that requested the EAW, e.g. by addressing appropriate questions to the court requesting the EAW
>
> 3. the final stage is to apply an individualised assessment, i.e. whether in the specific case the person transferred under the EAW will have the right to an independent and impartial tribunal; in making that assessment, it should be considered, inter alia, the personal situation of the person, the nature of the offence, the circumstances in which the offence was committed, the context in which the EAW was issued[46].

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[43] See timeline of crisis in: Devvrat Singh SHEKHAWAT, *Rule of law crisis deepens in Poland: Fresh Attack on the EU,* https://pathforeurope.eu/rule-of-law-crisis-deepens-in-poland-fresh-attack-on-the-eu/ (accessed: 6.02.2022). Current information are available at the website: https://ruleoflaw.pl/.

[44] The test based on the Caldararu and Aranyosi test. See COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 5 April 2016, C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru.*

[45] OPINION OF ADVOCATE GENERAL EVGENI TANCHEV *delivered on 28 June 2018, C-216/18 PPU, LM,* § 128-130.

[46] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM,* § 75. See also: Stanisław BIERNAT, Paweł FILIPEK, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM,* [in:] Armin von BOGDANDY, Piotr BOGDANOWICZ, Iris CANOR, Christoph GRABENWARTER, Maciej TABOROWSKI,

The *LM judgment test* forces the EU courts to start a horizontal dialogue[47]. If there are structural doubts about the independence of the judiciary in a certain state, it is the duty of the EAW requesting court to clarify whether there is a real risk of a violation of fundamental rights (deprivation of the right to a fair trial) in a specific case. However, it may be doubted whether the responses of the EAW requesting court will allow for a correct assessment of the independence of this body. It should not be forgotten that the court is the "judge in its own case" and in its response it will explain whether it is independent/impartial. S. Biernat and P. Filipek point out that asking a judge to assess his or her own independence is not an optimal solution, and the credibility of the answer may be questioned[48]. It is doubtful whether a judge in response to questions from a foreign court will indicate that he or she is not independent. It seems that in their answers judges tend to demonstrate that, despite systemic deficiencies in the independence of the judiciary, their attitude, the nature of the case, and the circumstances of the act do not give grounds for the assumption that the right to a fair trial is at risk[49].

3.2. Is the LM test appropriate for assessing judicial independence?

The question arises, whether an individualised assessment in the LM judgment is an appropriate method of evaluating the independence of the judiciary and independence (impartiality) of specific judge. Especially when there is increasing crisis of the rule of law in several countries EU Member States, including Poland[50]. Whether the problem of independence

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Matthias SCHMIDT (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions,* Springer 2021, p. 415-420

47 See Koen LENAERTS, *The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence.* http://www.nsa.gov.pl/download.php?id=753 (accessed: 6.02.2022).

48 See: Regional Court in Warsaw (Letter of 26 September 2018). http://bip.warszawa.so.gov.pl/attachments/download/7511 (accessed: 6.02.2022).

49 Stanisław BIERNAT, Paweł FILIPEK, *The Assessment of Judicial Independence,* p. 426-427.

50 Barbara GRABOWSKA-MOROZ, Olga ŚNIADACH, *The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland*,

of the judiciary is a matter of human rights protection (Article 6(1) of the ECHR, Article 47 of the CFR) or it is a matter of respect for fundamental values, the very foundations of the European Union (Article 2 TEU, Article 19(1) TEU)?. The case law of the CJEU does not provide an appropriate answer to the abovementioned problem. A. Frąckowiak-Adamska notes that the Luxembourg Court is not consistent in explaining the legal basis for the obligation of Member States to provide effective legal protection before an independent court (Article 19 TEU). In the *LM* judgment, the Court held that the right to an independent court/tribunal is one of the fundamental rights, which is primarily derived from Article 2 TEU[51], with a subsidiary reference to Article 47 CFR and the right to a fair trial[52]. However, the issue of the Article 19(1) TEU was omitted. In *the Portuguese judges judgment* a broader view of judicial independence was taken by the CJEU. The Luxembourg court referred mainly to Articles 2, 4(3) and 19 TEU. Similarly, as in Case C-487/19 concerning the possibility of judges who were appointed in a flawed procedure being considered as a "court", where the basis of the Court's analysis was precisely Article 19(1) TEU[53].

The individual assessment based on the test in the *Aranyoisi and Caldararu* or the *LM* judgments may strengthen respect for fundamental rights when there are significant differences in respecting them e.g. with regard to the conditions of imprisonment, the in absentia proceedings, the response of the EU institutions and Member States courts to incorrect

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Utrecht Law Review, 2021, v. 17, No. 2, p. 56-69; Laurent PECH, Patryk WACHOWIEC, Dariusz MAZUR, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action,* Hague Journal on the Rule of Law, 2021, v. 13, p. 1-43.

51 Agnieszka FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case,* [in:] Armin von BOGDANDY, Piotr BOGDANOWICZ, Iris CANOR, Christoph GRABENWARTER, Maciej TABOROWSKI, Matthias SCHMIDT (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions,* Springer 2021, p. 448-449.

52 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 25 July 2018, C-216/18 PPU, LM,* § 70-72. COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 17 December 2020, C-354/20 PPU and C-412/20 PPU, L and P,* §39 .

53 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 6 October 2021, C-487/19, WŻ,* § 159-160.

implementation of EU directives. However, it is not an adequate measure to ensure respect for the rule of law and the independence of the judiciary. The independence of the judiciary is a precondition for ensuring effective judicial protection in democratic states governed by the rule of law. The issue is whether the courts of a given EU country can be regarded as a 'judicial authority' within the meaning of the CJEU case law. If systemic deficiencies regarding the system of appointment of judges, the disciplinary responsibility regime, the possibility of political influence on the judiciary, the image of the judiciary in a particular EU country indicate a general, overall threat to the independence of the courts, it cannot be claimed that the problem of the independence or lack of independence of a specific court is only of an individual, incidental nature. The aforementioned issues have been highlighted by the Court of Amsterdam[54]. In its question for a preliminary ruling, the Amsterdam Court emphasised that the existence of systemic and general flaws in the independence of the Polish judicial authorities meant that no person obliged to appear before a Polish court had a guaranteed right to an independent court[55]. Furthermore, an individual assessment based on the LM test may not be appropriate and sufficient to protect the right to a fair trial if "Polish judges are at risk of being prosecuted before a disciplinary body [the Disciplinary Chamber of the Supreme Court[56]] which does not provide guarantees of independence, in particular in cases in which Polish judges examine whether the judge

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[54] See: Case C-354/20 PPU. Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice; https://curia.europa.eu/juris/showPdf.jsf?text=&docid=230982&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2211314 (accessed: 6.02.2022).

[55] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 17 December 2020, C-354/20 PPU and C-412/20 PPU, L and P,* § 13.

[56] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 15 July 2021, C-791/19,* § 235. In this judgment, the CJEU held that the Disciplinary Chamber did not comply with the conditions of Article 19(1), and that the persons ruling in the chamber did not meet the condition of "independence". The Polish government agreed to implement the CJEU judgment and to change the system of disciplinary liability of judges. However, it has not fulfilled this commitment. Poland was fined €1,000,000 per day as a result of its failure to comply with the CJEU's rulings. ORDER OF THE VICE-PRESIDENT OF THE COURT 27 October 2021, C-204/21 R.

or the court in question meets the guarantees of independence required by the Union law"[57].

Regarding concerns about the independence of the judiciary in Poland, there is a difference between the CJEU judgments concerning the Article 19(1) TEU and those issued in connection with the EAW procedure. In cases of a general nature, the Court takes a strict approach, highlighting systemic deficiencies, and examines the issue of the independence of the judiciary and the independence of judges from the broader perspective of respect for the rule of law (Article 2 TEU, Article 4(3) TEU, Article 19(1) TEU). In its rulings on the EAW and the principle of mutual recognition, the CJEU leaves considerable margin of discretion for case-by-case assessment, somehow reversing the burden of proving "independence" by the court that issued the EAW. In opinion on the Case C-562/21[58] the Advocate General indicated that, even where there may be evidence of systemic or general deficiencies in judicial authority which existed at the date the EAW was issued, the executing authority cannot refuse the status of "judicial authority" under Article 6(1) of the Framework Decision[59]. He also noted the deepening crisis of the rule of law in Poland and the disregard for both the EU law and the CJEU rulings. Referring to the judgements of the Polish Constitutional Tribunal[60], the Advocate General observed that the Constitutional Tribunal aims to challenge the fundamental principles and values of the EU, without questioning Poland's membership in the EU[61]. Regardless of these doubts, the Advocate General highlighted the crucial importance of the second stage of the *LM* test, i.e. checking whether the executive interference may affect a specific case,

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[57] COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 17 December 2020, C-354/20 PPU and C-412/20 PPU, L and P,* § 15.

[58] OPINION OF ADVOCATE GENERAL ATHANASIOS RANTOS *delivered of 16 December 2021, C-562/21 PPU and C-563/21, X and Y,* § 52-57

[59] Ibidem, § 40 and other judgments mentioned in this paragraph.

[60] Ibidem, § 67-71

[61] The Constitutional Tribunal, in its rulings of 14 July 2021 (P 7/20) and 7 October 2021 (K 3/21), considered the provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070 (accessed: 6.02.2022).

due to its the individual circumstances[62]. It is indicated that absolutisation and generalisation of grounds for refusal to execute the EAW would lead to a number of offences being unpunished, would discredit the work of Polish judges and would jeopardise the rights of victims[63].

In the recent judgment in the case C-562/21 the Court decided not to withdraw from the test of the LM judgment[64]. The CJEU stated that: "where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person:

– in the context of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by that person relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel, there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established

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62 OPINION OF ADVOCATE GENERAL ATHANASIOS RANTOS *delivered of 16 December 2021, C-562/21 PPU and C-563/21, X and Y,* § 60. In § 47 the advocate general pointed out: "In essence, this case law teaches us that irregularities in the appointment of certain judges may have an impact on the specific situation of individuals, when they pose a risk of interference by the executive in the administration of justice and thus raise, in the opinion of individuals, reasonable doubts as to the independence and impartiality of the judges and courts concerned, whom they were assigned. These indications lead me to the conclusion that, in the second stage of the examination in the main proceedings, it should be verified whether the situation of the persons concerned, taking into account the relevant criteria, is of interest to the executive, which goes beyond the specific elements of the offenses alleged against them and puts them at risk that their cases will not be dealt with impartially, as I will explain below".

63 OPINION OF ADVOCATE GENERAL ATHANASIOS RANTOS *delivered of 16 December 2021, C-562/21 PPU and C-563/21, X and Y,* § 69.

64 COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment (Grand Chamber) of 22 February 2022, C-562/21 PPU i C-563/21 PPU, X and Y.*

by law, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and

– in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by the person concerned relating to his or her personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right".

3.3. The need to modify the LM test

However, the LM test should be modified and adapted to the current situation of the EU in terms of Member States' respect for the rule of law. In the period when the LM judgment was delivered, the CJEU's attempt to ensure an appropriate balance between judicial independence as an individual right and the functioning of the principle of mutual recognition, was understandable. Currently, however, the limits of the disregard or even hostility to the EU law presented by the Polish government should have not only political consequences (e.g. financial penalties), but also implications in the sphere of cooperation in criminal matters. A. Frąckowiak-Adamska suggests that violation of judicial independence - as one of the values on which the EU is based - should result in suspension of the cooperation based on the principle of mutual recognition[65]. Otherwise, the limits of tolerance for non-compliance with the principles of the rule of law and independence of the judiciary will continue to be "tested", to the detriment of the principle of mutual recognition. The very need for an individual assessment of whether a Polish court - despite systemic doubts - is a judicial authority within the

[65] Agnieszka FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines,* p. 451. Currently, in the EU there are 20 instruments based on the mutual recognition principle.

meaning of EU law and meets the standard of independence does not correspond to the concept of mutual recognition of judgments and mutual trust of states in their compliance with fundamental principles of the EU.

4 Conclusions

The thesis of V. Mitsilegas about "sacrificing" the protection of fundamental rights for the efficient implementation of the principle of mutual recognition has not lost its relevance. Moreover, it seems that nowadays the EU institutions agree to limit not only human rights, but also to extend the limits of tolerance for violation of the rule of law and effective protection of rights in the EU (Article 19(1) TEU). There is an inseparable link between the rule of law, independence of the judiciary and respect for human rights (effective protection of rights). One value follows from the other and they cannot be separated. It is impossible to claim independence of the judiciary if the state does not respect the rule of law. It is also difficult to assume that effective judicial protection is possible if there are systemic doubts about the independence of the judiciary.

The CJEU tries to "rescue" the principle of mutual recognition in the crisis of the rule of law principle by introducing a case-by-case assessment of whether, in a particular case, the right to trial by an independent court (Article 47 of the CFR) is at risk. It requires (e.g. Polish) judges to declare that they will be independent within the meaning of the EU law, even if the judicial system as a whole raises doubts about independence. However, it is difficult for a judge to be independent internally if he or she does not have "institutional safety", i.e. without fear of possible consequences, whether career-related (transfer to another division of the court, delegation to another court) or disciplinary, he or she will be able to decide on the basis and within the limits of the law, in accordance with his or her own beliefs, without being exposed to any pressure. Especially when the disciplinary bodies related to the executive authority initiate proceedings against judges who, for example, have directly applied EU law or submitted a question for a preliminary ruling. Such activities can have a chilling effect on other judges, potentially restricting the right to a fair trial of participants in criminal proceedings.

It is also worth mentioning another weakness of the LM judgment test (individual assessment). A court requesting an EAW and answering questions from another EU court assesses for itself whether it will be independent in the case.

At the moment, there are basically no real consequences in the area of judicial cooperation in criminal matters for violations of judicial independence. While protecting the principle of mutual recognition, the EU institutions are constantly moving the tolerance limits for breaches of obligations resulting from membership of the EU. The example of Poland shows that the lack of decisive measures by the CJEU only increases the problem of respect for the rule of law and the independence of the courts. However, it is rather difficult to assess whether in the future the EU will decide, for example, to suspend cooperation on the basis of the principle of mutual recognition, if a member state questions the fundamental values on which the EU is based.

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The role of the constitutional courts and ECtHR in shaping negotiated justice mechanisms – a comparative perspective[1]

O papel das cortes constitucionais e do TEDH em modelar os mecanismos de justiça negocial – uma perspectiva comparada

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Abstract: The article analyses the role of constitutional courts of Germany, France and Italy in shaping negotiated justice mechanisms in these countries with regard to their procedural and – to some extent – substantive fairness as well as the role of the ECtHR in establishing common standards of fairness of such settlements. In each of the analysed countries, as well as in the case law of the EctHR, it was frequently questioned whether institutions similar to plea bargaining are conform to continental constitutional concepts as well as the standard of the fair trial derived from the ECHR. The role of constitutional courts and the ECtHR in shaping fairness of criminal justice settlements has been non-negligible, although differed in compared legal systems: in France and in case of ECtHR it has rather been a controlling one, whereas in Germany and Italy significant tensions between constitutional courts and the legislature as well as lower courts have arisen and had to be resolved.

[1] This publication has been developed as part of the research project 'The Optimum Model of Plea Bargaining. Between Efficiency and Justice', Registration no. 2019/35/N/HS5/03125, financed by the National Science Centre, Poland.

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Keywords: plea bargaining; negotiated justice; fair trial rights; comparative criminal procedure.

Resumo: *Este artigo analisa o papel das cortes constitucionais da Alemanha, França e Itália ao modelar os mecanismos de justiça criminal negocial nesses países em relação à legitimidade processual e – em alguma medida – material, bem como o papel do Tribunal Europeu de Direitos Humanos em estabelecer os parâmetros comuns da legitimidade de tais acordos. Em cada país analisado, assim como na jurisprudência do TEDH, é frequentemente questionada a conformidade dos institutos semelhantes à plea barganing em relação aos conceitos constitucionais continentais e ao standard de justo processo estabelecido pelo TEDH. O papel das cortes constitucionais e do TEDH em modelar da legitimidade dos acordos criminais não é negligenciável, mas difere nos sistemas jurídicos comparados: na França e no caso do TEDH, ele foi um pouco mais limitado, enquanto na Alemanha e na Itália, tensões significativas surgiram entre as cortes constitucionais e o legislador e tiveram que ser resolvidas.*

Palavras-chave: *acordo criminal; justiça negocial; devido processo; processo penal comparado.*

Summary: 1. Introduction; 2. Comparative analysis; 2.1 Germany; 2.2 France 2.3 Italy 2.4 ECtHR; 3. Concluding Remarks; Bibliography.

1. Introduction

Criminal justice systems throughout the world have become increasingly overloaded during the past half century. On the other hand, the system of procedural safeguards has been developed into an elaborate and sophisticated one, and thus criminal proceedings have become longer and more complicated. In Europe, as a result of the traumatising experience of totalitarianism and World War II, human rights were emphasised, including with respect to criminal proceedings, and the activity of the ECtHR also contributed to the imposition of new obligations on criminal courts in order to protect the accused from violations of his or her liberties and prerogatives. This tendency, although praiseworthy,

has led to an escalating problem of the excessive length of proceedings in many countries as courts were no longer able to deal with all cases within a reasonable time and provide the accused with necessary guarantees. The growing complexity of the social phenomenon of crime in the modern world also played its role. However, as getting the court's judgment within a reasonable time is also a component of the right to a fair trial as formulated in Article 6 of the European Convention on Human Rights and Fundamental Freedoms and in many constitutions, this problem could not remain unsolved. This caused a phenomenon which was called by George Fisher the plea bargaining's triumph to spread all over the world[3]. The method of settling criminal cases was originally a distinctive feature of the American criminal justice system. Over the last decades it became transposed or – according to a particularly apt formulation by Maximo Langer – translated into various legal systems around the world, where it was usually treated as a remedy for the excessive duration of proceedings[4]. However, the wish for strengthening consensual rather than adjudicatory means of resolving criminal cases were also of some importance.

The development of negotiated justice mechanisms inspired by plea bargaining was not always an easy process. In some countries their appearance was a result of a well-thought-out legislator's decision, whereas in others the practice of settling criminal disputes evolved by way of a *fait accompli* and was only afterwards noticed and regulated[5].

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The constitutional and supreme courts also played their role: they usually intervened if new mechanisms posed a danger to the fairness of proceedings and their result but sometimes even forced the legislator to explicitly regulate negotiated justice by way of statute, as was the case in Germany[6].

The aim of this paper is to conduct a comparative analysis of the role of constitutional courts in shaping negotiated justice mechanisms in three countries – Germany, France and Italy – as well as to explore the role of the ECtHR in establishing common standard of fairness of these institutions. Plea bargaining and other consensual institutions as well as the role of constitutional courts in legal systems have frequently been analysed by comparatists[7]. However, combining these two issues in order to assess the role of constitutional courts in the development of negotiated justice creates a new perspective, useful for evaluating the constitutional courts' position in shaping criminal politics and procedure.

The choice of countries for the comparative analysis is justified by the following reasons. The analysis pertains to the process of adjusting plea bargaining to continental constitutional standards. Thus, the focus was on European countries. Three of them were chosen due to active role of their constitutional courts in regulating the newly introduced practices of negotiated justice. Germany is an example of informal development of agreements between the prosecution and the defence

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6 This issue will be further described hereinbelow.

7 To name just a few examples: LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, op.cit.; TURNER, Jenia I. *Plea Bargaining Across Borders*. New York: Aspen Publishers, 2009; RAUXLOH, Regina. *Plea Bargaining in National and International Law*. Abingdon-sur-Thames: Routledge, 2012; LANGER, Maximo. Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions. *Annual Review of Criminology,* v. 4, n. 2, 2021; THAMAN, Stephen C. (ed.). *World Plea Bargaining. Consensual Procedures and the Avoidance of Full Criminal Trial*. Durham: Carolina Academic Press, 2010; THAMAN, Stephen C. Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases. In: BOELE-WOELKI, Katharina Boele-Woelki, VAN ERP, Sjef (eds). *General Reports of the XVII*th *Congress of the International Academy of Comparative Law*. Bruxelles: Bruylant, Utrecht: Eleven, 2007. p. 951.

which were only afterwards statutorily regulated thanks to the activity of the Constitutional Tribunal and the Supreme Court[8]. On the other hand, the Italian legal system is an important field of comparative research with regard to criminal procedure law due to its 1989 reform, which reoriented the whole system from inquisitorial to adversarial and introduced a form of criminal plea agreements[9]. However, the Italian Constitutional Court's case law significantly undercut the reforms, which eventually led to a change in Italian Constitution. Even in France, regardless of the cautious attitude of the legislator towards negotiated justice mechanisms (which are precisely regulated and attached to a complex set of procedural safeguards) still some constitutional doubts have arisen, with the last Constitutional Council's judgment issued only in 2021. Lastly, the role of the ECtHR will also be analysed. Although the ECtHR is not a constitutional court, it may to some extent play a similar role in shaping the procedural fairness of national negotiated justice mechanisms. In some countries, such as Poland, constitutional courts have not had the occasion to express their views on this particular issue. The case law of the ECtHR is thus the important legal framework for negotiated justice in these countries.

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8 ROXIN, Claus, SCHÜNEMANN, Bernd. *Strafverfahrensrecht*. Munchen: C.H. Beck, 2017. p. 79-80; ROBERSON, Cliff, DAS, Dilip K. *An Introduction to Comparative Legal Models of Criminal Justice*. Boca Raton: CRC Press, 2016. p. 145-146; LANGBEIN, John H. Land without Plea Bargaining: How the Germans Do It. *Michigan Law Review,* v. 78, n. 2, p. 201-212, 1979; LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, op.cit., p. 39.

9 LUPÁRIA, Luca. Model code or broken dream? The Italian criminal procedure in a comparative perspective. In: GIALUZ, Mitja, LUPÁRIA, Luca, SCARPA, Federica. *The Italian Code of Criminal Procedure. Critical Essays and English Translation*. Padova: Wolters Kluwer, 2014. p. 1-3; PIZZI, William T., MONTAGNA, Mariangela. The Battle to Establish an Adversarial Trial System in Italy. *Michigan Journal of International Law,* v. 25, n. 2, p. 437-438, 2004; VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system. *Emory International Law Review*, v. 11, p. 421, 1997.

2. Comparative analysis

2.12 Germany

The most typical example of negotiated justice in Germany, called *Absprachen* (literally meaning "agreements") or *Verständigung*, is currently statutorily regulated in § 257c StPO[10]. There are also other instruments that involve the component of agreement between the prosecutor and the defendant. However, they either do not result in a criminal conviction but rather a conditional or unconditional discontinuance of proceedings (§ 153 and § 153a StPO) or are of a different nature and origin, as in case of a penal order (§ 407 StPO)[11]. Such instruments are not comparable to plea bargaining in a strict sense and thus were excluded from the analysis.

Absprachen are settlements that may be concluded during trial in any criminal case and may pertain to the outcome of proceedings (understood as the punishment and other penal measures only and excluding factual findings, guilt and legal classification of the act) and its course (i.e. shortening further presentation of evidence to the court)[12]. Such an agreement results in a criminal conviction with an agreed penalty. *Absprachen* are now explicitly regulated on statutory level but until 2009 the German Code of Criminal Proceedings did not contain any legal basis for settling criminal cases. Nevertheless, agreements were in fact concluded informally by using the existing procedural institutions[13].

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[10] Code of Criminal Procedure (Strafprozessordnung, hereinafter: StPO) as published on 7 April 1987 (Federal Law Gazette I 1074, 1319), as last amended by Article 3 of the Act of 11 July 2019 (Federal Law Gazette I 1066).

[11] LANGER, Maximo. Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions. op.cit., p. 2, p. 8.

[12] BOYNE, Shawn Marie. Procedural Economy in Pre-Trial Procedure: Developments in Germany and the United States. In: THAMAN, Stephen C., ROSS, Jacqueline E. (eds). *Comparative Criminal Procedure*. Cheltenham, Northampton: Edward Elgar Publishing, 2016. p. 249-250, BOHLANDER, Michael. *Principles of German Criminal Procedure*. Oxford: Hart Publishing, 2021. p. 121-123.

[13] FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? *Hanse Law Review*, v. 5, n. 2, p. 199-202, 2009.

Such a practice was present even when the German criminal justice system was widely considered to be extremely legalistic and free from all manifestations of negotiated justice[14]. Informal agreements on the outcome of proceedings are now believed to have been present in Germany since the 1970s[15]. The reasons for their development include (but are not limited to): growing workload among judges and prosecutors (partly caused by the complexity and time-consuming nature of criminal proceedings in economic, drug and environmental criminal cases), new obstacles to streamlined process steaming from growing requirements of admissibility of evidence, as well as approval for the increasing participation of the parties in shaping the outcome of proceedings and reorientation of the criminal law system in general from the abstract ideal of retributive justice to the more practical approach focused on the prevention of crime[16]. The conclusion of the agreement at trial would usually be preceded by informal

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[14] ROBERSON, Cliff, DAS, Dilip K. *An Introduction to Comparative Legal Models of Criminal Justice*, op. cit. p. 145; LANGBEIN, John H. Land without Plea Bargaining: How the Germans Do It, op. cit. p. 201-212.

[15] LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, op. cit. p. 28. WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. *German Law Journal,* vol. 15, n. 1, p. 83, 2014. TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. In: AMBOS, Kai, DUFF, Antony, ROBERTS, Julian, WEIGEND, Thomas (eds). *Core Concepts in Criminal Law and Criminal Justice*, vol. I, 2020. p. 403. RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? *Fordham International Law Journal*, v. 34, n. 2, p. 296-331, 2011. WEIGEND, Thomas. The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure. In: JACKSON, John, LANGER, Máximo, TILLERS, Peter (eds). *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*. London: Hart Publishing, 2008. p. 50-53.

[16] WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 85-86. BOLL, Mathias. *Plea Bargaining and Agreement in the Criminal Process: A Comparison between Australia, England and Germany*. Hamburg: Diplomica Verlag, 2009. p. 39, p. 62; RAUXLOH, Regina. *Plea Bargaining in National and International Law*, op. cit. p. 64. KOBOR, Susanne. *Bargaining in the Criminal Justice Systems of the United States and Germany.* A Matter of Justice and Administrative Efficiency Within Legal, Cultural Context. Frankfurt: Peter Lang, 2007. p. 127-131.

talks between the judge, the prosecutor and the defence counsel[17]. Such confidential meetings were not attended by lay judges or the accused[18]. Agreements were thus usually concluded by professional participants in the proceedings, without a statutory basis and in hiding from the public opinion and scientific discourse[19]. This practice was disclosed in 1982 by a well-known German attorney-at-law in an article published under a false name[20]. The instigated debate lasted throughout 1980s and 1990s and divided legal scholars into opponents and proponents of negotiated criminal justice.

The German Federal Constitutional Court played a crucial role in determining the boundaries of the practice of informal agreements. The first key ruling was issued in 1987[21]. The Court acknowledged the practice of settling criminal disputes and stated that the principle of fair trial as interpreted in light of the rule of law did not generally prohibit agreements between the court and the parties concerning the assessment of the state of proceedings and the expected outcome. However, the court's duty to establish the substantive truth, observe the principle of

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[17] TURNER, Jenia I. Judicial Participation in Plea Negotiations: A Comparative View. *American Journal of Comparative Law*, vol. 54, p. 220, 2006. WEIGEND, Thomas. The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure. In: JACKSON, John, LANGER, Máximo, TILLERS, Peter (eds). *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*. London: Hart Publishing, 2008. p. 47. See also WEIGEND, Thomas. Exclusion without trial? Exclusion of evidence and abbreviated procedures. *Revista Brasileira de Direito Processual Penal,* v. 7, n. 1, p. 259-260, 2021. The author indicates that even nowadays negotiations usually take place before trial – although the wording of StPO suggests otherwise.

[18] TURNER, Jenia I. Judicial Participation in Plea Negotiations: A Comparative View. op. cit. p. 220.

[19] FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? *Hanse Law Review*, v. 5, n. 2, p. 199, 2009. Compare TURNER, Jenia I. Limits on the search for truth in criminal procedure: a comparative view. In: THAMAN, Stephen C., ROSS, Jacqueline E. (eds.). *Comparative Criminal Procedure,* op.cit. p. 51-52.

[20] DEAL, Detlef (pseudonym for WIEDER, Hans-Joachim). Der strafprozessuale Vergleich. *Strafverteidiger,* p. 545, 1982.

[21] Judgment of BverfG of 27 January 1987, 2 BvR 1133/86.

legality and impose a just sentence could not be negotiated or traded. The court was thus free to offer a lenient sentence only insofar as it remained within the boundaries of its guilt-appropriateness[22]. It was also explicitly stated that the accused cannot be persuaded to confess her guilt by deception or by a promise of benefits not provided for by the law. The defendant's freedom to act upon her will has to be protected from significant impairment. Nevertheless, the Court declared that if the evidence and the state of main hearing provided an objective basis for specific reference to the evidence or for the mitigating effect of the supposed confession, it was constitutionally admissible that the court communicated to the parties the maximum penalty, which would not have been exceeded by the court in case of a credible confession. However, it would be unacceptable to communicate a precise sentence that the court intended to impose.

The judgment of the Federal Constitutional Court constituted a milestone in the development of agreements in criminal proceedings. First, it officially acknowledged the existence of such a practice. Second, it confirmed its boundaries in terms of the principle of legality and the duty to establish substantive truth. Third, the Federal Court also referred to the procedural fairness of such mechanisms, clearly forbidding the use of deceit or false promises in negotiations as it would violate the defendant's rights.

However, the agreements remained outside the scope of statutory regulation. The case law of the Federal Court of Justice (*Bundesgerichtshof*) in the following years was divergent: the settlements' compliance with the principle of legality was either objected or accepted[23].

The dispute was only ended by another key judgment of the Federal Court of Justice in 1997[24]. The agreements were once again

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[22] See also KOBOR, Susanne. *Bargaining in the Criminal Justice Systems of the United States and Germany.* A Matter of Justice and Administrative Efficiency Within Legal, Cultural Context. Frankfurt: Peter Lang, 2007. p. 124.

[23] RAUXLOH, Regina. *Plea Bargaining in National and International Law*, op.cit. p. 69-70; RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? *Fordham International Law Journal*, v. 34, n. 2, p. 317-319, 2011.

[24] Judgment of BGH of 4 August 1997, 4 StR 240/97.

found admissible, provided that the issued judgment is proportionate to the defendant's guilt (bearing in mind that the confession may be taken into account and mitigate the sentence). It was pointed out that any agreement could be concluded only in open court and with the involvement of all participants[25]. Out-of-trial talks of the parties were allowed, but their final conclusions must have been stated in public and included in the minutes of the main hearing. At the same time, it was found inadmissible for the court to exercise any influence over the defendant's freedom to decide on the agreement. It was also explicitly forbidden to obtain before sentencing the defendant's waiver of the right to appeal in exchange for a possible leniency. According to the analysed judgment, the criminal court cannot be bound to impose a specific sentence. The court may, however, indicate the maximum penalty in the case of confession, which is binding unless new significant circumstances are disclosed[26].

In another judgment of March 2005[27], the Federal Court of Justice confirmed this approach and responded to the criticism of the legal doctrine. Some scholars were still reluctant to accept such informal creation of new institutions and their conformity to principles of material truth and legalism. However, the Court of Justice strongly underlined that the limits of judicial activism in this respect had been reached and the matter demanded urgent statutory regulation[28].

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[25] However, the empirical research of 2007 showed that only 2.4% of judges, defence attorneys and prosecutors admit that the defendants usually take part in negotiations. See ALTENHEIN, Karsten, DIETMEIER, Frank, MAY, Markus. *Die Praxis der Absprachen in Strafverfahren*. Baden-Baden: Nomos, 2013. p. 167, note 36.

[26] In practice the indicated penalty is usually understood as the one that in fact would be imposed and the empirical research proves that in fact it usually was. At this point it was controversial whether the court may at the same time have indicated what maximum sentence would have been considered as it may constitute an undue influence on the defendant's decision, especially if the difference between the two is significant. See ALTENHEIN, Karsten, DIETMEIER, Frank, MAY, Markus. *Die Praxis der Absprachen in Strafverfahren*. op.cit. p. 164-165, p. 169-172.

[27] Judgment of BGH of 3 March 2005, GSSt 1/04.

[28] RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? op. cit. p. 317-319.

That finally led to the enactment of the amending act on penal proceedings of 28 May 2009, which entered into force on 4 August 2009 and introduced a new § 257c of the StPO. The shape of statutory regulation was strongly influenced by the cited judgment of the Constitutional Tribunal (as well as by the further case law of the Federal Court of Justice).

The activity of the Constitutional Court regarding negotiated justice was continued after 2009 as well. The most important judgment was issued on 19 March 2013 in response to three constitutional complaints about § 257c StPO[29]. Two applicants claimed that their freedom from self-incrimination, right to a fair trial and the principle of individual guilt had been violated by the failure of the adjudicating courts to provide in advance relevant instructions as to the possibility of the court to withdraw from the agreement (although the courts had not actually withdrawn in their cases). The third applicant claimed that his right to a fair trial had been violated by the fact that the court had indicated – on its own initiative – not only the proposed sentence, but also the sentence which might be imposed if no confession would have been entered. According to the applicant, the proposed sentencing discount was so great that it in fact constituted undue pressure. The third applicant also alleged the violation of the court's duty to verify the facts of the case and truthfulness of the confession.

The Constitutional Court stated that improper application of the statutory provisions – although in fact occurred – did not make the law unconstitutional. The provision of § 257c StPO was conform to the Constitution as it contained sufficient guarantees of the substantive justice (which were: the duty to discuss the agreement openly at the public hearing and the court's obligation to establish all necessary facts truthfully so that the principle of guilt is observed) and the fairness of the procedure (these were especially: the duty of the court to give proper instructions to the accused and the inadmissibility of the defendant's

[29] Judgment of BVerG of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10 and 2 BvR 2155/11. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319_2bvr262810.html . Accessed on: 23.01.2022.

confession in case of the court's withdrawal from the agreement)[30]. Getting necessary instructions on the scope of the binding effect and the consequences of a failure to reach an agreement was deemed as a crucial factor for safeguarding the defendant's freedom of decision. If the court had failed to provide the defendant with all the necessary instructions specified in §257 c (4, 5) StPO, the agreement would have been concluded in violation of the law. Such a fault usually affects the judgment unless the defendant would have made the confession anyway had he been properly instructed[31]. The Court underlined that the principle of legalism and the rule of freedom from self-incrimination prohibited the court from offering the accused the prospect of a reduced sentence in case of confession, if such a sentence passed the limits of adequacy of the punishment to the guilt. In case of the third applicant, the penalties indicated by the court varied from suspended sentence in case of confession to a minimum sentence of three years imprisonment for one or two counts of aggravated robbery – if no confession would have been made. The Federal Constitution Court declared that these "sanction scissors" had been so huge that it amounted to an undue pressure over the defendant and a false promise of benefits not provided by the law[32]. Nevertheless, no practical guidelines to assess the proportionality of the sentencing discount were given by the Federal Court[33].

The Court also emphasised the importance of the transparency and publicity of negotiations – or at least the public disclosure of their

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[30] With regard to the principle of guilt and its implications for the proportionality of penalty and the court's duty to establish the truth: see TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. op. cit. p. 401, p. 420.

[31] WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 95-96.

[32] German: *Sanktionsschere,* literally: sanction scissors. See BOHLANDER, Michael. *Principles of German Criminal Procedure*. Oxford: Hart Publishing, 2021. p. 122.; ALTENHAIN, Karsten, DIETMAIER, Frank, MAY, Markus. Die Praxis der Absprachen in Strafverfahren. Baden-Baden: Nomos, 2013. p. 169-170.

[33] WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 99.

occurrence in open court – for procedural fairness of the agreement[34]. The importance of transparency for procedural fairness of the agreement was later confirmed in another judgment of the Federal Constitutional Court of 15 January 2015[35].

What is particularly interesting is that – for the purpose of issuing the discussed judgment – the Court appointed Prof. Karsten Altenhain to conduct an empirical study on the practice of *Absprachen*. The study showed that most settlements were entered by omitting judicial regulation, that is outside the main hearing and informally; usually they also involved the waiver of the right to appeal, which was inadmissible under the explicit wording of § 302 (2) StPO[36]. Thus, in practice procedural safeguards were circumvented by the participants to the proceedings, including the court. However, according to the discussed judgment, the statutory regulation would be contrary to the Constitution only if the unconstitutional practice could "be traced back to the provision itself, i.e. it was an expression of a normative regulatory deficit leading to this practice due to its structure"[37]. In the Court's view, the statutory provisions met the constitutional

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[34] WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 95. Lack of transparency has long been considered a serious drawback of sentencing agreements in Germany. See TULKENS, Françoise. Negotiated Justice. In: DELMAS-MARTY, Mireille, SPENCER, John R. (eds). *European Criminal Procedures*. Cambridge: Cambridge University Press, 2002. p. 664. SCHEMMEL, Alexander, CORELL, Christian, RICHTER, Natalie. Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013? *German Law Journal,* vol. 15, n. 1, p. 60-62, 2014.

[35] Judgment of BVerfG of 15 January, 2015, 35 STRAFVERTEIDIGER [StV] 269 (270), 2015 (Ger.). See more: JAHN, Matthias, SCHMITT-LEONARDY, Charlotte. The German "Verständigung" and Consensual Elements in German Criminal Trials. *German Law Journal*, vol. 21, n. 6, p. 1143. 2020.

[36] As stated in the discussed judgment, "58.9% of the judges surveyed stated that they had carried out more than half of their agreements 'informally', i.e. without applying Section 257c StPO, 26.7% stated that they had always proceeded in this way. 33% of the judges surveyed stated that they had made agreements outside of the main hearing, without this being disclosed at trial, while 41.8% of prosecutors and 74.7% of defence counsel said they had experienced it."

[37] Judgment of BVerG of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10 and 2 BvR 2155/11.

standard but they were circumvented by practitioners who found them impractical. The Court underlined that "the legislature must keep a careful eye on further developments" and intervene if the judicial practice continued to ignore procedural safeguards in the statutory regulation[38].

At the same time, the Court reversed individual decisions in applicants' cases, mostly because of the criminal courts' failure to instruct the defendants of the scope of the binding force of the agreements and risks resulting from therein. Even if the court did not actually withdraw from the agreement, the issued judgment was still based on a confession obtained through a violation of the defendant's fundamental rights and thus it had to be carefully assessed whether the accused would have confessed had he received the relevant instructions.

With regard to the third applicant, it was concluded that his freedom from self-incrimination had been violated by the fact that the court had indicated unjustifiably different upper and lower punishment limits in case of confession or its absence. What is even more important, the Court stated that the principle of guilt and the obligation to establish the material truth were violated as well, as the judgment had been based on a formal confession not backed by any statement as to the facts of the case or by additional evidence. That is a particularly important statement of the Constitutional Court. From this moment on, it is thus considered that some evidence has to be examined during the court hearing in order to check the credibility of a confession. However, it is deemed sufficient to inspect the investigative file or to question the leading investigator as a witness[39].

The discussed judgment of the Federal Constitutional Court faced mixed attitude of legal scholars. On one hand, it was noted that the attempt to limit the practice of negotiated justice and the emphasis

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[38] Judgment of BVerG of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10 and 2 BvR 2155/11.

[39] GILLIÉRON, Gwladys. Comparing Plea Bargaining and Abbreviated Trial Procedures. In: BROWN, Darryl K., TURNER, Jenia I., WEISSER, Bettina. *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press 2019. p. 713. MOSBACHER, Andreas. The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements. *German Law Journal*, vol. 15, n. 1, p. 7 -9, 2014.

put on "the search for truth, the proportionality of punishment and transparency of negotiations" is praiseworthy[40]. However, it was also pointed out that the Court failed to truly address the problems that lie at the core of negotiated justice, namely the constitutionality of the trade of "proportionate sentencing and a full examination of the facts for a waiver of the defendant's trial rights"[41]. It was also doubted whether the Court was able to actually influence the practice as it had long been developing outside statutory framework[42].

The newest empirical research shows that 7,8% of judges admit that they often or very often inform the defendants about the so-called "sanction-scissors" in case of confession and its lack (whereas 9.1% of the prosecutors and 23,6% of the defence attorney report such a practice as often or very often)[43]. Almost all the professional participants witnessed the defendant's confession after the court had indicated a possible punishment although the defendant had previously refused to confess[44]. When it comes to transparency, in 17,6% of the examined cases the negotiations of a settlement were not reflected in the minutes at all; even if in majority cases the duty to reflect the agreement in the minutes was fulfilled, it was usually only the results of negotiations that was noted, not their course[45]. As one can see, practitioners' tendency to informal shortcuts is not easy to eradicate exactly as it has been feared when the

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40 WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 82.

41 WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 95.

42 WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 98. Compare RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? op. cit. p. 321, p. 323-325, who expressed doubts as to whether the statutory regulation may prevent certain behaviours that have long been practised informally.

43 ALTENHAIN, Karsten, JAHN, Matthias, KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. Baden-Baden: Nomos, 2020. p. 410.

44 ALTENHAIN, Karsten, JAHN, Matthias, KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. op. cit. p. 412-414.

45 ALTENHAIN, Karsten, JAHN, Matthias, KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. op. cit. p. 149-150, p. 186.

statutory regulation entered into force[46]. The practice of not disclosing the course of negotiations in the minutes of the court hearing has already been criticised in 2006 but is still present although the importance of transparency is emphasised by the legal doctrine[47].

It was also pointed out in the legal doctrine that the strict legal framework of *Absprachen,* created by the discussed judgment of the Federal Constitutional Court of 2013, may have contributed to increasingly rare application of the institution itself and to the tendency of shifting the focus of practitioners to informal agreements in pre-trial phase of proceedings[48].

To sum up, the German Constitutional Court's case law focuses on preserving the principle of material truth and legalism, paying attention to the protection of defendants as well. The protection of the true voluntariness of the defendant's decision to enter a settlement is strongly emphasised by the Court as well as the particular importance of the transparency of negotiations and their result. The Court's role in introducing agreements to the criminal procedure in the first place and shaping them in an equitable way was exceptional as the Court's initial guidelines were actually incorporated into the statutory law. Nevertheless, the practical tendency to circumvent the well-designed regulations still escapes the Court's jurisdiction to some extent.

2.2. France

The most typical French institution resembling American plea bargaining is called *la comparution sur reconnaissance préalable de culpabilité* (CRPC) or *le plaider-coupable*, literally meaning "to plead

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[46] RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? op. cit. p. 321-323.

[47] TURNER, Jenia I. Judicial Participation in Plea Negotiations: A Comparative View. op. cit. p. 220-221; AMBOS, Kai, HEINZE, Alexander. Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure. In: BERGSMO, Morten (ed.). *Abbreviated Criminal Procedures for Core International Crimes*. Brussels: Torkel Opsahl, 2017. p. 72.

[48] JAHN, Matthias, SCHMITT-LEONARDY, Charlotte. The German "Verständigung" and Consensual Elements in German Criminal Trials. *German Law Journal*, vol. 21, n. 6, p. 1145-1146, 2020.

guilty". There is also another institution bearing a consensual feature, *la composition pénale*. It was left out of the analysis because it is doubtful whether it can be qualified as a negotiated justice mechanism similar to plea bargaining because it does not lead to a criminal conviction[49]. However, it is worth mentioning that its introduction into the French legal system was induced by the Constitutional Council's judgment of 2 February 1995 which had declared the institution of penal order unconstitutional due to the fact that its issuance had been the competence of the prosecutor and not of the court[50]. The penal order was thus substituted with *composition pénale*.

The CRPC was introduced into the French legal system by the Act of 9 March 2004 adapting the administration of justice to the changing face of crime, which dealt with several modern challenges to criminal justice systems such as organised crime and overly lengthy proceedings[51]. It was referred to the *Conseil Constitutionnel* (hereinafter: Constitutional Council or Council) for review by the members of parliament, who claimed that the new institution violated the right to a fair trial as well as the presumption of innocence, the principle of equality before the courts of law and the principle of trial in open court. It was argued that the institution put the defendant under real pressure due to the risk of harshening the sentence if the agreement was refused. The Constitutional Council in general did not share this view in its decision of 2 March 2004[52]. According to the Council, placing the approval of the agreement solely in the hands of the president of the relevant court sufficiently separated charging and adjudicating powers. Mandatory participation of the defence attorney, a ten-day period for reflection for the defendant

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[49] See PRADEL, Jean. *Procédure pénale*. Paris: Cujas, 2019. p. 669-670; GUINCHARD, Serge, BUISSON, Jacques. *Procédure pénale*. Paris: Lexis Nexis, 2020. p. 909; DESPORTES, Frédéric, LAZERGES-COUSQUER, Laurence. *Traité de procédure pénal*. Paris: Economica, 2015. p. 813-814.

[50] Cons. Const. no. 95-360 DC, 2 fevr. 1995: JO 7 fevr. 1995, 2097; STEFANI, Gaston, LEVASSEUR, George, BOULOC, Bernard. *Procédure pénale*. Paris: Dalloz, 20196. p. 666.

[51] Loi n°2004-204 du 9 mars 2004 portant sur l'adaptation de la justice aux évolutions de la criminalité, JORF n°59 du 10 mars 2004.

[52] Décision n° 2004-492 DC of 2.03.2004. Available at: https://www.conseil-constitutionnel.fr/decision/2004/2004492DC.htm . Accessed on: 16.01.2022.

upon request as well as the unlimited right to appeal guaranteed that the right to a fair trial was not infringed. The presumption of innocence was also not violated as the defendant was not forced to confess and the court remained obliged to verify the facts of the case. What is more, if the agreement was not approved, the statements made in the course of this procedure would be inadmissible at trial. The principle of equality before the law was not infringed either with regard to the victims, who enjoyed the right to make civil claims regardless of this special procedure. However, the Council agreed that it was unconstitutional that the court hearing regarding the agreement was supposed to take place *in camera,* as the Declaration of 1789 generally required that custodial sentences were imposed only in open court.

It was not long before the provisions regarding CRPC approval hearings were reviewed by the Constitutional Council again. This time it was questioned whether the new law providing for the non-mandatory presence of the prosecutor at the court hearing pertaining the settlement violated the Constitution. The Council disagreed with such a thesis in its decision of 22 July 2005[53]. However, the issue was controversial and even the Court of Cassation expressed in the course of proceedings before the Council the view that the prosecutor's presence at the hearing was of crucial importance for the constitutional values[54].

Other judgments of the Constitutional Council regarding CRPC were:

- the decision of 10 December 2010[55], resulting from a referral by the Court of Cassation (fr. *Cour de Cassation*) holding that it was conform to the Constitution that the prosecutor could simultaneously make a proposition of CRPC and summon the defendant to the court, as the summons became void

[53] Décision n° 2005-520 DC of 22.06.2005. Available at: https://www.conseil-constitutionnel.fr/decision/2005/2005520DC.htm . Accessed on: 16.01.2022.

[54] LAZERGES, Christine. Le rôle du Conseil constitutionnel en matière de politique criminelle. *Cahiers du Conseil Constitutionnel n° 26 (Dossier: La Constitution Et Le Droit Pénal),* 2009. Available at: https://conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/cahiers-du-conseil-constitutionnel-n-26-aout-2009 . Accessed on: 16.01.2022.

[55] Décision n° 2010-77 QPC of 10.12.2010. Available at: https://www.conseil-constitutionnel.fr/decision/2010/201077QPC.htm . Accessed on: 17.01.2022.

if the proposition was accepted and the law protected the accused by excluding all the documents regarding the CRPC procedure from the trial dossier,

- the decision of 8 December 2011[56], approving the constitutionality of the amendment which expanded the scope of application of CRPC to almost all offences and created the possibility of remitting the case to the prosecutor for negotiations by the investigating judge,
- the decision of 21 March 2019[57], affirming conformity to the Constitution of a reform which enlarged the scope of punishments that may be inflicted in the CRPC procedure,
- the decision of 18 June 2021[58], given in response to the Court of Cassation referral, establishing that the lack of appellate review of the court's refusal to approve the agreement did not violate the Constitution, as such a decision neither ended criminal proceedings nor created any risk to the rights of the defence in its further course, as the minutes of negotiations and other related statements were excluded from the case file[59].

As one can easily see, the case law of the Constitutional Council is usually approving the statutory regulation. Thus the role of the Council in shaping the procedural fairness of the CRPC was not predominant. However, the reason might simply be the quality of the French legislation regarding CRPC, which was always encased in an elaborate system of

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[56] Décision n° 2011-641 DC of 8.12.2011. Available at: https://www.conseil-constitutionnel.fr/decision/2011/2011641DC.htm . Accessed on: 17.01.2022.

[57] Décision n° 2019-778 DC of 21.03.2019. Available at: https://www.conseil-constitutionnel.fr/decision/2019/2019778DC.htm . Accessed on: 23.01.2022.

[58] Décision n° 2021-918 QPC of 18.06.2021. Available at: https://www.conseil-constitutionnel.fr/decision/2021/2021918QPC.htm . Accessed on: 23.01.2022.

[59] The exclusion of the documents created during CRPC from the case file is a particularly important safeguard for the defendant according to the French legal writing as well. AZIBERT, Gilbert. Perspectives et prospectives au sujet de la procédure de comparution sur reconnaissance préalable de culpabilité dans la loi dite "Perben 2". In: *Le droit pénal à l'aube du troisième millénaire. Mélanges offerts à Jean Pradel.* Collective work. Paris: Cujas, 2006. p. 176.

procedural safeguards protecting the accused and preserving fundamental values[60]. If the law already fulfils the standard of fairness, the role of a constitutional court obviously diminishes. It is underlined by French legal scholars that the CRPC is not an equivalent of American plea bargaining, does not involve real negotiations but rather consists in accepting or refusing the prosecutor's proposal and is coherent with fundamental principles of the presumption of innocence, fair trial as well as equitable punishment[61].

The exception to that rule was when the private character of the court hearing was found unconstitutional – but it is worth noting that it was the first time that the Constitutional Council derived the general rule of publicity of court hearings from the Declaration of 1789, where it was not expressly stated[62].

2.3. Italy

The main Italian institution inspired by American plea bargaining is called *applicazione della pena su richiesta delle parti* (*patteggiamento*).

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[60] Even legal scholars admit that the regulation was formulated in a particularly clear and detailed way whereas procedural safeguards diminish the risk of a miscarriage of justice or inflicting an unjust punishment. See PRADEL, Jean. Le plaider coupable, confrontation des droits américain, italien et français. *Revue internationale de droit comparé*, vol. 57, n. 2, p. 485, p. 488-491, 2005.

[61] PRADEL, Jean. *Procédure pénale.* op. cit. p. 927. PRADEL, Jean. Le plaider coupable, confrontation des droits américain, italien et français. *Revue internationale de droit comparé*, vol. 57, n. 2, p. 480, 2005. GUINCHARD, Serge, BUISSON, Jacques. *Procédure pénale*. Paris: Lexis Nexis, 2020. p. 940. FOURMENT, François, CAMOUS, Éric. *Procédure pénale.* Bruxelles: Bruylant, 2021. p. 239. PLANQUE, Jean-Claude, SAPSE, Danielle, TOURNEL, Gilles. La comparution sur reconnaissance préalable de culpabilité (CRPC): lointaine cousine du plea bargaining américain? *Revue pénitentiaire. Droit pénal,* v. 10, p. 97-98, 2016. Compare a different view expressed by NIANG, Babacar. *Le «plaider-coupable» en France et aux États-Unis au regard des principes directeurs du procès pénal.* Paris: l'Harmattan, 2014. p. 491-498.

[62] LAZERGES, Christine. Le rôle du Conseil constitutionnel en matière de politique criminelle. *Cahiers du Conseil Constitutionnel n° 26 (Dossier: La Constitution Et Le Droit Pénal),* 2009. Available at: https://conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/cahiers-du-conseil-constitutionnel-n-26-aout-2009 . Accessed on: 16.01.2022.

However, it is sometimes claimed that the abbreviated trial (*giudizio abbreviato)* is a negotiated justice mechanism as well. In the author's opinion, this view cannot be shared anymore, as currently the accused simply has the right to have an abbreviated trial, which does not require the prosecutor's consent. However, the case law regarding *giudizio abbreviato* (especially the one by ECtHR, which will be discussed later in the paper) in fact shaped the standard of procedural fairness of negotiated justice and will be included in the analysis.

Both *patteggiamento* and *giudizio abbreviato* were introduced (alongside other significant reforms transforming the Italian criminal justice system into an adversarial one) by the Code of Criminal Proceedings of 1987, which entered into force in October 1989[63]. The role of the Italian Constitutional Court in these reforms was an exceptional one, as the Court actually blocked many of them. It is even stated in the Italian legal doctrine with regard to *patteggiamento* that "it has, in fact, led to an endless series of decisions issued by the Joint Chambers of the Supreme Court and the Constitutional Court which were to find solutions to the crisis of *rejection* that was gradually produced by the transplant into the Italian legal culture of an institution that did not belong to that culture"[64].

In the 1990s the Italian Constitutional Court struck down some crucial elements of the 1989 reform, such as the exclusion of hearsay evidence coming from police officers[65], the exclusion of out-of-court statements of a defendant's accomplice who remained silent as a witness at trial[66], the exclusion of out-of-court witness statements in

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[63] Decree of the President of Republic no. 447 of 22 September 1988 Approval of Criminal Procedure Code (*Codice di Procedure Penale),* Gazzetta Ufficiale della Repubblica no. 250 of 24 October 1988, hereinafter: Italian Code of Criminal Procedure or ICCP.

[64] LUPÁRIA, Luca, GIALUZ, Mitja. Italian Criminal Procedure: Thirty Years After the Great Reform. *Roma Tre Law Review*, v. 1, p. 66, 2019.

[65] Corte cost., 31 Jan. 1992, n. 24, Gazz. Uff. 1' serie speciale, 5 Feb. 1992, n. 6, Foro It. 1992, I, 1052.

[66] Corte cost., 3 June 1992, n. 254, Gazz. Uff. 1 serie speciale, 4 June 1992, n. 24, Giur. It. 1993, I, 533; the amended provision of Article 513 was once again held unconstitutional in judgment n. 361/1998 of 4 November 1998, Corte cost., 2 Nov. 1998, n. 361, Gazz. Uff. 1 serie speciale, 4 Nov. 1998, n. 44, Foro It. 1998, 3441.

their substantive use as evidence[67] or the limited power of the court to initiate the introduction of evidence[68]. The attitude of the Constitutional Court presented was in favour of not impeding the search for truth and the judges' active role in this process; it was nevertheless characterised in the legal doctrine as misinterpretation of the Constitution[69]. With regard to *patteggiamento* itself, it was already on 2 July 1990 when the Constitutional Court held that the court has to play an active role in assessing the adequacy of the sentence to the act committed in the light of the directive of social readaptation. Thus, the wording of Article 444 has to be construed in such a way to permit the judge to play such an active role and not to release the court from the duty to determine the defendant's guilt[70]. On the other hand, it was pointed out that the criminal court is not bound by the parties' request for a particular penalty as it may be rejected after assessing the merits of the case – and thus the institution does not violate Article 101 of the Italian Constitution, which subordinates the judge only to the law[71]. The court is always obliged to verify the voluntariness of the defendant's statements and the appropriateness of legal classification of the act and the punishment, as well as to check whether there are any reasons that should lead to an acquittal[72]. It was nevertheless stated in

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[67] Corte cost., 3 June 1992, n. 255, Gazz. Uff. 1' serie speciale, 4 June 1992, n. 24, Foro It. 1992, I, 2012.

[68] Corte cost., 26 Mar. 1993, n. 11, Gazz. Uff. 1' serie speciale, 31 Mar. 1993, n. 14, Foro It. 1993, I, 1356.

[69] ILLUMINATI, Giulio. The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988). *Washington University Global Studies Law Review*, v. 4, n. 2, p. 576, 2005.

[70] VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system. op. cit. p. 446. The author provides a detailed analysis of the argumentation provided by the Italian Constitutional Court. See also FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? op. cit. p. 213.

[71] FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? op. cit. p. 216.

[72] IOVENE, Federica. Plea Bargaining and Abbreviated Trial in Italy. *Warwick School of Law Research Paper (Special Plea Bargaining Edition, editor Jackie Hodgson),* n. 11, p. 5-6, 2013.

the legal doctrine that the Constitutional Court's strong support for the judge's position in negotiated justice was rather verbal and "masked the extent to which the agreed upon sentence stripped the judge of substantial power"[73]. On the other hand, it is pointed out that the Constitutional Court presented a new attitude towards the adequacy of punishment, confirming that it is conform to the Constitution that a penalty is lowered by one third (as in case of *patteggiamento*) and thus that the waiver of procedural right may constitute a mitigating circumstance (although other aggravating and mitigating factors still have to be considered in order to ensure appropriateness of the penalty to the guilt)[74].

The judgment of 2 July 1990 led to the amendment of the Code no. 479/1999 of 16 December 1999 which introduced Article 444 (2) CPP. This provision explicitly imposed on the court the duty to inspect the guilt, the legal classification and the adequacy of sentence and prohibited bargaining over legal classification[75].

The activity of the Constitutional Court seriously undercut the reforms[76]. The Parliament reacted by amending Article 111 of the Italian Constitution so that it contains a clear basis for the adversarial concept of criminal trial[77]. The amended provision also explicitly provides legal

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[73] VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system, op. cit. p. 449. See more criticism in: FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? op. cit. p. 217.

[74] IOVENE, Federica. Plea Bargaining and Abbreviated Trial in Italy. op. cit. p. 9-10.

[75] FABRI, Marco in: FABRI, Marco (ed.). *Four Criminal Procedure Case Studies in Comparative Perspective: China – Italy – Russia – USA*. Baden-Baden: Nomos, Bern: Stämpfli Verlag, Wien: Jan Sramek Verlag, 2016. p. 140; GIALUZ, Mitja. The Italian Code of Criminal Procedure: a reading guide. In: GIALUZ, Mitja, LUPÁRIA, Luca. SCARP, Federica. *The Italian Code of Criminal Procedure. Critical Essays and English Translation,* op.cit. p. 45.

[76] PIZZI, William T., MONTAGNA, Mariangela. The Battle to Establish an Adversarial Trial System in Italy, op. cit. p. 430.

[77] Cost. Law n. 2 of Nov. 23, 1999, Gazz. Uff. serie generale, 23 Dec. 1999, n. 300, Lex. 1999, I, 4447. VITIELLO, Michael. Bargained-for-Justice: Lessons from the Italians? *University of the Pacific Law Review,* v. 48, p. 260, 2017.

grounds for waiving the right to a trial[78]. This is a unique example of a constitutional court having such a negative attitude towards the reforms intended by the legislature that it led to the change of the Constitution itself. However, other fields of the Constitutional Court's activity contributed to enhancing the fairness of negotiated justice. For example, as a result of judgment no. 443/1990 of 26 September 1990 the legislator provided legal basis for reimbursing the costs of proceedings borne by the victim regardless of the fact that proceedings ended in *patteggiamento*[79].

Especially after the discussed amendment of the Italian Constitution, the Italian Constitutional Court changed its attitude towards introduced reforms. The clear sign of a new approach towards negotiated justice was the judgment of 9 July 2004, when the Court affirmed constitutionality of raising a possible punishment inflicted in *patteggiamento* procedure from two to five years imprisonment[80]. As a sidenote it has to be underlined that the very same constitutional doubt arose when the scope of application of CRPC was enlarged in France – but it was also resolved in favour of legislator's will to promote negotiated justice.

In the years to come, the Italian Constitutional Court even derived sort of a right of the defendant to request for *patteggiamento*. For example,

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[78] It was added to Article 111 of the Italian Constitution among others that the defendant has the right "that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to subpoena favourable witnesses at trial on an equal basis with the prosecution, as well as the right to produce other evidence in his favour"; that the "criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer." It was also added that "The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by consent of the accused, due to verified objective impossibility or as a result of proven illicit conduct" (translation by PIZZI, William T., MONTAGNA, Mariangela. The Battle to Establish an Adversarial Trial System in Italy, op. cit. p. 460-461).

[79] PERRODET, Antoinette. The Italian System. In: DELMAS-MARTY, Mireille, SPENCER, John R. (eds). *European Criminal Procedures*. Cambridge: Cambridge University Press, 2002. p. 372-373.

[80] Corte cost., 9 July 2004, n. 219, Gazz. Uff. 1' serie speciale, 14 Jul. 2004, n. 27.

it was held in the judgment of 20 February 2019 that it is unconstitutional to deprive the defendant of the right to request for such a conviction due to the enlargement of the scope of the accusation with regard to the acts which were not initially covered by the act of indictment[81]. This tendency was initiated decades before, when in a series of three judgments the Constitutional Court determined that the provisions concerning *giudizio abbreviato* violated the constitutional principle of equality insofar as they did not demand the prosecutor to state reasons of refusal of consent to this procedure and did not allow the court to grant the benefits resulting from its application if the refusal was unfounded[82]. In light of the above, the standard of fairness of criminal proceedings in Italy involves the right of the defendant to request a sentencing agreement and such a request may only be refused on sufficient grounds subjected to judicial review. This exceptional feature of the Italian negotiated justice is partly resulting from the Constitutional Court's activity.

2.4. The role of the ECtHR

The European Court of Human Rights has had the opportunity to express its views on plea agreements on many occasions, mostly referring to the conditions of renouncing fair trial rights. The ECtHR correctly assumes that such a waiver lies at the core of negotiated justice[83].

One of the most widely cited judgments was the one of 18 October 2006 in *Hermi v. Italy,* case no. 18114/02. The applicant was sentenced in the *giudizio abbreviato* (which is a shortened and to some extent consensual procedure) but later filed an appeal. He was personally notified of the date of the appellate hearing and did not react to the notification. One of his defence counsels was present at this hearing and requested its adjournment

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[81] Corte cost., 20 Feb. 2019, n. 82, Gazz. Uff. 1' serie speciale, 17 Apr. 2019, n. 16.

[82] Corte cost., 8 Feb 1990, n. 66, Gazz. Uff. 14 Fev. 1990, n. 7; Corte cost., 18 Apr. 1990, n. 183, Gazz. Uff. 18 Apr. 1990, n. 16; Corte cost., 15 Feb 1991, n. 81, Gazz. Uff. 20 Fev. 1991, n. 8; VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system. op. cit. p. 453-456.

[83] BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion, op. cit. p. 238-239.

for reasons which included the motion to bring the defendant to the courtroom. This motion was denied as the accused had not demanded his participation in the hearing five days in advance, which was the legal requirement mentioned in the written notification. The appellate court upheld the judgment.

The applicant complained to the ECtHR about the violation of his right to a fair trial by not allowing him to take part in the appellate hearing. The Chamber's judgment initially stated that Article 6 of the Convention had been violated, as the applicant had never explicitly waived his right to participate in the hearing. However, the Grand Chamber later expressed a different view, underlining that Article 6 of the Convention did not forbid renouncing procedural rights. Such a waiver may be either explicit or implied as long as it is unequivocal, tied to a minimum of procedural safeguards and does not violate the public interest. Establishing that the defendant waived any rights in an implied way requires previous determination that he had been aware of these rights and could have reasonably foreseen the consequences of his or her behaviour. The Court concluded that this was the applicant's case, although the vote count was 12 to 5 and dissenting opinions were given.

Another fundamental judgment – and the one which explicitly refers to negotiated justice – was the judgment of 29 April 2014 in *Natsvlishvili and Togonidze v. Georgia,* application no. 9043/05. The first applicant, Mr Natsvlishvili, applied in writing for a plea agreement although he felt innocent, what he expressly stated in the very same letter. The applicant was detained at that time but was represented by two defence counsels and had access to the investigation file. He never plead guilty but participated in negotiations of the agreement which confirmed his guilt and contained a motion to inflict a lenient penalty. The settlement was approved by the court, whose judgment was not subject to appeal. During the court hearing, the applicant stated that he was aware of his rights and consented to the agreement entirely voluntarily, in the absence of any pressure from the prosecution during the negotiations. This statement was also confirmed by the defence counsel.

The applicant complained to the ECtHR about a breach of the right to a fair trial (Article 6 (1) ECtHR) and the right to appeal against a conviction (Article 2 of Protocol No. 7), pointing out that the waiver

of procedural rights was not accompanied by effective protection against procedural violations. In light of the low acquittal rate in Georgia (less than 1%), the applicant was under duress as an agreement was the only way to avoid long imprisonment. According to the complaint, judicial control of the agreement was insufficient as the court could only examine its contents, but not the procedure of negotiations. The applicant, being deprived of his liberty and therefore remaining in the hands of the public authorities, would not have had the courage to admit to the court that pressure had been put on him.

The Court did not consider any of these allegations justified, although the decision was not unanimous. The ECtHR once again confirmed that the right to a fair trial may be renounced provided that:

1. the waiver is unambiguous, genuinely voluntary, backed by full awareness of the facts and legal consequences,
2. the waiver is not contrary to the public interest
3. the waiver is accompanied by a minimum of procedural guarantees against abuse; in particular, both the content of the agreement and the fair method of its development should be subject to due review by the court[84].

In the circumstances of the case there was no breach of these requirements. The applicant was assisted by lawyers from the very beginning and had access to the case file. He initiated the consensual procedure and stated before the court that he had entered into the agreement voluntarily and had been aware of all its consequences. As regards the right to appeal, the Court found that the applicant had voluntarily, effectively and knowingly waived it by concluding an agreement.

However, Judge Gyulumyan of Georgia submitted a dissenting opinion. It was therein stated that the domestic court was not able to check whether the negotiations were actually fair as they were not recorded in any way. The judicial review was all the more illusory as the agreement was approved the very next day after it had been presented to the court despite the size of the case file. In addition, due to the low percentage of

[84] See also BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion, op. cit. p. 244.

acquittals in Georgia, the accused had no real alternative to the agreement, so he was under undue pressure.

The judgment in *Natsvlishvili and Togonidze v. Georgia* was criticised in the legal doctrine due to the lack of consideration of undue pressure resulting from particular circumstances of the pre-trial detention of the applicant and illusionary chances of acquittal in Georgia[85]. The judgment is considered as conservative and certainly not raising procedural standards of plea agreements over the one set by European constitutional courts[86].

Another significant thread of the ECtHR's case law on consensual and abbreviated procedures is the loyalty of state authorities in negotiations, which was widely discussed in the landmark judgment *Scoppola v. Italy (II)*, application no. 10249/03.

The applicant, Franco Scoppola, was charged with the murder of his wife and requested the *giudizio abbreviato* (shortened procedure). The Italian Code of Criminal Procedure provided that if such a procedure had been applied, the penalty of life imprisonment (with or without daytime isolation) would have been replaced with thirty years' imprisonment. On the day of the applicant's sentencing, an amendment entered into force which allowed the imposition of the penalty of life imprisonment without daytime isolation instead of life imprisonment with daytime isolation in *giudizio abbreviato* procedure. After the prosecutor's appeal, the applicant was sentenced to life imprisonment without daytime isolation.

The applicant complained to the ECtHR about the breach of his right to a fair trial, arguing that when he had applied for *giudizio abbreviato,* he had understood that he would have been sentenced to 30 years' imprisonment instead of a life sentence. The subsequent change in the regulations resulted in the imposition of a life imprisonment, which unilaterally violated the agreement concluded at the moment of adopting the special procedure. The government claimed that the possibility of withdrawing the application for *giudizio abbreviato* within 30 days of the

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[85] BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion, op. cit. p. 245-249.

[86] TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. op. cit. p. 408.

entry into force of amended provisions had been a sufficient guarantee of the right to a fair trial.

The ECtHR found that, by requesting an abridged procedure, the applicant had expressly waived his right to a public hearing and to adversarial trial in exchange for certain benefits, especially for avoiding life imprisonment. These benefits could have been reasonably expected by the applicant. The ECtHR stressed that "a person charged with an offence must be able to expect the state to act in good faith and take due account of the procedural choices made by the defence, using the possibilities made available by law. It is contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial. (...) [I]t cannot be regarded as fair if (...) a crucial element of the agreement between the State and the defendant is altered to the latter's detriment without his consent"[87]. At the same time, it was not enough to allow the applicant to withdraw the consent to *giudizio abbreviato*, as it deprived him of the said benefit anyway.

As it can easily be seen, the ECtHR's case law is to the greatest extent focused on the issue of procedural fairness of the negotiated justice, true voluntariness and consciousness of the waiver of procedural rights as well as state authorities' loyalty towards the defendant. As it has already been mentioned, the ECtHR's case law is worth including in the analysis as it contributes to creating common standards of fairness of negotiated justice. This is particularly important in the countries where constitutional courts have not yet had the occasion to express their position in this matter. Nevertheless, the legal doctrine is somewhat critical towards the ECtHR's case law. It is underlined that the ECtHR – especially in its *Natsvlishvili* judgment – did not create any standards that would surpass the level of protection of the defendant already guaranteed for example by the case law of the German Constitutional Court[88]. However, there is one issue which is emphasised by the ECtHR to a far greater extent

[87] § 139.

[88] TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. op. cit. p. 408.

than in national legal orders: the loyalty of the state authorities expressed in awarding the benefits which were previously promised or at least reasonably expected by the defendant. The standard set in *Scoppola (II)* in this matter shall be of particular interest for the European constitutional courts and the legislators.

3. Concluding remarks

The comparative analysis leads to the conclusion that the role of the constitutional courts and the ECtHR in shaping procedural fairness of negotiated justice systems is different in the compared legal systems.

The French Constitutional Council, although frequently asked to review the conformity to the Constitution of the negotiated justice, usually approves the legislative solutions. However, it has to be noted that French consensual institutions provide a particularly high level of procedural protection of the defendant and provide the court with a real possibility of inspecting the appropriateness of the legal classification of the act and the proposed punishment to the circumstances of the case.

In Germany, on the other hand, the Constitutional Court's competence to hear individual complaints entrenches a great number of judgments relating to the agreements in criminal proceedings. The reasoning of the Court usually focuses on the principles of legalism and material truth although procedural fairness is not omitted as well. The role of the Constitutional Court in the creation of *Absprachen* was exceptional as it was the Court which acknowledged the informal practice of concluding agreements and set its boundaries with regard to both substantive and procedural fairness. What is also worth underlining is the exceptional approach of the Federal Constitutional Court towards the transparency of negotiations (to the parties and the public) which is seen as an important guarantee of the procedural fairness. The Court's conclusion that the undue pressure over the defendant may result from proposing too broad sanction scissors is the crucial achievement in terms of fairness of negotiated justice. The case law of the German Federal Constitutional Court is also characterised by a practical focus – not only the law in books, but also the law in action is inspected by the Court.

In Italy the Constitutional Court played a peculiar role in the adversarial transformation of the legal system (which included introducing consensus mechanisms) as it used to undercut the legislator's efforts by eliminating important elements of the reforms from the legal system. This led to a particularly unique reaction of the Parliament: the amendment of the Constitution so that it now contains a specific basis for adversarial features of criminal trial as well as for waiving these rights, which is crucial for the existence of plea bargaining and similar institutions. The Constitutional Court's case law refers strongly to the active role of the court in verifying the adequacy of the proposed judgment.

On the other hand, the conditions of a voluntary waiver of procedural rights are at the heart of the ECtHR's case law, along with the loyalty of the state authorities in the course of negotiations. The ECtHR specifically focuses on providing the defendant with all the necessary information, protecting his or her freedom of making a decision without undue pressure and the exchange of mutual benefits as promised. Nevertheless, the standard or protection of voluntariness set by the ECtHR does not surpass the one provided by the case law of constitutional courts of the analysed countries. The ECtHR's approach thus gains importance in countries where constitutional courts have not reviewed negotiated justice instruments yet and with regard to the issue of loyalty of the state in providing the promised benefits. The latter was not covered by the case law of other analysed judicial bodies.

The common standard set by the case law in Germany, France and Italy is the constitutional requirement for the active role of the court in verifying not only the voluntariness of the defendant's consent for conviction but also the appropriateness of legal classification of the act and the proposed punishment to the circumstances of the case. Thus, the activity of the constitutional courts to the great extent focuses on distinguishing the negotiated justice in their legal systems from American plea bargaining. On the other hand, the ECtHR refers solely to the procedural fairness, acting within the frames of the wording of Article 6 of the ECHR.

In none of the compared countries the role of the constitutional court in shaping procedural fairness of negotiated justice can be described as marginal – although it sometimes consisted of amending the legislators'

efforts and sometimes opposing them to the extent that led to a change of the constitution itself. What is more, it is sometimes difficult to prevent the practitioners from circumventing the requirements set by the case law. For these reasons, the constitutional courts' power to shape the legal framework of negotiated justice is in fact limited.

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The role of constitutional courts in taming adverse impact of new technologies in the criminal proceedings

O papel das cortes constitucionais em reduzir os impactos negativos das novas tecnologias no processo penal

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Abstract: This article presents the impact of constitutional courts in shaping the fair trial standards in the context of new technologies application in the criminal proceedings. Surveillance measures based on the use of new technologies by law enforcement agencies are highly intrusive in nature and may violate not only the constitutional right to privacy, but also, in the author's opinion, guarantees of the fair trial and procedural rights of the suspect. The aim of the article is to indicate to what extent constitutional courts have contributed to establishing the procedural standards in the activities of gathering evidence using new technologies (regarding both content and metadata), as well as to present potential problems in this area that courts will have to face in the future.

Keywords: New technologies; constitutional courts; data retention; surveillance.

Resumo: *Este artigo apresenta os impactos das cortes constitucionais em modelar os parâmetros do devido processo no contexto da aplicação das novas tecnologias no processo penal. Medidas de vigilância baseadas no uso de novas tecnologias*

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pelas agências de persecução são altamente intrusivos em essência e podem violar não somente o direito constitucional à privacidade, mas também, na visão da autora, garantias do devido processo e direitos processuais do suspeito. O objetivo deste artigo é indicar qual a extensão da contribuição das cortes constitucionais para o estabelecimento de critérios processuais nas atividades de obtenção de provas por meio de novas tecnologias (em relação tanto ao conteúdo quanto à metadata), assim como apresentar os potenciais problemas nesse tema, os quais deverão ser enfrentados pelas cortes no futuro.

Palavras-chave: *novas tecnologias; cortes constitucionais; conservação de dados; vigilância.*

Summary: 1. Introduction; 2. Fair trial and right to privacy; 3. Data retention; 4. Interception of communications content; 5. Self – incrimination and lie-detecting technologies – the emerging problems; 6. Conclusions

1. Introduction

The use of new technologies in criminal proceedings has undoubtedly been gaining in importance recently. Avoiding facing them in the practice of applying the law is, in fact, significantly hindered. This is the result of their widespread use in society[2], but also their prevalence

[2] In 2020 in Poland the use of fixed-line Internet access per households amounted to 56.7%. Dedicated mobile access via modems, cards and keys was used by 23.5% of the population, Possibility of access to the Internet at a speed of min. 75.9% of households have 30 Mb / s; 141, 5% of mobile network. OFFICE OF ELECTRONIC COMMUNICATION. Report of June 2021, https://www.uke.gov.pl/download/gfx/uke/pl/defaultaktualnosci/36/391/10/raport_o_stanie_rynku_telekomunikacyjnego_w_polsce_w_2020_roku_.pdf (access: January 9, 2022). Also, 95% of American adults own a cell phone, while 77% own a smartphone. *See* PEW RESEARCH CENTER FO INTERNET AND TECHNOLOGY. Mobile Fact Sheet, Pew Research Center for Internet and Technology of February 5, 2018, https://www.pewinternet.org/fact-sheet/ mobile/. According to one of the polls, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, RANGAVIZ, David, Compelled decryption & state constitutional

in operational practice of law enforcement agencies, which must adapt their apparatus to contemporary technological challenges and ensure the effectiveness of their activities.

However, the issue of adapting legal solutions to the current problems of the applying the law raises many doubts. It seems that a large part of the legislations of individual countries reacts to the existing problematic issues with some delay and the process of regulating issues related to the use of new technologies in criminal proceedings takes place only after some time of their practical application, in particular with regard to the implementation of relevant procedural rights of parties to the proceedings. In such a state of facts, the courts are often responsible for clarifying the shape of these powers in a way that goes further than in the case of traditional procedural institutions, and thus for the level of ensuring the standards of a fair trial. This process also takes place at the level of district and local courts, however, due to their specific role and nature, it is the constitutional courts that have a particularly strong impact on the identification of the limits of procedural rights, which not only relate to individual cases, but also shape the general content of the rights making up a concept of the fair trial.[3]

The research question of the study is as follows – do the constitutional courts have a role in shaping the fair trial standards in criminal proceedings with regard to the use of new technologies. The research is based on the European continental system with the particular focus on Polish legal order and Polish Constitutional Tribunal Case Law. Although the author does not undermine its importance, the case law of Polish Supreme Court, administrative, district and local courts were excluded due to the scope of this particular study. To provide for

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protection against self-incrimination. *American Criminal Law Review*, v. 57, no. 1, p. 157-206, 2020.

[3] Sometimes, due to the lack of proper regulation and basis for particular measures, the courts also declare some provisions unconstitutional. E.g. in Spain Constitutional Court considered unconstitutional recording of conversations through a hidden device installed in the inmates' prison cells because of the lack of a sufficient legal grounds. BACHMAIER WINTER, Lorena. Remote computer searches under Spanish Law: The proportionality principle and the protection of privacy. *Zeitschrift für die gesamte Strafrechtswissenschaft,* v. 129 no. 1, p. 205-231, 2017. https://doi.org/10.1515/zstw-2017-0008

adequate legal frames the study also analyzes the CJEU and ECtHR case law connected with the discussed problems. In the part dedicated to the privilege against self-incrimination author additionally includes the case law of the Supreme Court of the United States to reflect on issues that have not yet met with the sufficient recognition among European courts. In the legal traditions of the US and Commonwealth countries, derived from the common law system, there are no constitutional courts, while problems related to ensuring respect for procedural rights are resolved by supreme courts and lower instance courts.[4] The example of the United States and problematic issues settled by the Supreme Court regarding the US Constitution and its amendments, in particular the Fifth, is, however, a perfect example of what challenges will constitutional courts face in the future, what will be presented in the further part of the article.

The study is focused mainly on the surveillance measures used by the law enforcement agencies (LEAs) applying to both content and non-content data and on the pre-trial phase of proceedings. In author's opinion it is the stage, in which, especially in case of Polish legal system, the right to a fair trial is especially vulnerable to infringement. One of the main hypothesis of the study is that right to a fair trial and right to privacy in the analyzed scope have some common elements and judgments addressing the problem of right to privacy can also affect the fair trial standard. In the existing Polish case law it can be observed that Constitutional Tribunal rarely addresses directly fair trial standards in regard to legislation regulating the use of new technologies during the proceedings. The author however claims, that constitutional courts influence fairness of the proceedings not only by shaping the content of fair trial *per se*, but also creating fundamental standards for other constitutional rights that ultimately affect the individual procedural rights during the trial.

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[4] DIXON, Rosalind. Updating Constitutional Rules. *The Supreme Court Review*, no. 1, p. 319–346, 2009. https://doi.org/10.1086/653651, CHOPRA, Pran. The Constitution and Supreme Court. *Economic and Political Weekly*, *v. 39* no. 30, p. 3355–3359, 2004. http://www.jstor.org/stable/4415313, DEENER, David. Judicial Review in Modern Constitutional Systems. *The American Political Science Review*, v. 46 no, 4, 1079–1099, 1952. https://doi.org/10.2307/1952114

The article is structured as follows. First of all it addresses the common aspects of the right to a fair trial and right to privacy to provide a point of reference to further analysis. In the next part it discusses the case law referring to problems connected with gathering digital evidence with distinction between non-content and content data. In the part regarding to non-content data the study is focused on data retention due to the fact that it became the particular interest of constitutional courts in the EU and therefore is of much importance to the research. Then, the article presents the emerging problems for the European constitutional courts connected with the privilege against self-incrimination that have not been yet widely addressed among particular countries. Finally, the study provides for general and fundamental conclusions that can contribute to answering the main research question.

2. Fair trial and right to privacy

As a rule, the problems caused by the dissemination of new technologies in the criminal proceedings are most often identified with the right to privacy, and it is the sphere that the judicial decisions of not only constitutional courts, but also, among others, European Court of Human Rights, refer to.[5] This is understandable, as new technologies inherently have the potential to be highly intrusive, so the general protection model here has been grounded in the content of the right to privacy. It should be noted, however, that the case law in this area also has a huge impact on the implementation of rights resulting from the right to a fair trial.[6]

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[5] EUROPEAN COURT OF HUMAN RIGHTS (Hereinafter as "ECtHR"). Judgments in cases: S. and Marper v. the United Kingdom 4 December 2008 (Grand Chamber), B.B. v. France (no. 5335/06), Gardel v. France and M.B. v. France (no. 22115/06) 17 December 2009, Shimovolos v. Russia 21 June 2011, Robathin v. Austria 3 July 2012, M.K. v. France (no. 19522/09) 18 April 2013, Brunet v. France 18 September 2014, Szabó and Vissy v. Hungary 12 January 2016, Trabajo Rueda v. Spain 30 May 2017, Aycaguer v. France 22 June 2017, Gaughran v. the United Kingdom 13 February 2020, Centrum För Rättvisa v. Sweden 25 May 2021 (judgment – Grand Chamber).

[6] About right to a fair trial see also: HARRIS, David. The right to a fair trial in criminal proceedings as a human right, *International & Comparative Law Quarterly*, v. 16 n. 2, p. 352-378, 1967, https://doi.org/10.1093/

The elements and specific institutions distinguished under both of these rights, i.e. the right to privacy and the right to a fair trial, are to a large extent interrelated and affect the mutual implementation of standards for the protection of constitutional rights.

One such institution is undoubtedly the right to notification. The right to notification, mentioned primarily in the scope of the right to the protection of personal data, is an integral part of the right to active participation in the proceedings, which is an element of the right of defense.[7] Without informing the suspect or accused about the activities carried out against him, even if such information is delayed in time, they*de facto* loses the possibility of effective defense, taking any action in relation to the measures applied by law enforcement agencies, including questioning their legality and proportionality. The latter is also associated with the right to judicial review, especially of particularly intrusive measures, which appears often in the case law.[8] Enabling the suspect the access to judicial control of actions taken against him not only strengthens the protection of their right to privacy, but also largely protects the overall fairness of the proceedings.

It should also be noted that in the case of activities involving the use of digital evidence, due to their nature, the suspect is often completely

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iclqaj/16.2.352, VITKAUSAS, Dovydas; DIKOV, Grigoriy. *Protecting the right to a fair trial under the European Convention on Human Rights. Council of Europe*, Available at: https://edoc.coe.int/en/module/ec_addformat/download?cle=c82b013313066e0702d58dc70db033ca&k=2fc0fa200f64659df501f62a8386baad. Accessed: March 23, 2022, BREMS, Eva. Conflicting human rights: an exploration in the context of the right to a fair trial in the European Convention for the protection of human rights and fundamental freedoms. *Human Rights Quarterly*, v. 27, n. 1, p. 294-326, 2005, https://doi.org/10.1353/hrq.2005.0003 , MAHONEY, Paul. Right to a fair trial in criminal matters under Article 6 ECHR. *Judicial Studies Institute Journal*, v. 4, n. 2, p. 107-129, 2004, AKTHER, Shajeda; NORDIN, Rohaida. An Analysis of Fair Trial Guarantees at Trial Stage under the ECHR, *Law Review* p. 211-234, 2015.

7 WILIŃSKI, Paweł. *Proces karny w świetle Konstytucji*, Warsaw: Wolters Kluwer Polska, p. 174-177, 2011, LACH, Arkadiusz. *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Warsaw: Wolters Kluwer Polska, p. 112-158, 2019, CONSTITUTIONAL TRIBUNAL OF POLAND. Judgment of May, 17 2004, SK 32/03 OTK-A no. 5, p. 44.

8 CONSTITUTIONAL TRIBUNAL OF POLAND. Judgment of December, 12 2005 r., K 32/04.

unaware of the surveillance carried out against him, therefore it is not possible to take any action or legal remedies in the criminal proceedings related to the measures used by law enforcement authorities. The grounds for justifying the lack or delay of information are generally connected with the sake of the proceedings and eliminating the potential obstruction of the trial.[9] In this case, at the constitutional level, it is a premise of security and public order, and from the criminal trial perspective, it is an attempt to deliver an effective, just ruling and implement the appropriate criminal response. However, the problem arises as to whether such a far-reaching restriction can be considered proportionate.[10]

The principle of proportionality is also extremely important to the fairness of the proceedings. It is an element of the European human rights standard, although it is often not directly expressed in legal acts.[11] It is considered to be the necessary element of the legal systems based on the rule of law and democratic principles.[12] The proportionality test, based on the adequacy, necessity and proportionality *stricto sensu* became a part of constitutional traditions of particular states as a result of

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[9] OLBER, Paweł. Remote Search of IT System in Polish Legislation and Its Importance in Fight Against Cybercrime, *Internal Security,* v. 11, n. 2, p. 141-140. http://dx.doi.org/10.5604/01.3001.0013.8288. See also LOFTUS, Bethan. Normalizing covert surveillance: the subterranean world of policing, *The British Journal of Sociology,* p. 2070-2091, https://doi.org/10.1111/1468-4446.12651

[10] The right to notification is a problematic issue not only at the national level, but also raises doubts in the context of EU legal solutions. It is one of the main points of contention connected with the proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225 final - 2018/0108 (COD). EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. Opinion EESC 2018/02737, OJ C 367, 10.10.2018, p. 88–92. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_11314_2021_INIT&from=EN>. Accessed: January 9, 2022.

[11] The exception can be the Charter of Fundamental Rights of the European Union. ŚLEDZIŃSKA SIMON, Anna. *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności. Teoria i praktyka*, p. 24, 2019. https://doi.org/10.34616/23.19.020

[12] BARAK, Aharon. *Proportionality. Constitutional Rights and Their Limitations*, Cambridge: Cambridge University Press, p. 472, 2006.

"judicial borrowing"[13]. Now it is said to be the common judicial standard of European constitutional courts and European Court of Human Rights as well.[14] It has frequently been also the subject of Constitutional Tribunal of Poland case law.[15]

When addressing the impact of new technologies on human rights standards, Constitutional courts, including the Constitutional Tribunal of Poland, often raise the problem of proportionality in the context of restricting the constitutional right to privacy.[16] However, at the same

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[13] CHOUDHRY, Sujit (ed.). *The Migration of Constitutional Ideals*, Cambridge: Cambridge University Press, 2006, JACKSON, Vicki. *Constitutional Engagement in a Transnational Era*, Oxford: Oxford University Press, p. 60, 2010, KUMM, Mattias. Constitutional Rights as Principles, *International Journal of Constitutional Law* v. 2, p. 595, 2004, https://doi.org/10.1093/icon/2.3.574, BARKHUYSEN, Tom, EMMERIK, VAN, Michiel, JANSEN, Oswald, FEDOROVA, Masha. Right to a Fair Trial. In: DIJK, VAN, Pieter, HOOF, Van, Fried RIJN, VAN, Arjen, ZWAAK, Leo. *Theory and practice of the European Convention on Human Rights*, Cambridge: Intesentia, p. 637, 2018.

[14] BARAK, 181–206, J. McBride, Proportionality and the European Convention of Human Rights, [w:] E. Ellis (red.), The Principle of Proportionality in the Laws of Europe, Portland 1999, s. 23

[15] CONSTITUTIONAL TRIBUNAL OF POLAND. Judgments of 11 February 1992 r., K 14/91, 26 January 1993, U 10/92, 17 October 1995, K 10/95, 25 November 2003, K 37/02, 9 July 2009, SK 48/05, 25 July 2013, P 56/11, 5 June 2014 r., K 35/11, 14 July 2015, SK 26/14, 4 November 2015, K 1/14, WÓJTOWICZ, Krzysztof. Zasada proporcjonalności jako wyznacznik konstytucyjności norm. In: ZUBIK, Marek (ed.). *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warsaw: Biuro Trybunału Konstytucyjnego, 265– 278, 2006, GARLICKI, Lech; WOJTYCZEK, Krzysztof. Komentarz do art. 31 Konstytucji. In: GARLICKI, Lech; ZUBIK, Marek (ed.). *Konstytucja Rzeczypospolitej Polskiej*. Komentarz, t. II, Warsaw: Wolters Kluwer Polska, p. 69, 2016, TULEJA, Piotr. Komentarz do art. 31 Konstytucji. In: TULEJA, Piotr (ed.). *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw: Wolters Kluwer Polska, p. 114.119, 2019, BANASZAK, Bogusław. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa: C.H.Beck, p. 212, 2012.

[16] ROJSZCZAK, Marcin. National Security and Retention of Telecommunications Data in Light of Recent Case Law of the European Courts. *European Constitutional Law Review*, p. 1-29, 2021. doi:10.1017/S157401962100035, see also *i.a.* FEDERAL CONSTITUTIONAL COURT, Press release no 11/2010 of 2 March 2010. DE VRIES, Katja, BELLANOVA Rocco, DE HERT Paul, GUTWIRTH Serge. The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?). In: GUTWIRTH Serge, POULLET Yves, DE HERT Paul, LEENES Ronald

time, the existing case law ensures the proportionality of all measures taken against the suspect or accused in the proceedings, thus ensuring that the standards of a fair trial are met.

One of the main rules of a fair trial, which can be found in the case law of constitutional courts, is the principle of equality of the parties, related in particular to the adversarial model of the trial. This principle assumes no clearly dominant procedural position of any of the parties and its implementation undoubtedly contributes to ensuring the right of defense.[17] It should be noted, however, that due to the fact that law enforcement agencies have a wide range of resources and the entire state apparatus at their disposal, this principle can never be fully implemented in practice. This is particularly evident in the use of new technologies, where the data acquisition rights are often one-sided.[18] Respecting the requirement of proportionality in the application of measures aimed at interfering with the sphere of privacy of the suspect will therefore also contribute to ensuring equality of the parties. It should be pointed out that in view of the tendency to transfer the center of procedural activity to the first stage of proceedings and the possibility of collecting data in a large amount and on a large scale, this protects the suspect from finding themself in a situation in which they will *de facto* have to prove their innocence and question the standard of presumption of innocence.[19] The principle of proportionality, even if invoked in the context of the right to privacy, is therefore of great importance to the fair trial guarantees.

In connection with the above mentioned arguments, it seems that the strict limitation of the sphere of influence of new technologies on

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(eds) Computers, Privacy and Data Protection: an Element of Choice, p. 3-23, 2011, https://doi.org/10.1007/978-94-007-0641-5_1

[17] SKRĘTOWICZ, Edward. Z problematyki rzetelnego procesu karnego. In: SKORUPKA, Jerzy (ed,), Rzetelny proces karny. Księga jubileuszowa Profesor Zofi i Świdy, p. 23, 2009, PIECH, Michał Glosa do wyroku TK z dnia 25 września 2012r., SK 28/10.

[18] This applies *i. a.* to the possibility of asking operators directly to provide data, the inability to independently obtain evidentiary material and present evidence.

[19] STOYKOVA, Radina. Digital evidence: Unaddressed threats to fairness and the presumption of innocence, *Computer Law & Security Review*, v. 42, 2021. https://doi.org/10.1016/j.clsr.2021.105575

respect for human rights only to the right to privacy cannot be perceived as justified. Therefore, the question arises, whether the elements of protection of both indicated rights have many common points, or whether, due to the progressive change in the measures applied by law enforcement agencies, excessive restriction of the suspect's right to privacy in the trial will translate into the overall fairness of the proceedings.

Both the European Court of Human Rights and the Court of Justice of the European Union[20] referred to this issue to some extent. The previous case law of the European Court of Human Rights shows that, when referring to use of new technologies, especially surveillance measures, in principle, the Court does not include in its decisions connection between the violation of the right to privacy through the use of specific measures by law enforcement agencies and the right to a fair trial.[21] Despite finding numerous violations of Article 8 of the European Convention on Human Rights[22], in terms of the use of new technologies in the proceedings, it often refused to recognize a violation of Art. 6 of the ECHR, despite the fact that the collected evidence was based on the above-mentioned methods.[23] However, the Court does not clearly preclude that possibility. In the recent judgments, there appear some indications of a link between excessive or unlawful surveillance measures used as a basis for conviction and Article 6 infringement.[24] Nevertheless, at the moment it is difficult to identify an unambiguous line of case law in this respect, and the violation of Article 6 is often combined with other elements and infringed rights as well.

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[20] Hereinafter also as "CJEU".

[21] Excluding, of course, situations where surveillance measures are applied to conversations between suspect or accused and their defense counsel, which Court finds as a clear breach of article 6 (3) of the Convention. See e.g. EUROPEAN COURT OF HUMAN RIGHTS. Judgment of 16 November 2021, Vasil Vasiliev v. Bulgaria, app. no. 7610/15.

[22] EUROPEAN CONVENTION OF HUMAN RIGHTS, adopted in Rome on 4th November 1950. Available at: https://www.echr.coe.int/documents/con-vention_eng.pdf. (access: January 9, 2022). Hereinafter as the "ECHR".

[23] EUROPEAN COURT OF HUMAN RIGHTS. Press Unit, Factsheet – new technologies, 2021. Available at: https://www.echr.coe.int/documents/fs_new_technologies_eng.pdf. (access: January 9, 2022).

[24] EUROPEAN COURT OF HUMAN RIGHTS. Judgment of 14 October 2021, Lysusk v. Ukraine, app. no. 72531/1.

A slightly different position can be found in the recent case law of the Court of Justice of the European Union. The Court, with regard to the problem of *i.a.* data retention, has indicated that the final evidential use of materials obtained through disproportionate and illegal electronic evidence gathering has a particular impact on the respect of the standard to a fair trial. The Court pointed out, that the need to exclude information and evidence obtained in breach of Union law must be assessed, in particular, in the light of the risk which the admissibility of such information and evidence presents to respect for the adversarial principle and thus the right to a fair trial. Therefore, in the Court's view, the principle of effectiveness imposes an obligation on the national criminal courts to disregard information and evidence obtained through measures incompatible with EU in the framework of criminal proceedings instituted against persons suspected of committing a crime, if these persons are not able to effectively respond to the information and evidence belonging to an area not examined by the court and which may have a decisive influence on the assessment of the facts. According to CJEU, otherwise the State would admit to some extent the possibility of violating the right to a fair trial by failing to ensure the right to active participation in the trial.[25]

Taking into account the above mentioned elements, it, therefore, seems that the role in shaping the fair trial standards will have not only judicial decisions addressing the fair trial directly, but to some extent also case law that refer to right to privacy infringements.

3. Data retention

Undoubtedly, a notable influence of constitutional courts on respecting the procedural rights of participants in proceedings can be observed in the context of data retention. The issue of retention is most often identified with the right to privacy and the right to the protection of

[25] Judgment (Grand Chamber), 2 March 2021, C-746/18, *Criminal proceedings against H. K.,* EU:C:2021:152, judgment of 6 October 2020, *La Quadrature du Net and Others v Premier ministre and Others*, joined cases C-511/18, C-512/18 i C-520/18, EU:C:2020:791, p. 226, 227.

personal data, in particular.[26] The method of using the evidence obtained in this way is, however, not without significance also for the observance of the rules of the fair trial during the criminal proceedings.

Data retention itself is generally defined as an obligation imposed on telecommunications operators (service providers) to collect and store information about connections made within the mobile network and the Internet.[27] The Directive 2006/24/EC adopted in 2006[28], imposed an obligation on member States of EU to retain and store particular categories of 'data by providers of publicly available electronic communications services or of a public communications network within the jurisdiction of

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[26] MITROU, Lilian. The impact of communications data retention on fundamental rights and democracy – the case of the EU Data Retention Directive. In HAGGERTY, Kevin, SAMATAS, Minas Samatas (eds). *Surveillance and Democracy*, New York: Routledge, 2010, TAYLOR, Mark. The EU Data Retention Directive *Computer Law & Security Review,* v. 22 p. 309-312, 2006. https://doi.org/10.1016/j.clsr.2006.05.005; MARAS, Marie-Helen. From targeted to mass surveillance: is the EU Data Retention Directive a necessary measure or an unjustified threat to privacy?. In GOOLD, Benjamin J., NEYLAND, Daniel (eds). *New Directions in Surveillance and Privacy*, Willan, 2009. https://doi.org/10.4324/9781843927266, JUSZCZAK, Adam, SASON, Elisa. Recalibrating Data Retention in the EU. The Jurisprudence of the Court of Justice of the EU on Data Retention – Is this the End or is this the Beginning? *EUCRIM* v. 4, p. 238 – 266, 2021, CZERNIAK, Dominika. Collection of location data in criminal proceedings – European (the EU and Strasbourg) standards. *Revista Brasileira de Direito Processual Penal*, v. 7, n. 1, p. 123-160, 2021. https://doi.org/10.22197/rbdpp.v7i1.503, VERBRUGGEN, Frank; CONINGS, Charlotte. After zigzagging between extremes, finally common sense? Will Belgium return to reasonable rules on illegally obtained evidence? *Revista Brasileira de Direito Processual Pena*l, v. 7, n. 1, p. 273-310, 2021. https://doi.org/10.22197/rbdpp.v7i1.500

[27] FUNDACJA PANOPTYKON, Telefoniczna Kopalnia Informacji. Przewodnik, p. 20. Available at: http://panoptykon. org/biblio/telefoniczna–kopalnia–informacji–przewodnik. (access: January 9, 2022).

[28] DIRECTIVE 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, Available at: http://data.europa.eu/eli/dir/2006/24/oj. Declared invalid by the judgment of 8 April 2014, joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, ECLI:EU:C:2014:238.

the Member State in the process of supplying the communication services concerned'. The act and new national regulations created, however, such controversy in some of the countries, that the issue had to be addressed by constitutional courts.[29]

In this case, constitutional courts adopted more protective position in relation to the constitutionally guaranteed fundamental rights. In many member States there appeared judgments stating that data retention regulated in such way as in the directive is unconstitutional and irreconcilable with constitutional rights and freedoms guaranteed in particular countries.[30] The rendered judgments influenced not only local concepts of procedural rules and fairness, but also general European standards[31].

The constitutional courts generally questioned not the retention *per se*, but procedural guarantees that were lacking in the resolutions of the Directive. First of all, the courts found problematic general lack of precision within the regulation which led to questioning the legal security and even presumption of innocence.[32] In many countries' laws implementing the Directive provisions there were no clear indication of the type of data subjected to the retention and authorities competent to

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[29] VAINIO, Niklas, MIETTINEN, Samuli. Telecommunications data retention after Digital Rights Ireland*:* legislative and judicial reactions in the Member States, *International Journal of Law and Information Technology*, v. 23, no. 3, p. 290–309, 2015. https://doi.org/10.1093/ijlit/eav010

[30] BULGARIAN SUPREME ADMINISTRATIVE COURT, Decision No 13627, 11 December 2008, CONSTITUTIONAL COURT OF ROMANIA, Decision No 1258 of 8 October 2009, CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, Decision of 22 March 2011, Pl. ÚS 24/10, decision of 22 December 2011, Pl. ÚS 24/11.

[31] ZUBIK, Marek; PODKOWIK, Jan; RYBSKI, Robert. *European Constitutional Courts towards Data Retention Laws*, Cham: Springer, 2021, https://doi.org/10.1007/978-3-030-57189-4

[32] CONSTITUTIONAL COURT OF ROMANIA, Decision No 1258 of 8 October 2009, FEDERAL CONSTITUTIONAL COURT, Press release no 11/2010 of 2 March 2010, CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, Decision of 22 March 2011, Pl. U´ S 24/10' (2012). More about issues connected with presumption of innocecne connected with new technologies application in the proceedings – STOYKOWA, (2021), Digital evidence: Unaddressed threats to fairness and the presumption of innocence, Computer Law & Security Review, Volume 42, https://doi.org/10.1016/j.clsr.2021.105575

collect it.[33] Courts also found that there exist some serious doubts with regard to proportionality.[34] The issue of proportionality was connected not only with the scale of data retention but also with no time limits of applying the measure. The other basic concern of the courts was lack of the adequate control of using the retained data in the criminal trial and the retention process as such. For example Polish Constitution Tribunal stated that there is a need for judicial control to ensure procedural fairness and respect for privacy.[35] The decision of Constitutional Tribunal of Poland addressing data retention (K 23/11)[36] is in fact a perfect example of a case, when despite the fact that the right to privacy was invoked as a point of reference, it was the right to a fair trial that has been affected due to the final decision of the Court. After the judgment in which Court declared the previous regulations incompatible with constitutional right to privacy, Polish legislator introduced in the Act on the Police[37] Article 20ca, in which some type of judicial review was introduced. According to the provisions of the Article, competent authorities every six months submit a report to the circuit court covering the number of cases of obtaining telecommunications, postal or internet data in the reporting period, the type of such data and legal classification of offences in relation to which telecommunications, postal or internet data has been requested, or information on obtaining data in order to save human life or health or to support search or rescue activities. In addition, the circuit court may request materials that justify the disclosure of data to the Police. Although the review in its present shape is said to be insufficient and cannot be

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[33] CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, Decision of 22 March 2011, Pl. ÚS 24/10, decision of 22December 2011, Pl. ÚS 24/11.

[34] FEDERAL CONSTITUTIONAL COURT, Press release no 11/2010 of 2 March 2010.

[35] CONSTITUTIONAL TRIBUNAL OF POLAND. Judgment of December 12, 2005, K 23/04. The Court in its ruling stated that lack of the obligation to obtain consent to covert acquisition of information (surveillance) leads to violation of the fair trial. Similarly, EUROPEAN COURT OF HUMAN RIGHTS. Judgments of 29 June 2006, Weber and Saravia v. Germany, (app. no. 54934/00); 2 Sptember 2010 Uzun v. Germany (app. no. 35623/05).

[36] CONSTITUTIONAL TRIBUNAL OF POLAND. Judgment of April 30, 2014, K 23/11.

[37] ACT ON THE POLICE of 6 April 1990, *Dziennik Ustaw,* item 1882.

seen as a proper procedural guarantee compatible with requirements set out by the CJEU[38], its introduction definitely affected the right to a fair trial to some extent.

There appeared also some references to the process of treating the evidence gathered by means of data retention as the base for rendering judgments and potential conviction. According to some of the statements, the final indication of the fact if the trial can be considered fair will be whether the evidence base on unlawful data retention will be used in the proceedings.[39]

The impact of using the evidence collected by means of data retention on the observance of the fair, adversarial trial standards was also noted by the Court of Justice of the European Union in its judgments, as it was already indicated above.[40] However, one of the research conducted by Eurojust shows considerable uncertainty related to the future of admitting evidence obtained through retention inconsistent with the conditions imposed by the CJEU and some of the constitutional courts. While in the Member States, during the EU surveys, the evidence was still generally considered admissible for the purposes of the trial, its future remains uncertain.[41] Therefore, it seems

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[38] ROJSZCZAK, Marcin. *Ochrona prywatności w cyberprzestrzeni z uwzględnieniem zagrożeń wynikających z nowych technik przetwarzania informacji*, Warsaw: Wolters Kluwer Polska, 2019.

[39] FEDERAL CONSTITUTIONAL COURT, Judgment of the First Senate of 20 April 2016, 1 BvR 966/09, 1 BvR 1140/09.

[40] COURT OF JUSTICE OF THE EUROPEAN UNION. Judgment (Grand Chamber), 2 March 2021, C-746/18, *Criminal proceedings against H. K.*, EU:C:2021:152, judgment of 6 October 2020, *La Quadrature du Net and Others v Premier ministre and Other*s, joined cases C-511/18, C-512/18 i C-520/18, EU:C:2020:791, See also judgment of 21 December 2016, joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, EU:C:2016:970, judgment of 6 October 2020, Case C-623/17 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*, EU:C:2020:790.

[41] Five countries reported on court rulings where the admissibility of evidence from data retention was evaluated by the court. So far the evidence has been deemed admissible by courts, although one of the five cases (in Ireland) is still pending on appeal. EUROJUST. Data retention regimes in Europe in light of the CJEU ruling of 21 December 2016 in Joined Cases C-203/15

that the creation of compliant, coherent rules regarding the regulation of new technologies in criminal proceedings, e.g. on the basis of the already functioning case law of constitutional courts, will contribute not only to ensuring respect for the fairness of the trial, but also to guaranteeing the effectiveness of the trial.

4. Interception of communications content

Data retention is generally based on metadata, excluding the possibility of intercepting the actual content of messages. This matter, however, has been the subject of interest for constitutional courts for quite some time. Jurisprudence mainly focus on wiretapping and phone communications interception. Nevertheless, with the dissemination of Internet use, the role of online surveillance is significantly increasing. This applies not only to mail interception and digital communications surveillance, but also to the use of remote searches.[42] In the process of determining the scope of procedural guarantees and, therefore, fair trial, both courts and scholars base on the same principles.[43]

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and C-698/15 – Report, 2017. Available at: <https://www.statewatch.org/media/documents/news/2017/nov/eu-eurojust-data-retention-MS-report-10098-17.pdf> .Accessed January 9, 2022. See also ROJSZCZAK, Marcin. The uncertain future of data retention laws in the EU: Is a legislative reset possible? Computer Law & Security Review, v. 41, 2021. https://doi.org/10.1016/j.clsr.2021.105572, JUSZCZAK, Adam, SASON, Elisa. Recalibrating Data Retention in the EU. The Jurisprudence of the Court of Justice of the EU on Data Retention – Is this the End or is this the Beginning? *EUCRIM* v. 4, p. 238 – 266, 2021, https://doi.org/10.30709/eucrim-2021-020

[42] A remote search may take the form of an extended search (i.e. when, during a search of a traditional nature, it turns out that the data essential for the taking of evidence are contained in another system related to the primary device in such a way that direct access from it is possible, admissible is extending the search to the above-mentioned system) or remote search *sensu stricto* (i.e. collecting data from the target system based on a specific type of remote investigative software).

[43] See e.g. HAGGERTY, Kevin, SAMATAS, Minas Samatas (eds). *Surveillance and Democracy*, New York: Routledge, 2010.

As a rule, courts consider the covert surveillance measures compatible with state constitutions.[44] However, they also set some conditions necessary to consider regulations constitutional and meeting the requirements of the protection of human rights. In the existing jurisprudence there are some common elements of the constitutional tradition regarding approach to measures including surveillance.

First of all, the courts require an examination of whether surveillance has been ordered on the base of precise, objective indications of a crime, not just by general suspicions. The evidence material has to be examined if there exist facts that rationally, in an objective assessment, indicate the probability that some person is involved in a criminal activity and if they can be supported by objective data.[45]

The courts also indicate, that all powers allowing to covertly collect data must satisfy the principle of proportionality. All forms of surveillance must be supported by weighty legal interests, a threat to which must be sufficiently foreseeable. They may, only under limited conditions, extend also to the third parties. There must be also guaranteed some protection of persons subject to professional confidentiality. Generally, the regulation must fulfill conditions of transparency, individual legal protection and adequate supervisory control.

The problem of digital communications surveillance and remote searches *per se* is less frequently tackled by the decisions of courts. However, e.g. German Federal Constitutional Court addressed directly forms of surveillance of technology systems. The court stated that as a rule the state has to ensure confidentiality and integrity of information technology systems. Such breach of privacy must be perceived as an exception and must be 'based on clear indications of a concrete danger to a predominantly important legal interest, a threat to which affects the basis

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[44] FEDERAL CONSTITUTIONAL COURT. Judgment of the First Senate of 20 April 2016, 1 BvR 966/09, 1 BvR 1140/09, judgment of the First Senate of 27 February 2008, 1 BvR 370/07, 1 BvR 595/07, CONSTITUTIONAL TRIBUNAL OF POLAND. Judgment of December, 12 2005 r., K 32/04, judgment of July, 30 2014, K 23/11.

[45] CONSTITUTIONAL COURT OF SPAIN. Judgment 253/2006 of 11 September 2006, FEDERAL CONSTITUTIONAL COURT. Judgment of the First Senate of 20 April 2016, 1 BvR 966/09, 1 BvR 1140/09.

or continued existence of the state or the basis of human existence. The court also indicated that secret infiltration of an information technology system is in principle to be placed under the reservation of a judicial order'. Moreover, due to the highly intrusive nature of the discussed measures, if the state agency is not authorized to obtain information of the contents of Internet communication, acquiring evidence will constitute the encroachment of the Basic Law provisions.[46]

The courts also referred to the problem of subsequent use of the evidence in the proceedings. This matter is closely related to the fair trial standards, as it ultimately determines, whether the proceedings can be considered fair. E.g. Spanish Constitutional Court rendered a judgment in which it put forward a thesis that evidence obtained, directly or indirectly, in violation of fundamental rights or liberties, will have no effect. It will include also an infringement of right to privacy. Therefore, if the evidence will be used as a basis for final court decision in the criminal proceedings, it will in fact influence the ultimate fairness of the trial.[47]

The case law of constitutional courts regarding the means of gathering evidence with the use of new technologies in proceedings should be definitely assessed positively. Courts, through their judicial decisions, identify certain common elements that should be implemented in individual regulations adopted by the legislator in order to meet the standard guaranteed in the constitution. The last position expressed by the Polish Constitutional Tribunal in the judgment of June 30, 2021 is all the more controversial.

An application has been submitted to the Constitutional Tribunal of Poland to review the constitutionality of the provisions on surveillance measures contained in the Police Act[48] to the extent that they do not provide for judicial review of the order of the abovementioned surveillance, as well as its execution, the maximum duration of these measures and, finally, the right to notify the person to whom it was applied about the

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[46] FEDERAL CONSTITUTIONAL COURT. Judgment of the First Senate of 20 April 2016, 1 BvR 966/09, 1 BvR 1140/09,

[47] CONSTITUTIONAL COURT OF SPAIN, decision STC 114/184, BACHMAIER, Lorena, Exclusionary Rules of Evidence in Spain, in: THAMAN, S. (ed.), Truth versus Legality in a Comparative View, Heidelberg, p. 209–234, 2012.

[48] ACT of 6 April 1990 on the Police, Dz. U. of 2021, item 1882.

conduct of the control after its completion.[49] The constitutional standard in this case was to be, first of all, the right to a fair trial and the right to an effective remedy, *i.e.* Articles 45 and 78 of Polish Constitution[50] and the principle of a democratic state governed by the rule of law. However, in the presented case, the Tribunal found that the question referred by the Ombudsman was groundless and that its subject matter exceeded the scope of the Constitutional Tribunal jurisdiction. The Tribunal stated that the legal status covered by the question was in fact a legislative omission, left within the limits of legislative freedom and thus not subject to constitutional control.[51]

However, this position seems highly unjustified, as the issue of infringing constitutionally guaranteed rights cannot be seen as a legislative omission in the sense adopted by the Constitutional Tribunal. In the light of the previous judgments of the Polish Constitutional Tribunal and other constitutional courts, it seems that this is exactly the particular and significant role of constitutional courts - to check whether the legislator has provided for all constitutionally required procedural guarantees, resulting, *i.a.* from the right to a fair trial, the right of defense and, as a result, if the regulation in question is compatible with the constitutional provisions.

5. Self – incrimination and lie-detecting technologies – the emerging problems

The most developed and broad scope of judgments connected with the issue of use of the new technologies in criminal proceedings,

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[49] OMBUDSMAN. Motion of 4 December 2015 r., II.511.84.2015.KSz, ATTORNEY GENERAL. Motion of 12 November 2015 r., PG VIII TKw 41/14.

[50] THE CONSTITUTION OF THE REPUBLIC OF POLAND of 2nd April 1997, published in *Dziennik Ustaw* No. 78, item 483.

[51] CONSTITUTIONAL TRIBUNAL OF POLAND. Decision of June, 30 2021 r., K32/05. About the controversies concerning the status of Polish Constitutional Court and its influence on surveillance measures see e.g. ROJSZCZAK, Marcin. National Security and Retention of Telecommunications Data in Light of Recent Case Law of the European Courts. *European Constitutional Law Review*, p. 609, 2021. https://doi.org/10.1017/S157401962100035

with regard to fair trial standards, has been appearing in the legal orders of USA and Commonwealth.[52] These systems, however, did not include the constitutional courts in their traditions and the role of determining the scope of constitutional provisions is left to district, federal and supreme courts.[53] All the issue that were tackled are, nevertheless, the good indication of what is going to be, in the near future, the concern of the constitutional courts. The content of right of defense and fair trial among existing legal systems tend generally to approximate and have similar core.[54] As a result, the problems that the common law systems are facing now, will have to be finally approached by continental systems. Therefore, it appears beneficial to present some problematic aspects connected with the use of new technologies that have already appeared in Supreme Court of the United States case law.

One of the interesting issues that were tackled in the case law of Supreme Court of the United States, was the relation of privilege against self-incrimination and the use of digital evidence in the proceedings. The privilege (*nemo tenetur*) is the element of the right of defense and fair trial, well established in the constitutional traditions of particular countries. ECtHR stated that it is not directly expressed in the Article 6 of the Convention but acknowledged it as a part of fair trial principle.[55]

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[52] HERRERA, Adam. Biometric Passwords and the Fifth Amendment: How Technology Has Outgrown the Right to Be Free from Self-Incrimination, *UCLA Law Review,* v. 66 n. 3, p.778-817, 2019, GERSTEIN, Robert. Privacy and self-incrimination. In SCHOEMAN, Ferdinand David (ed.), *Philosophical Dimensions of Privacy:* An Anthology, Cambridge: Cambridge University Press, p. 245-264, 1984. https://doi.org/10.1017/CBO9780511625138.010

[53] CHOPRA, Pran. The Constitution and Supreme Court. *Economic and Political Weekly*, *v. 39* no. 30, p. 3355–3359, 2004. http://www.jstor.org/stable/4415313, DEENER, David. Judicial Review in Modern Constitutional Systems. *The American Political Science Review*, v. 46 no, 4, 1079–1099, 1952. https://doi.org/10.2307/1952114.

[54] HARRIS, David. The Right to a Fair Trial in Criminal Proceedings as a Human Right, *International and Comparative Law Quarterly,* v. 16 n. 2, p. 352-378, 2008, https://doi.org/10.1093/iclqaj/16.2.352

[55] EUROPEAN COURT OF HUMAN RIGHTS. Judgment of 8 February 1996, *John Murray v. the United Kingdom* (app. no. 18731/91) §45, of 29 June 2007, O'Halloran and Francis v. the United Kingdom, (Applications nos. 15809/02 and 25624/02).

As similar matters, concerning the use of new technologies and their impact on the privilege against self-incrimination, begin to appear before European local and district courts[56], it appears that it is only a matter of time when the constitutional courts will have to take a stand on this matter. The main problem in this sphere is connected with the question if the officers of law enforcement agencies or the prosecutor can compel the suspect to provide the password, encryption key or unlock their phone using biometrical means and data.[57] Supreme Court of the United States examined the scope of the Fifth Amendment provisions and, basing its rulings mainly on the previous decisions concerning the division between real and testimonial evidence. Finally, Court introduced guidelines for the following judgments, differentiating *i.a.* between biometrical and alpha-numerical safeguards.[58] The issue also was analyzed by the courts e.g. of UK, Australia. In the given countries, legislator introduced laws allowing to treat not submitting the passwords and encryption keys as an

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[56] See for example RECHTBANK NOORD-HOLLAND [District Court of North-Holland, the Netherlands]. Judgment of 25 January 2019, NJFS 15/168454-18.

[57] See e.g. GOLDMAN, Kara. Biometric passwords and the privilege against self-incrimination. *Cardozo Arts & Entertainment Law Journal*, v. 33, no. 1, p. 211-236, 2015.

[58] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. *United States v. Kirschner,* 823 F. Supp. 2d 665 (E.D. Mich. 2010), UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011,* 670 F.3d 1335, 1349 (11th Cir. 2012), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. *United States v. Fricosu,* 841 F. Supp. 2d 1232, 1237 (D. Colo. 2012), MASSACHUSETTS SUPREME JUDICIAL COURT. *Commonwealth v. Gelfgatt,* 11 N.E.3d 605, 614-15 (Mass. 2014), DISTRICT COURT OF APPEAL OF FLORIDA. *State v. Stahl,* 206 So. 3d 124, 136-37 (Fla. Dist. Ct. App. 2016), UNITED STATES COURT OF APPEAL FOR THE ARMED FORCES. *United States v. Mitchell H, 76* M.J. 413,424-25 & n.5 (C.A.A.F. 2017), UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. *United States v. Apple MacPro Computer,* 851 F.3d 238, 248 & n.7 (3d Cir. 2017 138 S. Ct. 1988 (2018), UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. *United States v. Spencer,* No. *17-cr-00259-CRB-1,* 2018 WL 1964588, at *3 (N.D. Cal. Apr. 26, 2018), INDIANA COURT OF APPEAL. *Seo v. State, 109* N.E.3d 418, 425-31 (Ind. Ct. App. 2018) *2018* WL 6565988 (Ind. Dec. 6, 2018).

offence punishable even by imprisonment. The regulations were highly controversial and met with very mixed responses.[59]

The district courts, as well as doctrine representatives, are not unanimous, however, in their conclusions and some voices appeared that the privilege against self-incrimination should be reformulated for the purpose of adjusting criminal proceedings to new technological challenges.[60] As a result, the more impact and meaning will have developing the position on this subject by constitutional courts. It will be interesting to observe, if the courts will share coherent view on the matter or if the scope of the principle in question will differ to the significant extent in particular countries. It seems that there will be an intriguing debate on the concept of real evidence and its meaning in the digital era. Not all of the countries have that clear distinction, as in the constitutional system of the USA, but many visibly draw from it and present similar approach.[61] It is necessary in order to enable e.g. acquiring fingerprints, getting access to evidence material of particular type, however nowadays, as the technological progress shifted our perception of the digital sphere, the question appears, if differentiating the extent of the fair trial guarantees, is in this case justified.

The other issue, emerging from the development of new technological accomplishments that is connected with privilege against self-incrimination, is the broadening scope of lie-detecting measures. The problem of measures based on unconscious reactions of the human body as the basis of conviction evidence, e.g. with the use of polygraph

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[59] ADAM, Lisanne, BARNS, Greg. Digital strip searches in Australia: A threat to the privilege against self-incrimination, *Alternative Law Journal*, V. 45, no. 3, p. 222–227, 2020. https://doi.org/10.1177/1037969x20923073 See *i. a.* also VICTORIAN COURT OF APPEAL, McElroy v The Queen; Wallace v The Queen [2018] VSCA 126, 55 VR 450, QUEENSLAND COURT OF APPEAL, Wassmuth v Commissioner of Police [2018] QCA 290, FEDERAL COURT OF AUSTRALIA, Luppino v Fisher (No 2) [2019] FCA 1100.

[60] See for example REDMAYNE, Mike. Rethinking the Privilege Against Self-Incrimination, *Oxford Journal of Legal Studies*, v. 27, no. 2, p. 209–232, 2007 https://doi.org/10.1093/ojls/gql001, CARNES, Brittany A. Face ID and Fingerprints: Modernizing Fifth Amendment Protections for Cell Phones, *Loyola Law Review,* v. 66, n.1, p. 183-210, 2020.

[61] WILIŃSKI, Paweł. Zasada prawa do obrony w polskim procesie karnym, p. 354-359, 2006.

was the subject of decisions of constitutional courts in the past. [62] Most constitutional courts of individual states indicated that it is possible to admit evidence from analysis of this type if the accused or the suspect voluntarily submits to them. Currently, however, the technologies used so far have been significantly modified and, in addition to the technologies that study the basic functions of the body, there also appear solutions allowing for mapping the areas of brain activity and determining on this basis to a limited extent both the content of the suspect's thoughts and the verification of the truthfulness of the statements made.[63]

The existing case law, including the one of constitutional courts, constitutes a good basis for the emerging technologies. In case of new measures described above and their possible implementation in the course of the criminal proceedings, there will probably be a need to reformulate the existing judgments of the courts, adapt them to new challenges, and possibly refer to new aspects of human rights protection, including the area of fair trial. Until now, the case law has focused to a large extent on a significant margin of error and not sufficient reliability of measures of

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[62] FEDERAL CONSTITUTIONAL COURT. Judgment of 7 April 1998, 2 BvR 1827/97 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1998/04/rk19980407_2bvr182797.html r., zob. też GWIRDWOYŃ, WEIGEND, Ewa, WIDACKI, Jan, WÓJCIKIEWICZ, Józef.

German Supreme Court's alleged approval of polygraph examination in criminal proceedings, *Prokuratura i Prawo,* no. 7-8, 2009, FISCHER, Larissa BETTINA, Paul, VOIGT, TORSTEN, Voigt. Wahrheit unter dem Vergrößerungsglas. Vorstellungen von Subjekt und Technik in der Rechtsprechung zur Polygraphie, *Zeitschrift für Soziologie* v. 48, no. 5-6, p. 418-434, 2019.

[63] The existing measures allow for a much further analysis of the body's reaction, including eye-detecting technologies etc. These measures are advertised as possible to use, *i.a.* at airports in order to prevent possible criminal activities. The studies include e.g. fMRI - tracking brain activity, but also TMS, tDCS, which create the possibility of changing the activity of the brain in order to acquire particular results. BRADSHAW Robert. Deception and detection: the use of technology in assessing witness credibility, *Arbitration International*, v. 37, no. 3, p. 707-720, 2021. https://doi.org/10.1093/arbint/aiab007, FARAHANY, Nita. Incriminating Thoughts. *Stanford Law Review*, v. *64* no. 2, p. 351–408, 2012, LUBER, Bruce, FISHER, Carl, APPELBAUM, Paul, PLOESSER, Marcus, LISANBY, Sarah. Non-invasive brain stimulation in the detection of deception: Scientific challenges and ethical consequences. *Behavioral Sciences and the Law*, no. 27, p. 191-208, 2009. https://doi.org/10.1002/bsl.860

this type. In view of change in the nature and method of their operation, the question arises what statements will constitutional courts develop, if the methods used by law enforcement agencies and required expert witnesses allow for the determination of certain variables with almost absolute certainty. The question remains, how will constitutional courts define the standard of privilege against self-incrimination in this respect, and to what extent will they agree to award the suspects and defendants with the above-mentioned rights.

6. Conclusions

The progressing technological development definitely has an impact on the conduct of criminal proceedings, in particular on the scope and type of evidence invoked in individual cases. In the era of changes in procedural measures used by law enforcement agencies, it seems that the role of constitutional courts will continue to grow, affecting the protection of the rights and procedural guarantees of suspects and defendants, including ensuring the fairness of the proceedings. As it was indicated above, the new technologies that can potentially make an adverse impact on the right to a fair trial continue to appear.

As it seems, courts in their judgments concerning the use of new technologies in criminal proceedings, to a large extent rely on the already existing decisions of constitutional courts regarding fair trial and specific rights of suspects and defendants. The standards and rights affected by constitutional courts decisions are undoubtedly the right to notification, the right to information, the right to appropriate judicial review and the equality of arms. The significant impact can be also seen in the right of defense – both in terms of active participation of the suspect in the proceedings and privilege against self-incrimination. Moreover, the set of individual rights distinguished by constitutional courts on the basis of the right to privacy and the right to the protection of personal data has a fundamental impact on the fairness of the proceedings, especially considering that the existing regulations on the use of new technologies in criminal proceedings are often not yet finally clarified and they pose a risk of a threat to legal security and certainty. The principle of proportionality,

even if invoked in the context of right to privacy (for example in the context of time limits for surveillance measures taken against suspects), will have a significant role in limiting the actions of LEAs and ensuring the adequate protection of fair trial standards.

All the above mentioned factors can be observed in Polish legal system as well. The Constitutional Tribunal of Poland addressed the problems of the use of new technologies in criminal proceedings, especially the surveillance measures, mostly in the context of right to privacy. However, it does not exclude the simultaneous impact on the fair trial principles. On the contrary – the direct influence on the legislation can be noticed.

The case law of constitutional courts influences legislation in shaping the procedures for the use of digital evidence, both in terms of access to content and non-content data, and will most definitely continue to do it. It is also in some way intertwined with the judgments of European courts, in particular the CJEU. Recently, the need for mutual approximation and harmonization of procedures has also been discussed in order to ensure efficient cooperation in criminal matters and to eliminate threats to procedural rights. If this were to happen, the provisions would undoubtedly be based not only on the CJEU case law, but also on the standards developed by the constitutional courts of the Member States.

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Presunção de inocência e a doutrina da *prova além da dúvida razoável* na jurisdição constitucional

Presumption of innocence and the doctrine of proof beyond reasonable doubt *in judicial review*

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Resumo: Em razão da centralidade do princípio da presunção de inocência nos sistemas constitucionais democráticos, diversos tribunais constitucionais têm buscado, nos mais diversos quadrantes e a partir do recurso a diferentes metodologias, desenvolver parâmetros que tornem eficaz a dimensão do princípio ligada à exigência de que a condenação criminal esteja fundada em certo nível de certeza probatória. Para que o princípio da presunção de inocência desempenhe sua função de garantia, alguns tribunais constitucionais desenvolveram o *standard* da prova "para além da dúvida razoável". A jurisprudência constitucional estrangeira deu passos significativos na superação do uso meramente retórico da categoria da prova "para além da dúvida razoável", atribuindo-lhe significado normativo mais denso e operativo. Alguns tribunais constitucionais – *e.g.* Tribunal Constitucional da Espanha e Corte Constitucional da Colômbia – têm procurado tutelar essa dimensão do princípio da presunção de inocência por meio da exigência, por um lado, de comprovação da culpa para *além de qualquer dúvida razoável* e, por outro, da obrigatoriedade de *valoração integral do*

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conjunto probatório e de *motivação lógica e racional* acerca desses elementos probatórios.

Palavras-chave: presunção de inocência; prova "para além da dúvida razoável"; valoração integral do conjunto probatório; dever de motivação; jurisdição constitucional.

Abstract: *Because the presumption of innocence is a fundamental principle for democratic-constitutional systems, several constitutional courts have sought, in the most diverse ways and using various methodologies, to develop parameters to ensure that criminal convictions are grounded on a certain level of evidentiary certainty. To perform the protective function of the principle of presumption of innocence, some constitutional courts have developed the "beyond a reasonable doubt" standard of proof. Constitutional courts in different countries have taken significant steps in overcoming the merely rhetorical use of "beyond a reasonable doubt", assigning a more dense and operative normative meaning to this standard. Some constitutional courts – e.g. Constitutional Court of Spain and Constitutional Court of Colombia – seek to protect the presumption of innocence by demanding not only the burden of proof beyond a reasonable doubt, but also requiring full assessment of the evidence and logical and rational motivation regarding the evidence.*

Keywords: *presumption of innocence; proof "beyond a reasonable doubt"; full assessment of the evidence; motivation; constitutional review.*

Sumário: Introdução; 1. Nota teórica prévia: as dimensões do princípio da presunção de inocência. 2. O princípio da presunção de inocência e a doutrina da exigência de prova "para além da dúvida razoável". 3. A verificação de violações individuais ao princípio da presunção de inocência pelos Tribunais Constitucionais: mecanismos de controle da suficiência do *standard* probatório nas sentenças condenatórias. 4. Conclusões. Referências bibliográficas.

Introdução

O princípio da presunção de inocência é tradicionalmente decomposto em três dimensões básicas: (i) o direito de ser *tratado como inocente*

no curso da persecução criminal, (ii) a *atribuição à acusação do ônus da prova* da realização de todos os elementos do injusto penal pelo acusado e (iii) a exigência de um *grau probatório mínimo* para a condenação. A primeira dimensão da presunção de inocência – conhecida como *regra de tratamento* –, além de ter seu sentido precisamente delimitado pela jurisprudência, possui considerável eficácia e ampla operacionalidade na jurisprudência do Supremo Tribunal Federal.

A noção de que o investigado ou acusado deve ser tratado como inocente durante as investigações constituiu o fundamento principal da declaração de inconstitucionalidade da prisão preventiva obrigatória para o preso em flagrante por tráfico de drogas.[2] Antes mesmo dessa decisão que declarou a inconstitucionalidade da vedação à liberdade provisória para o crime de tráfico de drogas, o STF já havia declarado a inconstitucionalidade do dispositivo legal que vedava a liberdade provisória para os acusados de cometer determinados crimes previstos no Estatuto do Desarmamento.[3] E, para além desses casos de declaração de inconstitucionalidade de leis que restringiam de maneira ilegítima o princípio da presunção de inocência, o Supremo Tribunal Federal tem se valido da *regra de tratamento* deduzida desse princípio para controlar a validade de todo tipo de restrição de direitos fundamentais impostas pelo Judiciário antes da condenação criminal definitiva.[4]

As duas outras dimensões da presunção de inocência – *atribuição do ônus probatório da culpa à acusação* e *estabelecimento de grau probatório mínimo* para a condenação –, embora possuam conteúdo e feição

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2 BRASIL. Supremo Tribunal Federal, HC n° 104.339, Tribunal Pleno, Rel. Min. Gilmar Mendes, j. 10/05/2012. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3164259>. Acesso em: 18 mar. 2022.

3 BRASIL. Supremo Tribunal Federal, ADI n° 3.112, Tribunal Pleno, Rel. Min. Ricardo Lewandowski, j. 02/05/2007. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=491806>. Acesso em: 18 mar. 2022

4 Para um panorama da aplicação do princípio da presunção de inocência na jurisprudência do STF, cf. FACHIN, Luiz Edson. Presunção de inocência e persecução penal: conformação constitucional pelo Supremo Tribunal Federal. In: ALVIM, Eduardo Arruda; ALVIM, José Manoel de; GALDINO, Flavio (coords.). *Uma vida dedicada ao direito:* estudos em homenagem a Roberto Rosas. Rio de Janeiro: GZ, 2020, p. 461-472.

metodológica autônomas, costumam aparecer de maneira superposta na jurisprudência do Supremo Tribunal Federal.[5] De fato, o modo como o direito processual penal distribui os ônus probatórios não determina o grau de certeza probatória exigido para a condenação e tampouco oferece critérios para o reconhecimento de que há dúvida relevante sobre qualquer dos aspectos da imputação criminal.

No Brasil, apesar da ampla aceitação doutrinária[6] e jurisprudencial[7] de que o princípio da presunção de inocência impede a imposição

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[5] Cf., a título de exemplo: "A presunção de inocência exige, para ser afastada, um mínimo necessário de provas produzidas por meio de um devido processo legal. No sistema acusatório brasileiro, o ônus da prova é do Ministério Público, sendo imprescindíveis provas efetivas do alegado, produzidas sob o manto do contraditório e da ampla defesa, para a atribuição definitiva ao réu, de qualquer prática de conduta delitiva, sob pena de simulada e inconstitucional inversão do ônus da prova" (BRASIL. Supremo Tribunal Federal, AP n° 883, 1ª Turma, Rel. Min. Alexandre de Moraes, j. 20/03/2018. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14801986>. Acesso em 18 mar. 2022). Ainda: "o ordenamento jurídico pátrio veda a possibilidade de alguém ser considerado culpado com respaldo em simples presunção ou meras suspeitas, consagrando o princípio da presunção de inocência, insculpido no artigo 5º, inciso LVII, da Constituição da República. Esse postulado condiciona a decisão judicial a atividade probatória produzida pela acusação, sendo vedada a condenação ante a ausência de comprovação das evidências" (BRASIL. Supremo Tribunal Federal, RHC n° 107.759, 1ª Turma, Rel. Min. Luiz Fux, j. 18/10/2011. Disponível em: <http://stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?numero=107759&classe=RHC>. Acesso em: 18 mar. 2022).

[6] BADARÓ, Gustavo Henrique. *Ônus da prova no processo penal*. São Paulo: Revista dos Tribunais, 2003, p. 233.

[7] Cf., a propósito: "O princípio da presunção de inocência ou de não culpabilidade, insculpido no art. 5º, LVII, da Constituição Federal, preceitua, na sua acepção probatória, que cabe ao órgão acusatório o ônus de comprovar a ocorrência de todas as circunstâncias elementares do tipo penal atribuído ao acusado na incoativa, sob pena de tornar inviável a pretendida responsabilização criminal" (BRASIL. Supremo Tribunal Federal, AP n° 1.018, 2ª Turma, Rel. Min. Edson Fachin, j. 18/09/2018. Disponível em: <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?idDocumento=748852403>. Acesso em: 18 mar. 2022); "o ônus da prova referente aos fatos constitutivos da imputação penal incumbe, exclusivamente, a quem acusa" (BRASIL. Supremo Tribunal Federal, HC n° 180.144, 2ª Turma, Rel. Min. Celso de Mello, j. 10/10/2020. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754177235> Acesso em: 18 mar. 2020).

ao acusado de qualquer ônus probatório na ação penal condenatória, não se verificou na jurisprudência do Supremo Tribunal Federal o mesmo estágio de desenvolvimento em relação ao estabelecimento de parâmetros claros acerca do significado da dimensão da presunção de inocência ligado à exigência de um *grau probatório mínimo* para a condenação. A jurisdição constitucional brasileira, nesse campo, tem emprestado adesão, em linhas gerais, *standard* da *prova para além da dúvida razoável* (*proof beyond a reasonable doubt*) como condição para a superação do estado de inocência do acusado. Apesar das numerosas referências a esse parâmetro pela jurisprudência do STF,[8] permanece presente o risco de que sua

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[8] A primeira referência explícita ao *standard* da *prova para além da dúvida razoável* data do ano de 1996: "Desse modo, se o Ministério Público oferece denúncia contra qualquer réu por crime de corrupção de menores, cumpre-lhe demonstrar, de modo consistente – e além de qualquer dúvida razoável –, a ocorrência do fato constitutivo do pedido [...]. O fato indiscutivelmente relevante no domínio processual penal, Sr. Presidente, é que, no âmbito de uma formação social organizada sob a égide do regime democrático, não se justifica, sem base probatória idônea, a formulação possível de qualquer juízo condenatório, que deve sempre assentar-se – para que se qualifique como ato revestido de validade ético-jurídica – em elementos de certeza, os quais, ao dissiparem ambiguidades, ao esclarecerem situações equívocas e ao desfazerem dados eivados de obscuridade, revelam-se capazes de informar, com objetividade, o órgão judiciário competente, afastando, desse modo, dúvidas razoáveis, sérias e fundadas que poderiam conduzir qualquer magistrado ou Tribunal a pronunciar o *non liquet*. A condenação do réu pela prática de qualquer delito – até mesmo pela prática de simples contravenção penal – somente se justificará quando existentes, no processo, e sempre colhidos sob a égide do postulado constitucional do contraditório, elementos de convicção que, projetando-se *beyond all reasonable doubt* (além, portanto, de qualquer dúvida razoável), veiculem dados consistentes que possam legitimar a prolação de um decreto condenatório pelo Poder Judiciário" (BRASIL. Supremo Tribunal Federal, HC n° 73.338, 1ª Turma, Rel. Min. Celso de Mello, j. 13/08/1996. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=74424>. Acesso em 18 mar. 2022). Desde então, o *standard* da *prova para além da dúvida razoável* tem sido reiteradamente reafirmado pela jurisprudência do STF. Cf., por todos, BRASIL. Supremo Tribunal Federal, HC n° 83.947, 2ª Turma, Rel. Min. Celso de Mello, j. 07/08/2007. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=506601>. Acesso em: 18 mar. 2022; BRASIL. Supremo Tribunal Federal, AP n° 470, Tribunal Pleno, Rel. Min. Joaquim Barbosa, j. 17/12/2012. Disponível em: <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?idDocumento=3678648>. Acesso em: 18 mar. 2022; BRASIL. Supremo Tribunal Federal, 1ª Turma, AP

invocação apresente um caráter retórico, expressando, não raramente, um mero recurso a um *topos*, sem caráter sistemático ou conteúdo definido. A utilização da estrutura argumentativa da *prova para além de qualquer dúvida razoável* pode esconder uma nova forma de reprodução de indesejável subjetivismo no campo da justiça penal: se afirma que a condenação só é válida se passar pelo filtro da *prova para além da dúvida razoável*, sem que isso represente um efetivo controle sobre a racionalidade da sentença condenatória.[9]

Nesse contexto, pretende-se discutir o papel dos Tribunais constitucionais na delimitação do sentido da dimensão da presunção de inocência relacionado ao estabelecimento de parâmetros de segurança probatória exigidos para a válida imposição de condenação criminal. Para tanto, serão utilizadas decisões de outros Tribunais constitucionais que pertencem, assim como o Brasil, à tradição processual penal continental[10] – *e.g.* Portugal, Espanha e Colômbia – para delimitar com maior grau de precisão o significado central do requisito da existência de *prova para além de qualquer dúvida razoável* para a condenação penal.[11] Ao lado

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n° 521, Rel. Min. Rosa Weber, DJe 05/02/2015. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7688221>. Acesso em: 18 mar. 2022.

9 Cf., nesse sentido, LUCCHESI, Guilherme Brenner. O necessário desenvolvimento de standards probatórios compatíveis com o direito processual penal brasileiro. *Revista Brasileira de Ciências Criminais*. São Paulo, v. 27, n. 156, jun. 2019, p. 165-188.

10 O sistema processual penal continental se estruturou em torno da lógica do sistema romano-germânico e concebe a ação penal como instrumento para de apuração oficial dos fatos, com objetivo de busca da verdade, em que também o acusador é visto como guardião da lei e do interesse público. As diferenças entre os sistemas anglo-saxão e o romano-germânico vão desde a diferenciação de poderes entre os atores processuais – juiz, promotor e defensor – e chegam a concepções profundamente diversas sobre a estrutura e o sentido do próprio processo criminal. Para uma visão global dessas diferenças, cf. LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. *Harvard International Law Journal*, v. 45, n. 1, p. 1-64, 2004.

11 No direito processual penal italiano, tão próximo do brasileiro, a doutrina da prova *al di là di ogni ragionevole dubbio* foi quase inteiramente desenvolvida pela jurisprudência da Corte de Cassação, e não pela Corte constitucional. Cf., sobre o tema, DELLA TORRE, Jacopo. *Il lungo cammino della giurisprudenza*

da pretensão de identificar um sentido mais claro e operacional dessa dimensão do princípio da presunção de inocência, buscou-se na jurisprudência desses Tribunais constitucionais – selecionados porque se inserem em sistemas processuais penais semelhantes ao brasileiro e admitem o acesso individual do acusado à jurisdição constitucional – critérios para o controle da constitucionalidade de sentenças condenatórias concretas à luz da exigência de *prova para além de qualquer dúvida razoável*. Esse esforço tem por objetivo contribuir para a atribuição de um sentido mais operativo ao *standard da prova para além de qualquer dúvida razoável* pela jurisdição constitucional brasileira, tanto pela via do recurso extraordinário como do *habeas corpus*.

1. Nota teórica prévia: as dimensões do princípio da presunção de inocência

O princípio da *presunção de inocência* é uma das colunas sobre as quais se alicerçam o Estado de Direito e as democracias modernas.[12] Segundo a Observação Geral 13 do Comitê de Direitos Humanos das Nações Unidas, essa garantia é sintetizada como o direito a que "o ônus da prova recaia sobre a acusação e o acusado tenha o benefício da dúvida", não se podendo "presumir a culpa de alguém, a menos que a acusação tenha demonstrado sua culpa fora de qualquer dúvida razoável".[13] Em sentido similar, a Observação Geral 32 assinala que a presunção de inocência "impõe o ônus da prova à acusação, garante que não se presuma a culpabilidade a menos que se tenha demonstrado a acusação fora de toda

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italiana sull'"oltre ogni ragionevole dubbio". Disponível em: <https://www.penalecontemporaneo.it/upload/1403195064DELLA%20TORRE_2014.pdf>. Acesso em: 18 mar. 2022.

[12] Cf. O'DONNELL, Daniel. *Derecho Internacional de los Derechos Humanos:* normativa, jurisprudencia y doctrina de los sistemas universal e interamericano. Bogotá: Oficina en Colombia del Alto Comisionado de la Naciones Unidas para Colombia, 2007, p. 397.

[13] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Comitê de Direitos Humanos, General Comment no. *13*, 1984, parágrafo 7. Disponível em: <https://www.refworld.org/publisher,HRC,GENERAL,,453883f90,0.html>. Acesso em: 18 mar. 2022.

dúvida razoável, assegura que o acusado tenha o benefício da dúvida, e exige que as pessoas acusadas de um delito sejam tratadas em conformidade com esse princípio".[14]

A presunção de inocência, mais do que espinha dorsal do processo penal,[15] é considerada pela doutrina como "um princípio fundamental de civilidade" que é "fruto de uma opção garantista a favor da tutela da proteção dos inocentes, inclusive com o preço da impunidade de algum culpado".[16] Esse direito fundamental se encontra consagrado em diversos tratados internacionais de direitos humanos. A Declaração Universal de Direitos Humanos estabelece em seu art. 11 que "todo ser humano acusado de um ato delituoso tem o direito de ser presumido inocente até que a sua culpabilidade tenha sido provada de acordo com a lei, em julgamento público no qual lhe tenham sido asseguradas todas as garantias necessárias à sua defesa". Por sua parte, o Pacto Internacional de Direitos Civis e Políticos estabelece no parágrafo 2º do artigo 14 que "toda pessoa acusada de um delito terá direito a que se presuma sua inocência enquanto não for legalmente comprovada sua culpa". Adicionalmente, no plano do sistema interamericano de proteção de direitos humanos, o item 2 do artigo 8º da Convenção Americana de Direitos Humanos estabelece que "toda pessoa acusada de delito tem direito a que se presuma sua inocência enquanto não se comprove legalmente sua culpa".

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[14] ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Comitê de Direitos Humanos. General Comment no. 32, 2007, páragrafo 30. Disponível em: <https://digitallibrary.un.org/record/606075>. Acesso em: 18 mar. 2022.

[15] O Tribunal Constitucional da Espanha assentou que o princípio da presunção de inocência "serve de base a todo procedimento criminal e condiciona a sua estrutura, constituindo um dos princípios cardiais do Direito Penal contemporâneo, em suas facetas substantiva e formal" (ESPANHA. Tribunal Constitucional, STC n° 141/2006, 1ª Sala, Rel. María Emilia Casas Baamonde, j. 08/05/2006. Disponível em: <https://hj.tribunalconstitucional.es/eu-ES/Resolucion/Show/5743>. Acesso em: 18 mar. 2022).

[16] FERRAJOLI, Luigi. *Derecho y Razón:* Teoría del garantismo penal. Madri: Editorial Trotta, 2000, p. 549.

Alguns países – *e.g.* Espanha,[17] França,[18] Portugal,[19] Itália[20] e Brasil – incorporaram expressamente o princípio da presunção de inocência em suas constituições. Mesmo nos Estados Unidos, em que a *Bill of Rights* não contém exigência expressa nesse sentido, a jurisprudência da Suprema Corte dos EUA reconhece *status* constitucional ao princípio da presunção de inocência, exigindo, inclusive, o *standard* da *prova para além da dúvida razoável* (*proof beyond a reasonable doubt*) para a superação do estado de inocência do acusado.[21]

No Brasil, o princípio da presunção de inocência é expressamente previsto pela Constituição Federal de 1988 por meio do art. 5º, LVII, e assume pelo menos três funções importantíssimas no Processo Penal: trata-se (i) de *regra de tratamento processual* – as pessoas sob investigação ou acusadas por um delito devem ser tratadas como inocentes; (ii) de *regra probatória* – o ônus da prova acerca da responsabilidade recai sobre a acusação; e (iii) de *regra de juízo* – ninguém pode ser considerado culpado a menos que se tenha comprovado a acusação para além

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[17] Art. 24.2. da Constituição espanhola (ESPANHA. Constitución Española. 1978. Disponível em: <https://www.boe.es/legislacion/documentos/ConstitucionCASTELLANO.pdf>. Acesso em: 18 mar. 2022).

[18] Preâmbulo da Constituição francesa (FRANÇA. Constitution du 4 de octobre 1958. Disponível em: <https://www.conseil-constitutionnel.fr/le-bloc-de--constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en--vigueur>. Acesso em: 18 mar. 2022).

[19] Art. 32.2 da Constituição portuguesa (PORTUGAL. Constituição da República Portuguesa. 1976. Disponível em: <https://www.parlamento.pt/ArquivoDocumentacao/Documents/CRPVIIrevisao.pdf>. Acesso em: 18 mar. 2022).

[20] Art. 27.2 da Constituição italiana de 1947 (ITÁLIA. Constituzione della República. 1947 Disponível em: <https://www.senato.it/documenti/repository/istituzione/costituzione.pdf>. Acesso em: 18 mar. 2022.

[21] Cf. ESTADOS UNIDOS DA AMÉRICA. Suprema Corte, In re Winship, 397 US 358, 364 (1970). Disponível em: <https://caselaw.findlaw.com/us-supreme--court/397/358.html>. Acesso em: 17 mar. 2022. ("[A] cláusula de devido processo legal protege o acusado contra condenação, exceto mediante prova além de uma dúvida razoável sobre algum dos fatos necessários para constituir o crime pelo qual ele é acusado", tradução livre); e ESTADOS UNIDOS DA AMÉRICA. Suprema Corte, Miles v. United States, 103 US 304, 312 (1880). Disponível em: <https://caselaw.findlaw.com/us-supreme-court/103/304.html>. Acesso em: 17 mar. 2022. ("A evidência sobre a qual o júri se debruça para proferir o veredicto de culpado deve ser suficiente para produzir uma convicção de culpa do acusado, com exclusão de toda dúvida razoável", tradução livre).

de qualquer dúvida razoável, em processo que respeite seus direitos e garantias fundamentais.[22]

Como *regra de tratamento processual*, o princípio da presunção de inocência impede que o acusado seja tratado como culpado antes do trânsito em julgado do processo. Isso significa dizer que o acusado não poderá sofrer sanção antes de uma sentença definitiva. Dessa regra decorre, por exemplo, o caráter excepcional das medidas cautelares processuais, especialmente da prisão preventiva, que não poderão ser utilizadas como forma de antecipação da punição, antes do trânsito em julgado da decisão condenatória.[23] Foi com base nessa perspectiva, por exemplo, que o Supremo Tribunal Federal declarou a inconstitucionalidade de regras que estabeleciam presunção absoluta de necessidade da prisão cautelar para determinados crimes.[24] Essa compreensão de que a prisão

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[22] Sobre as facetas do princípio da presunção de inocência, cf. GIACOMOLLI, Nereu José. *O devido processo penal:* abordagem conforme a Constituição Federal e o Pacto de São José da Costa Rica. 3. ed. São Paulo: Atlas, 2016, p. 116-142.

[23] É do entendimento do Supremo Tribunal Federal que "a custódia cautelar, enquanto medida excepcional, exige demonstração inequívoca de sua necessidade, em observância ao princípio constitucional da presunção de inocência ou da não culpabilidade, sob pena de representar mera antecipação da reprimenda a ser cumprida quando da condenação" (BRASIL. Supremo Tribunal Federal, HC n° 135.741, 1ª Turma, Rel. Min. Rosa Weber, DJe 05/09/2017. Disponível em: <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?idDocumento=14217622>. Acesso em: 18 mar. 2022).

[24] O Tribunal declarou a inconstitucionalidade da vedação à liberdade provisória prevista no art. 44, *caput*, da Lei 11.343/200 por entender que a vedação absoluta da concessão da liberdade provisória é incompatível com os princípios constitucionais da presunção de inocência e do devido processo legal (BRASIL. Supremo Tribunal Federal, HC nº 104.339, Tribunal Pleno, Rel. Min. Gilmar Mendes, j. 10/05/2012. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3164259>. Acesso em: 18 mar. 2022). Antes mesmo dessa decisão que declarou a inconstitucionalidade da vedação à liberdade provisória para o crime de tráfico de drogas, o STF já havia declarado a inconstitucionalidade do dispositivo legal que obrigava a prisão preventiva para presos em flagrante pela prática de delitos previstos no Estatuto do Desarmamento, ocasião em que afirmou que uma presunção da necessidade da prisão violava o princípio da presunção de inocência (BRASIL. Supremo Tribunal Federal, ADI nº 3.112, Tribunal Pleno, Rel. Min. Ricardo Lewandowski, j. 02/05/2007. Disponível em: <https://

preventiva obrigatória viola o princípio da presunção de inocência tem sido reafirmada em diversas ocasiões pela Corte Constitucional da Itália.[25]

A *regra probatória* contida no princípio da presunção de inocência, por sua vez, impõe uma série de requisitos procedimentais para a superação do estado de inocência do acusado, sem a observância dos quais tem-se como violada essa garantia constitucional: o acusado só pode ser declarado culpado ao final de um processo cercado de plenas garantias processuais em que se tenha demonstrado sua culpabilidade, cujo ônus da comprovação compete à acusação. Um dos principais aspectos do princípio da presunção de inocência como regra probatória reside na atribuição à acusação do ônus de comprovar a culpabilidade do acusado. Nesse sentido, o Supremo Tribunal Federal tem enunciado que "não cabe ao réu provar sua inocência, mas sim ao órgão acusador demonstrar, para além de qualquer dúvida razoável, a prática da conduta criminosa e a culpabilidade a ele imputada".[26] Apesar de o acusado não ser obrigado a demonstrar a sua inocência, ele tem o direito de fazê-lo. O acusado poderá, por exemplo, produzir provas para introduzir uma dúvida razoável sobre a hipótese acusatória, ou mesmo demonstrar a ocorrência de um elemento negativo do tipo, como a legítima defesa.[27]

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redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=491806>. Acesso em: 18 mar. 2022).

[25] Cf., entre outros, ITÁLIA. Corte Constitucional, Sentenza n° 265 de 2010, Rel. Giuseppe Friggo, j. 07/07/2010. Disponível em: <https://www.giurcost.org/decisioni/2010/0265s-10.html>. Acesso em: 18 mar. 2022 (sobre a presunção legal absoluta de prisão cautelar para o crime de pornografia infantil); ITÁLIA. Corte Constitucional, Sentenza n° 164 de 2011, Rel. Giuseppe Frigo, j. 09/05/2011. Disponível em: <https://www.giurcost.org/decisioni/2011/0164s-11.html>. Acesso em 18 mar. 2022 (sobre a presunção legal absoluta de prisão cautelar para o crime de homicídio); ITÁLIA. Corte Constitucional, Sentenza n° 231 de 2011, Rel. Giuseppe Frigo, j. 19/07/2011. Disponível em: <https://www.giurcost.org/decisioni/2011/0231s-11.html>. Acesso em: 18 mar. 2022 (sobre a presunção legal absoluta de prisão cautelar para o crime de associação para o tráfico de drogas).

[26] BRASIL. Supremo Tribunal Federal, AP nº 512, 2ª Turma, Rel. Min. Teori Zavascki, DJe 27/04/2016. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10810152>. Acesso em: 18 mar. 2022.

[27] GIACOMOLLI, Nereu José. *Op. cit.*, p. 121-123.

Apesar da profunda identificação do direito fundamental à presunção de inocência com essa lógica de distribuição do ônus probatório no processo penal, o fato é que o julgamento de casos penais dificilmente se dá com base exclusivamente na *regra probatória*. Como advertiu Jordi Nieva Fenoll, "o ônus da prova é uma instituição que só é utilizada em uma situação realmente extrema: a ausência de prova".[28] Daí porque se tem conferido, mais recentemente, maior atenção à dimensão da presunção de inocência ligada ao estabelecimento de um *standard* probatório exigido para a imposição válida da condenação precisamente por sua capacidade para estabelecer um parâmetro objetivo e controlável acerca grau de probabilidade ou de certeza que autorizam a superação do estado de inocência.[29]

Sob essa ótica, e de acordo com a *regra de juízo*, a presunção de inocência somente poderá ser superada por uma condenação que resultar da valoração integral do conjunto probatório dos autos, realizada à luz de critérios racionais, e que seja devidamente motivada a respeito da existência de todos os elementos do crime e da participação do acusado. O juiz deve se debruçar sobre a totalidade das provas relevantes coligidas aos autos, inclusive aquelas que sustentam a tese defensiva.[30] Além disso, de acordo com sólida diretriz jurisprudencial do Supremo Tribunal Federal, essa *regra de juízo* determina, ainda, um grau probatório mínimo para a condenação, correspondente à prova para além da dúvida razoável.[31]

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[28] NIEVA FENOLL, Jordi. La razón de ser de la presunción de inocencia. *Indret*. Barcelona, v.1, 2016, p. 10.

[29] NARDELLI, Marcella A. M.; MASCARENHAS, Fabiana A. Os standards probatórios como métrica da verdade: em busca de parâmetros objetivos para a racionalização das decisões sobre os fatos. *Revista del Instituto Colombiano de Derecho Procesal,* n. 44, jul.-dez. 2016, p. 45-66.

[30] ESPANHA. Tribunal Constitucional, STC 124/2000, 2ª Sala, Rel. Guillermo Jiménez Sánchez, j. 16/05/2000. Disponível em: <http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/4108>. Acesso em: 18 mar. 2022.

[31] Em recente precedente, o STF consagrou a máxima de que o princípio da presunção de inocência "impõe a necessidade de um quadro probatório robusto, com provas de todos os elementos da acusação. As provas devem ser aptas a gerar a responsabilidade criminal do acusado, com o afastamento de todas as hipóteses contrárias, desde que razoáveis, a essa convicção" (BRASIL. Supremo Tribunal Federal, AP nº 676, 1ª Turma, Rel. Min. Rosa Weber, DJe

As três dimensões do princípio da presunção de inocência foram objeto de importantes desenvolvimentos pela jurisdição constitucional nacional e estrangeira. Apesar da elevada relevância da jurisprudência constitucional em relação às duas primeiras dimensões do princípio da presunção de inocência, o presente artigo investigará o papel dos tribunais constitucionais na concretização da dimensão da presunção de inocência consubstanciada na *regra de juízo*, ou seja, na proteção da garantia de que a condenação criminal esteja fundada em certo nível de certeza probatória. Para os fins do presente artigo, portanto, o aspecto mais importante da presunção de inocência é a *regra de juízo* a ela inerente, que opera no momento da valoração das provas produzidas na instrução criminal.[32]

Em razão da elevada importância axiológica do princípio da presunção de inocência nas democracias constitucionais contemporâneas, os tribunais constitucionais têm buscado, nos mais diversos quadrantes e de variadas formas, desenvolver parâmetros que tornem operativa essa dimensão do princípio consubstanciada na conhecida *regra de juízo*, especialmente na perspectiva de garantir que o direito à presunção de inocência exige, a partir de uma *valoração integral do conjunto probatório* e de *motivação lógica e racional*, a comprovação da culpa para *além de qualquer dúvida razoável*.

Para discutir o papel dos tribunais constitucionais no desenvolvimento jurisprudencial dessa dimensão do princípio da presunção de inocência relacionado ao estabelecimento de requisitos de certeza probatória exigidos para uma condenação legítima, deve-se analisar não apenas a qualidade dos critérios materiais desenvolvidos, mas também os parâmetros com base nos quais os tribunais constitucionais admitem examinar arguições individuais de violação à presunção de inocência.

05/02/2018. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14300838>. Acesso em: 18 mar. 2022).

[32] Nesse sentido, o princípio *in dubio pro reo* entra em ação depois de concluída a produção de prova. Referido princípio dispõe, na verdade, que "a dúvida insanável sobre factos deve favorecer o arguido. [...] O princípio do in dubio pro reo não é, pois, um princípio de direito probatório, mas antes uma regra de decisão na falta de uma convicção para além da dúvida razoável sobre os factos" (ALBUQUERQUE, Paulo Pinto de. *Comentário do Código de Processo Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*. 4. ed. Lisboa: Universidade Católica Editora, 2011, p. 61).

Nessa perspectiva, merece destaque o fato de que os tribunais constitucionais que contam com mecanismos de acesso individual – *e.g.* recurso de amparo em países latino-americanos ou reclamações constitucionais em países europeus[33] – têm buscado desenvolver parâmetros para distinguir situações em que essa dimensão da presunção de inocência pode ser diretamente ou autonomamente violada – *i.e.* casos que assumem dimensão constitucional – daquelas em que o debate não ultrapassa os limites de uma controvérsia de natureza legal. Afinal, como afirmou o Tribunal Constitucional de Portugal, não cabe àquela corte *corrigir* a apreciação do juízo recorrido em matéria de prova e condenação, substituindo-se à decisão das instâncias.[34] Apesar disso, é preciso garantir, tal como advertiram o Tribunal Constitucional da Espanha[35] e a Corte Constitucional da

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[33] Com efeito, em muitos países da Europa e da América Latina, o tribunal constitucional é acessado diretamente por meio do chamado *recurso de amparo*. Trata-se de ação autônoma de impugnação, célere e eficaz, vocacionada à proteção de determinados direitos fundamentais, cujo conhecimento se atribui ao tribunal constitucional, e que se caracteriza pelos princípios da subsidiariedade e da excepcionalidade. Em verdade, o recurso de amparo, na experiência da Europa continental e da América Latina, assemelha-se à versão individual da ADPF incidental que, aprovada pelo Congresso Nacional, acabou vetada pela Presidência da República (inciso II do art. 2º do projeto de lei que resultou na aprovação da lei nº 9.882/99). O recurso de amparo é considerado instrumento subsidiário, cabível quando a parte não dispuser de outro meio recursal pelo qual possa fazer cessar, dentro do regular itinerário processual, a lesão a direito, a fim de evitar dano irreversível. Cf. BOTELHO, Catarina Santos. *Tutela Directa dos Direitos Fundamentais:* Avanços e Recuos na Dinâmica Garantística das Justiças Constitucional, Administrativa e Internacional. Coimbra: Almedina, 2010.

[34] PORTUGAL. Tribunal Constitucional, Decisão Sumária nº 291/2020. Nesse sentido, a advertência da doutrina portuguesa: "como é evidente – se o Tribunal Constitucional ultrapassasse o âmbito do controlo estritamente normativo que lhe está cometido, estaria a invadir as áreas de competência dos outros tribunais, nomeadamente no que se refere à interpretação do direito infraconstitucional, à apreciação da matéria de facto e do mérito da causa, naquilo que se não prende com a estrita resolução da questão de constitucionalidade suscitada [...]" (REGO, Carlos Lopes do. *Os Recursos de Fiscalização Concreta na Lei e na Jurisprudência do Tribunal Constitucional*. Coimbra: Almedina, 2010, p. 107).

[35] Cf. ESPANHA. Tribunal Constitucional, STC n° 139/2000, 1ª Sala, Rel. Fernando Garrido Falla, j. 29/05/2000. Disponível em: <https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4123>. Acesso em: 18 mar. 2022.

Colômbia,[36] que essa barreira procedimental não signifique uma autorização para a violação aberta, pelas instâncias inferiores, do princípio da presunção de inocência por meio da elaboração de condenações criminais com base em apreciação arbitrária do conjunto probatório.

2. O princípio da presunção de inocência e a doutrina da exigência de *prova para além da dúvida razoável*

A dimensão da presunção de inocência relativa à *regra de juízo* exige, tradicionalmente, um grau probatório mínimo para a condenação, correspondente à *prova para além da dúvida razoável* (*proof beyond a reasonable doubt*).[37] Nesse sentido, a Suprema Corte dos Estados Unidos decidiu, em 1970, que o parâmetro da *proof beyond a reasonable doubt* constituía um componente implícito do devido processo legal, cuja aplicação seria então obrigatória em casos criminais em todos os tribunais do país.[38] Em *Jackson v. Virginia*, a Suprema Corte norte-americana criticou condenações sustentadas apenas por "*modicum of evidence*" ao afirmar que "[q]ualquer evidência que seja relevante – que tenha alguma tendência a fazer a existência de um elemento de um crime um pouco mais provável do que seria sem a evidência [...] pode ser considerado um 'mero modicum'. Mas não se poderia afirmar verdadeiramente que tal 'mínimo' de evidências poderia, por si só, apoiar racionalmente uma convicção além de uma dúvida razoável".[39]

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[36] Cf. COLÔMBIA. Corte Constitucional, Sentencia SU-447/11, Tribunal Pleno, Rel. Mauricio Gonzalez Cuervo, 26/05/2011. Disponível em: https://www.corteconstitucional.gov.co/relatoria/2011/SU447-11.htm. Acesso em: 18 mar. 2022.

[37] Cf., sobre as origens dessa categoria jurídica que foi progressivamente sendo reconhecida como expressão do direito fundamental à presunção de inocência, WHITMAN, James Q. *The origins of reasonable doubt*. New Haven: Yale Press, 2008.

[38] A Corte afirmou que esse *standard* "reduz o risco de condenações baseadas em erro factual" e "densifica a presunção de inocência" (ESTADOS UNIDOS DA AMÉRICA. Suprema Corte, In re Winship, 397 U.S. 358 (1970). Disponível em: <https://caselaw.findlaw.com/us-supreme-court/397/358.html>. Acesso em: 18 mar. 2022 – tradução livre).

[39] Tradução livre. No original: "Any evidence that is relevant - that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401- could be

A exigência de nível elevado de segurança probatória no processo penal costuma ser associada pela jurisprudência a uma regra de segunda ordem, que determina como o juiz deve agir em caso de dúvida.[40] É aí que entra em cena a faceta do princípio da presunção de inocência como *in dubio pro reo*, que impõe a absolvição do acusado nos casos de dúvida sobre a sua culpa. Mas a definição do *standard* probatório exigido para a condenação não se confunde com a noção de *in dubio pro reo*. Até porque, antes mesmo de afirmar que a dúvida se resolve em favor do acusado, é preciso definir o *standard* de prova suficiente para afirmar a presença da culpa e, nessa perspectiva, a ausência de dúvida.[41] A confusão entre essas

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deemed a 'mere modicum'. But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt". (ESTADOS UNIDOS DA AMÉRICA. Suprema Corte, Jackson v. Virginia, 443 U.S. 307, 320 (1979). Disponível em: <https://caselaw.findlaw.com/us-supreme-court/443/307.html>. Acesso em: 18 mar. 2022).

40 Na jurisprudência portuguesa, por exemplo, as regras probatória e de juízo aparecem, não raro, de maneira indistinta: "Enquanto norma probatória, [o princípio da presunção de inocência] consubstancia-se no princípio processual penal do in dubio pro reo, que se traduz numa imposição dirigida ao julgador no sentido de que qualquer situação de dúvida a respeito dos factos relevantes para o apuramento da responsabilidade do arguido deve ser decidida a favor deste, de modo que a condenação penal fique reservada aos casos em que, em função das provas obtidas segundo as formas admitidas por lei, o tribunal de julgamento esteja em condições de dar por demonstrados os factos de que o arguido é acusado" (PORTUGAL. Tribunal Constitucional, Acórdão nº 173/2018, 3ª Seção, Rel. Cons. Gonçalo de Almeida Ribeiro, j. 05/04/2018. Disponível em: <https://www.tribunalconstitucional.pt/tc/acordaos/20180173.html>. Acesso em: 18 mar. 2022).

41 Para maior clareza do raciocínio, cf., na doutrina portuguesa, a lição de Helena Magalhães Bolina: "O princípio in dubio pro reo só se aplica no caso de surgir a dúvida quanto à apreciação da matéria de facto. O princípio da presunção de inocência, atento o objetivo que visa atingir, intervém em momento anterior, condicionando o surgimento dessa dúvida, impondo-o em todas as situações em que, à luz da verdade material, a culpabilidade do arguido não possa considerar-se afirmada com certeza. A dúvida é, assim, por imposição do princípio de presunção de inocência, uma dúvida legal: uma dúvida que deve surgir em determinadas circunstâncias e constitui também matéria de direito, não só a questão de saber se a dúvida surgida na apreciação da prova foi resolvida favoravelmente ao arguido – caso em que se está perante a verificação do respeito do princípio in dubio pro reo –, mas também se, em face da prova produzida, a dúvida surgiu quando devia, ou, noutra perspectiva, se o juízo de certeza foi bem fundado. Nesse caso, o princípio cujo respeito se

esferas está na base dos problemas relacionados à crise da doutrina da exigência de *prova para além da dúvida razoável* e à falta de delimitação precisa dos seus contornos.[42]

Sem desprezar a importância do rico debate dogmático em torno da relação entre o princípio da presunção de inocência e a *doutrina da prova além da dúvida razoável*[43] – para alguns a discussão sobre o *standard* probatório demandado para a condenação não decorre do princípio da presunção de inocência –, há bons argumentos teóricos e pragmáticos em favor da afirmação de que a exigência de *prova para além da dúvida razoável* constitui uma dimensão do direito fundamental à presunção de inocência.

Em primeiro lugar, sob o prisma teórico, convém lembrar que a teoria externa dos limites aos direitos fundamentais determina que se atribua maior amplitude ao âmbito de proteção desses direitos. Na literatura brasileira, Virgílio Afonso da Silva sintetizou essa proposição ao afirmar que "o âmbito de proteção desses direitos deve ser interpretado da forma mais ampla possível, o que significa dizer que qualquer ação, fato, estado ou posição jurídica que, isoladamente considerado, possa ser subsumido no 'âmbito temático' de um direito fundamental, deve ser considerado como por ele prima facie protegido".[44] Não há razão,

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avalia é, não já o in dubio pro reo, mas, mais rigorosamente, o princípio da presunção de inocência. O princípio da presunção de inocência distingue-se, assim, do princípio *in dubio pro reo*, não só pela sua relevância no tratamento do arguido ao longo de todo o processo e pelo seu reflexo extraprocessual como critério dirigido ao legislador ordinário, mas também, em sede de prova, impondo que a dúvida surja em determinadas circunstâncias, assim possibilitando, em momento lógico posterior, a aplicação do princípio *in dubio pro reo*" (BOLINA, Helena Magalhães. Razão de ser, significado e consequências do princípio da presunção da inocência. *Boletim da Faculdade de Direito da Universidade de Coimbra*, v. 70, 1994, p. 443-446).

[42] Para uma síntese desse debate na doutrina nacional e estrangeira, cf. VASCONCELLOS, Vinicius Gomes de. Standard probatório para condenação e dúvida razoável no processo penal: análise das possíveis contribuições ao ordenamento brasileiro. *Revista Direito GV*, v. 16, n. 2, 2020.

[43] A respeito das diversas posições na doutrina sobre as relações entre o princípio da presunção de inocência e o princípio *in dubio pro reo*, cf. BOLINA, Helena Magalhães. *Op. cit.*, p. 440-442.

[44] SILVA, Virgílio Afonso da. O conteúdo essencial dos direitos fundamentais e a eficácia das normas constitucionais. *Revista de Direito de estado*, n. 4, 2006, p. 24.

portanto, para uma rejeição à exclusão da controvérsia acerca do *standard* probatório exigido para a condenação criminal do âmbito de proteção do direito fundamental à presunção de inocência.

Em segundo lugar, e sob a ótica pragmática, o inegável *status* constitucional do princípio da presunção de inocência contrasta com a questionável natureza constitucional autônoma da exigência de *prova além da dúvida razoável*. A isso se deve associar o fato de que o princípio da presunção de inocência constitui a "chave de leitura" dominante na jurisprudência comparada para a verificação da legitimidade constitucional do nível de segurança probatória demandada para sustentar uma condenação criminal. O elevado grau de integração das cortes e tribunais constitucionais e o vertiginoso crescimento da importância da abertura nacional às experiências estrangeiras[45] fazem com que a utilização de uma linguagem comum aperfeiçoe a reflexão científica e dogmática sobre os limites constitucionais do processo penal. A semelhança do roteiro argumentativo utilizado por diferentes cortes e tribunais constitucionais melhora a capacidade de diálogo entre eles e contribui para o aprendizado recíproco em torno dos problemas comuns.

A partir dessa perspectiva, a aparente perda de precisão dogmática decorrente da inserção da *doutrina da prova além da dúvida razoável*

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[45] Têm-se ressaltado, nos últimos anos, as vantagens das teorias dialógicas como vetores prescritivos capazes de aperfeiçoar a jurisdição constitucional. A superioridade normativa das teorias dialógicas foi sintetizada por Rodrigo Brandão nos seguintes termos: "a grande vantagem da teoria dos diálogos constitucionais consiste em reconhecer as falhas e as virtudes de cada ator institucional, confiando que a interação entre eles em um sistema de separação de poderes contribuirá para a construção de um sistema deliberativo melhor" (BRANDÃO, Rodrigo. *Supremacia Judicial v. Diálogos Constitucionais:* a quem cabe a última palavra sobre o sentido da Constituição*?*. Lumen Iuris: Rio de Janeiro, 2011, p. 288). Esse diálogo se dá não apenas no âmbito doméstico, a partir do intercâmbio de experiências entre os Poderes Legislativo e Executivo com o Tribunal constitucional, mas também das cortes constitucionais entre si e com os Tribunais internacionais. Cláudio Pereira de Souza Neto e Daniel Sarmento asseveram que atualmente "há uma positiva troca de experiências, conceitos e teorias entre cortes nacionais e internacionais, com a possibilidade de aprendizado recíproco entre as instâncias envolvidas nesse diálogo" (SARMENTO, Daniel; SOUZA NETO, Cláudio Pereira de. *Direito Constitucional:* Teoria, História e Métodos de Trabalho. Belo Horizonte: Fórum, 2012, p. 451).

no âmbito de proteção do direito fundamental à presunção de inocência é largamente compensada pelo ganho de operatividade e de eficácia de um modelo que permita à jurisdição constitucional contribuir para a racionalização do processo penal. A despeito da eventual vagueza das formulações jurisprudenciais até aqui acumuladas sobre o tema, a utilização do parâmetro da *prova além da dúvida razoável* pelos tribunais constitucionais tem sido mobilizada pelo objetivo de evitar, no campo do processo penal, o enraizamento da fórmula da *convicção íntima do juiz*. A mais recente orientação jurisprudencial da Corte de Cassação italiana confirma a ideia de que o desenvolvimento da exigência da absolvição em caso de dúvida razoável surge como reação à tradicional ideia de livre convencimento do juiz em matéria criminal:

> A doutrina tem reconhecido que o critério '*oltre ogni ragionevole dubbio*' (além da dúvida razoável) representa a superação do princípio do 'livre convencimento do juiz' e, assim, a necessidade que a condenação seja baseada na avaliação da prova produzida em contraditório e que, para respeitar esse cânone interpretativo, deve ter aptidão suficiente para neutralizar com segurança a relevância antagonista das teses alternativas.[46]

Como se vê, a regra de valoração probatória contida na presunção de inocência constitui limitação ao princípio do livre convencimento judicial. Este não pode ser confundido com licença para o julgador valorar os meios de prova de modo arbitrário, sem qualquer tipo de critério, ou olvidando-se das regras da razão que norteiam a formação do conhecimento humano.[47]

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[46] ITÁLIA. Corte de Cassação. Sentenza n° 30407/2018, 2ª Seção Penal, Rel. Recchione Sandra, j. 19/06/2018. Disponível em: <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20180705/snpen@s20@a2018@n30407@tS.clean.pdf>. Acesso em: 18 mar. 2022 (tradução livre).

[47] RUIZ, Juan Cámara. *La impugnación de las resoluciones penales por falta de motivación*. Santiago de Compostela: Andavira Editora, 2018, p. 80. Na jurisprudência estrangeira, cf. ESPANHA. Tribunal Constitucional, STC 31/1981, 1ª Sala, Rel. Gloria Begué Cantón, j. 28/07/1981. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/31>. Acesso em: 18 mar. 2022.

O processo penal é parte integrante do aparato coercitivo do Estado, mas também expressa a função essencial de proteção da liberdade individual do acusado, ao garantir condições mínimas para a realização de uma avaliação imparcial da responsabilidade criminal.[48] Um primeiro princípio de tomada de decisão no processo penal, portanto, pode ser deduzido do reconhecimento de que ele envolve interesses de imensa relevância axiológica – desde a honra e a reputação até a liberdade pessoal. Então, resulta profundamente injusto condenar alguém por cometer um crime quando houver uma dúvida razoável sobre sua culpa.[49] Nesse sentido, a regra da tomada de decisão para além de qualquer dúvida razoável sinaliza a adesão a um princípio jurídico fundamental para o Estado Democrático de Direito.

Mas essa fórmula não pode ser empregada de forma meramente retórica, como um simples jargão vazio. Pelo contrário, a regra que presume a inocência até prova para além de qualquer dúvida razoável só pode desempenhar adequadamente a sua função de garantia se submetida a parâmetros concretos de aplicação.[50] Daí a importância do desenvolvimento jurisprudencial do *standard* da prova para além da dúvida razoável. É mais promissor apostar no aperfeiçoamento dessa doutrina a partir de um aprofundamento da constitucionalização do processo penal pelos tribunais constitucionais do que na criação de uma nova teoria para resolver o problema da insegurança que tradicionalmente caracterizou esse parâmetro.[51]

Uma das principais consequências que os tribunais constitucionais têm extraído do *standard* da prova "para além da dúvida razoável" está

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[48] CORDERO, Franco. *Tre studi sulle prove penali*. Milão: Giuffrè, 1963, p. 65.

[49] CENTOZE, Francesco. La Corte d'assise di fronte al "ragionevole dubbio". *Rivista Italiana di Diritto e Procedura Penale*, v. 46, n° 1/2, 2003, p. 674.

[50] Para uma crítica sobre a indefinição desse *standard* no direito norte-americano, cf. LAUDAN, Larry. Por qué un estándar de prueba subjetivo y ambíguo no es un estándar. *Doxa*, n. 28, 2005, p. 95-113.

[51] Concorda-se, no ponto, com a posição de Vinícius Vasconcelos, segundo a qual "há potencial espaço para aprimoramentos a partir da definição de seu conteúdo em termos ainda não concretizados nos exemplos indicados pelo autor, especialmente em ordenamentos em que há um dever forte de motivação das decisões judiciais" (VASCONCELLOS, Vinicius Gomes de. *Op. cit.*, p. 15).

precisamente em diferenciá-lo do modelo de "simples preponderância da prova no sentido da culpa do arguido".[52] O *standard* de prova genericamente adotado no processo civil é o da "preponderância da prova" (*preponderant evidence*). Diante de dúvida sobre questão de fato relevante para o deslinde da causa, esse *standard* permite ao juiz escolher, entre as versões contrapostas, aquela que lhe parece a mais provável, com base nos meios de provas disponíveis.[53] Algumas matérias específicas do processo civil, como disputas relacionadas a direitos de paternidade, exigem um *standard* de prova mais rigoroso, consistente na "prova clara e convincente" (*clear and convincent evidence*), correspondente a uma probabilidade elevada.[54] Apesar de demandar elementos de prova mais consistentes para a formação do convencimento judicial, esse segundo *standard* também confere ao magistrado certo espaço de liberdade na determinação da versão dos fatos, pois admite a condenação, apesar da existência de outras hipóteses razoáveis, embora menos prováveis, que igualmente pudessem explicar os fatos.

Contudo, é amplamente consensual a ideia de que, no processo penal, o *standard* que deve orientar uma condenação criminal é o da "prova para além da dúvida razoável" (*proof beyond a reasonable doubt*), importado do direito anglo-saxão, desenvolvido pela jurisprudência norte-americana[55] e largamente incorporado ao sistemas jurídicas de tradição continental.[56] A interpretação mais aceita desse *standard* probatório demanda prova incriminatória suficiente para descartar, por completo,

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[52] PORTUGAL. Tribunal Constitucional, Acórdão n. 521/2018, 3ª Seção, Rel. Cons. Gonçalo de Almeida Ribeiro, j. 17/10/2018. Disponível em: <https://www.tribunalconstitucional.pt/tc/acordaos/20180521.html>; Acesso em: 18 mar. 2022.

[53] TARUFFO, Michelle. *A prova*. São Paulo: Marcial Pons, 2014, p. 135.

[54] PALMA. Andrea Galhardo. Breve análise comparativa dos modelos de valoração e constatação da prova penal – standards probatórios – no Brasil, nos EUA e na Itália: crítica à regra beyond any reasonable doubt ou oltre ragionevole dubbio (além da dúvida razoável). In: FILIPPO, Thiago Baldani Gomes de; ONODERA, Marcus Vinicius Kiyoshi (coords.). *Brasil e EUA:* temas de direito comparado. São Paulo: Escola Paulista da Magistratura, 2017, p. 287-338.

[55] Cf., a propósito, LAUDAN, Larry. *Truth, Error, and Criminal Law*: an essay in legal epistemology. Nova York: Cambridge University Press, 2006.

[56] Cf., sobre a recepção dessa doutrina em países de tradição continental, cf. CLERMONT, Kevin M; SHERWIN, Emily. A Comparative View of Standards

qualquer versão alternativa e razoável dos fatos, que possa inocentar o acusado. Ou seja, exige uma quase certeza sobre a culpabilidade do réu.

Há formulações dogmáticas que exemplificam esse grau de exigência em termos probabilísticos, sugerindo que as provas incriminatórias devem apontar para uma probabilidade de pelo menos 99% de que os fatos tenham ocorrido de acordo com a versão acusatória, em contraste aos 51% exigidos para o atingimento da "preponderância da prova" (*preponderant evidence*)[57] e aos 75% para "prova clara e convincente" (*clear and convincent evidence*).[58] Contudo, como o Direito não se sujeita à lógica puramente matemática, os critérios para aferição do atendimento ao padrão da "prova para além da dúvida razoável" devem estar submetidos a *parâmetros jurídicos* seguros,[59] cujos contornos o direito comparado tem progressivamente consolidado.

Nesse sentido, o direito espanhol oferece importantes balizas para a determinação do *standard* de prova necessário para uma condenação criminal.[60] A doutrina espanhola afirma que devem concorrer os seguintes fatores para se considerar provada a culpabilidade do acusado: (i) os elementos probatórios dos autos devem explicar a hipótese acusatória, bem como (ii) refutar todas as outras hipóteses plausíveis que conduziriam

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of Proof. *The American Journal of Comparative Law*, v. 50, n. 2, 2002, p. 243–275.

57 FLETCHER, George P. Conceptos básicos de Derecho Penal. Valência: Ed. Tirant lo Blanch, 1997, p. 36-37.

58 PALMA, Andrea Galhardo. *Op. cit.*, p. 297.

59 Até porque, como adverte a doutrina, no processo penal não se provam, a rigor, os fatos, mas sim a veracidade de enunciados factuais. A expressão "prova do fato" é utilizada por razões pragmáticas, pois é extensamente acolhida por doutrina e jurisprudência. Cf. UBERTIS, Giulio. *La Prova Penale:* Profili Giuridici ed Epistemologici. Turim: UTET Librería, 1999, p. 8 e ss.

60 Confira-se: "Tanto a jurisprudência do Tribunal Constitucional como a do Supremo Tribunal, em praticamente todos os casos em que fizeram uso de seu poder para anular ou casar sentenças recorridos, foram, precisamente, como consequência do entendimento de que as evidências poderiam levar não apenas à tese condenatória, mas também a outras teses alternativas igualmente razoáveis de conteúdo absolutório, que supõem, em minha opinião, uma clara aplicação das consequências implícitas no princípio interpretativo 'in dubio pro reo'" (BELLOCH JULBE, Juan Alberto. "*La prueba indiciaria" en la sentencia penal*. Madri: Consejo General del Poder Judicial, 1992, p. 77).

à inocência do acusado. Caso contrário, impõe-se a absolvição.[61] Essa formulação teórica foi incorporada à jurisprudência do Tribunal Constitucional e do Tribunal Supremo da Espanha.

De acordo com o Tribunal Supremo da Espanha, o princípio da presunção de inocência impede o juiz de optar pela hipótese acusatória, sempre que os elementos probatórios constantes nos autos sejam compatíveis com versão alternativa para os fatos favorável ao acusado, ainda que esta seja menos provável.[62] Com efeito, na STS 4500/2002, aquele Tribunal determinou a cassação de sentença fundada em provas que permitiam uma "conclusão distinta igualmente racional e plausível" para os fatos.[63] Na mesma linha, na STS 7905/2000, o mesmo Tribunal reconheceu violação ao princípio do *in dubio pro reo* "dado não ser possível excluir a possibilidade de que os fatos tenham ocorrido de forma mais favorável ao acusado".[64] O Tribunal também tem aplicado essa regra para afastar a configuração de circunstâncias agravantes e causas de aumento de pena.[65]

Como se vê, o Tribunal Supremo da Espanha tem assentado que apenas a plena convicção sobre culpabilidade do acusado permite a sua

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61 FERRER BELTRÁN, Jordi. Los estándares de prueba en el proceso penal español. *Cuadernos electrónicos de filosofía del derecho*, nº 15, 2007. Disponível em: <https://www.uv.es/CEFD/15/ferrer.pdf>. Acesso em 18 mar. 2022. Em sentido crítico a essa formulação, reafirmando a possibilidade de subjetivismo também na aplicação desses parâmetros, cf. NIEVA FENOLL, Jordi. La razón de ser de la presunción de inocencia. *Indret*. Barcelona, v.1, 2016, p. 12.

62 ESPANHA. Tribunal Supremo, STS n° 6584/1998, Sala de Penal, Rel. Jose Jimenez Villarejo, j. 10/11/1998. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/a2bac224b8dd0d88/20031011>. Acesso em: 18 mar. 2022.

63 ESPANHA. Tribunal Supremo, STS n° 4500/2002, Sala de Penal, Rel. Diego Antonio Ramos Gancedo, 19/06/2002. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/1670a259eb7a5ae3/20030918>. Acesso em: 18 mar. 2022.

64 ESPANHA. Tribunal Supremo, STS n° 7905, Sala de Penal, Rel. Enrique Bacigalupo Zapater, j. 31/10/2000. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/1670a259eb7a5ae3/20030918>. Acesso em: 18 mar. 2022.

65 ESPANHA. Tribunal Supremo, STS n° 3209/2002, Sala de Penal, Rel. Perfecto Agustin Andres Ibañes, j. 07/05/2002. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/a2bac224b8dd0d88/20031011>. Acesso em 18 mar. 2022.

condenação.[66] Esse parâmetro geral ganha maior densidade a partir da compreensão manifestada por aquela corte em múltiplas oportunidades, no sentido de que o princípio da presunção de inocência, na sua vertente de regra de juízo, é violado nos casos em que a condenação ocorre mesmo diante da existência de versão defensiva alternativa favorável ao acusado, que se compatibiliza com o seu estado de inocência, e que também pode explicar os fatos, à luz do conjunto probatório obtido.[67]

No Brasil, o Supremo Tribunal Federal adota abertamente o *standard* da prova para além da dúvida razoável[68] e confere ao art. 5º, LVII, da Constituição Federal interpretação similar àquela atribuída pela jurisprudência espanhola sobre o princípio da presunção de inocência. Afirma nossa Corte Suprema que a presunção de inocência "impõe a necessidade de um quadro probatório robusto, com provas de todos os elementos da acusação", além de que "as provas devem ser aptas a gerar a certeza da responsabilidade criminal do acusado, com o afastamento de todas as hipóteses contrárias, desde que razoáveis, a essa convicção".[69]

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[66] Da remansosa jurisprudência do Tribunal Supremo Espanhol em relação a esta questão, vale destacar os seguintes: ESPANHA. Tribunal Supremo, STS n° 1248/2003, Sala de Penal, Rel. Candido Conde-Pumpido Touron, j. 25/02/2003. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/1670a259eb7a5ae3/20030918>. Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Supremo, STS 7829/2002, Sala de Penal, Rel. Diego Antonio Ramos Gancedo, j. 25/11/2002. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/a2bac224b8dd0d88/20031011%3E>. Acesso em: 18 mar. 2022.

[67] Cf. ESPANHA. Tribunal Supremo, STS n° 444/2001, Sala de Penal, Rel. Enrique Bacigalupo Zapater, j. 22/03/2001. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/a2bac224b8dd0d88/20031011%3E>. Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Supremo, STS n° 702/2001, Sala de Penal, Rel. Enrique Bacigalupo Zapater, j. 05/02/2001. Disponível em: <https://www.poderjudicial.es/search/TS/openDocument/a2bac224b8dd0d88/20031011%3E.>. Acesso em: 18 mar. 2022

[68] BRASIL. Supremo Tribunal Federal, AP n° 694, 1ª Turma, Rel. Min. Rosa Weber, j. 31/08/2017. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=13501194>. Acesso em: 18 mar. 2022; e BRASIL. Supremo Tribunal Federal, AP n° 676, 1ª Turma, Rel. Min. Rosa Weber, j. 17/10/2017. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14300838>. Acesso em: 18 mar. 2022.

[69] BRASIL. Supremo Tribunal Federal, AP n° 580, 1ª Turma, Rel. Min. Rosa Weber, j. 13/12/2016. Disponível em: <http://www.stf.jus.br/portal/

Nesse sentido, não é dado ao juiz, ante o estado de dúvida, escolher a versão dos fatos atribuída pela acusação. No Brasil, de acordo com o Supremo Tribunal Federal, "tudo o que oferece duas vertentes lógicas não permite ao magistrado concluir em prejuízo do acusado".[70]

Ainda mais claros são os critérios propostos pela doutrina italiana para a identificação da *prova para além da dúvida razoável* cuja satisfação depende dos seguintes requisitos:

> i) deve ser sustentada em todos os elementos que a constituem; ii) a contraprova não pode estilhaçar seu núcleo essencial; iii) a hipótese contrária deve revelar-se indemonstrável ou não plausível; iv) a hipótese acusatória deve assumir uma coerência lógica, isto é, não deve ser auto-contraditória; v) a hipótese deve ser a única congruente no que diz respeito aos fatos; ou seja, a hipótese – sem ter a pretensão de explicar todos os aspectos do caso – deve ser a única que está em condições de refletir os fatos fundamentais e de explicar, segundo esquemas de racionalidade e bom senso (isto é, segundo os esquemas cognoscitivos próprios de uma determinada colectivadade numa determinada época).[71]

Ocorre que o *uso distorcido* da fórmula de inocência até prova para além de qualquer dúvida razoável pode propiciar equivocadas comparações entre duas versões dos fatos, com o objetivo de identificar a que seria *mais razoável*. Essa ótica transforma completamente o cânone em questão. O resultado prático dessa distorção é que a menor probabilidade da versão defensiva acaba corroborando a versão acusatória.[72] E

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inteiroTeor/obterInteiroTeor.asp?idDocumento=13086712>. Acesso em: 18 mar. 2022.

[70] BRASIL. Supremo Tribunal Federal, AP n° 465, Tribunal Pleno, Rel. Min. Cármen Lúcia, j. 24/04/2014. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7065801>. Acesso em: 18 mar. 2022.

[71] Francesco Iacovello. *La motivazione dela Sentenza Penale e il suo controlo in Cassazione*. Milão: Giufreé, 1997, p. 778 *apud* LOPES, José António Mouraz. *A fundamentação da sentença no sistema penal português:* legitimar, diferenciar, simplificar. Coimbra: Edições Almedina, 2019, p. 237.

[72] O *standard* da prova para além da dúvida razoável não foi incorporado de maneira uniforme no direito brasileiro. Como advertiu Guilherme Lucchesi, "[c]ausa espanto o fato de um *standard* probatório desenvolvido para ser uma

tal conclusão é abertamente contrária à lógica subjacente à fórmula de inocência até prova para além de qualquer dúvida razoável. Afinal, como tem advertido a Corte de Cassação italiana, a mera dúvida sobre a tese defensiva já é suficiente para excluir a condenação.[73]

Apesar de incumbir à acusação o ônus da prova no processo penal, o acusado tem o direito de produzir prova sobre a sua inocência. Mas não é possível exigir da defesa, para a demonstração da inocência do acusado, o mesmo grau de prova demandado da acusação para comprovar a culpabilidade do acusado. Para a absolvição, basta à defesa introduzir uma dúvida razoável ou plausível acerca da versão acusatória, com o que deverá prevalecer o princípio da presunção de inocência.[74] Nesse sentido, registrou Jordi Ferrer Beltrán:

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forma rígida de evitar condenações indevidas seja defendida como um meio de mitigar o controle sobre a atividade de valoração de provas no Brasil. [...] Ao que parece, o recurso à expressão 'prova para além de dúvida razoável' tem sido utilizado como simples adorno retórico da decisão, sem que esteja cumprindo alguma efetiva função de controle" (LUCCHESI, Guilherme Brenner. O necessário desenvolvimento de standards probatórios compatíveis com o direito processual penal brasileiro. *Revista Brasileira de Ciências Criminais*, São Paulo, v. 27, n. 156, jun. 2019, p. 165-188).

[73] Enquanto o juízo de condenação pressupõe a certeza processual da culpabilidade, a absolvição não pressupõe a certeza da inocência, mas a simples não certeza – e, assim, uma dúvida razoável – da culpa penal.

[74] "*Em vista de tudo isso, pode-se concluir que, no processo criminal, diferentemente do que ocorre na ordem civil, enquanto o ônus da prova da acusação implica na necessidade de esta demonstrar a realidade dos fatos em que se sustenta a pretensão, ao acusado é suficiente gerar no tribunal uma dúvida razoável sobre a confiabilidade da versão acusatória. Assim, o grau de conhecimento judicial sobre os fatos alegados por ele é significativamente menor do que aquele que deve ser alcançado pela acusação. Isso significa, em última análise, que a defesa deve ter como objetivo mínimo gerar uma dúvida razoável que debilite a hipótese acusatória, e pode fazê-lo de duas maneiras: em primeiro lugar, limitando-se a atacar a credibilidade das provas de acusação ou, em segundo lugar, em vez disso, apresentando provas sobre os elementos de defesa. Vislumbra-se assim uma diferença substancial com a regra do juízo civil: enquanto no processo civil o réu verá rechaçada sua pretensão quando existam dúvidas acerca de algum fato impeditivo, extintivo ou excludente, no processo criminal a existência da dúvida – graças à presunção de inocência, que gera essa importante diferença – , beneficia, em qualquer caso, o acusado; em outras palavras, o réu, ao contrário do acusado, tem o ônus de convencer o tribunal da realidade dos fatos que lhe são favoráveis*" (FERNÁNDEZ LÓPEZ, Mercedes. *Presunción de inocencia y carga de la prueba en el proceso penal*. Tese de (Doutorado em Direito) – Facultad de Derecho, Universidad

> Não existe razão para que os *standards* de prova aplicáveis à hipótese de culpabilidade e à hipótese de inocência sejam iguais. Com efeito, a razão que temos para aplicar um *standard* de prova muito exigente no processo penal parece ser que o bem em jogo, *i.e.*, a liberdade do acusado, é muito valioso e, portanto, é preciso ter um alto grau de probabilidade de acertar para sacrificá-lo. Mas essa razão não opera, obviamente, no caso da ou das hipóteses da defesa. Se aumentamos as exigências probatórias para diminuir as probabilidades de que um sujeito inocente seja condenado e, portanto, privado de sua liberdade, não tem sentido aplicar as mesmas exigências à hipótese da defesa. Por essa razão, no processo penal teremos *standards* de prova assimétricos para a acusação e para a defesa.[75]

As tentativas mais bem-sucedidas no direito comparado de racionalizar o padrão de teste subordinam a demonstração da tese acusatória à satisfação, no mínimo, das seguintes condições: a hipótese incriminatória deve ser capaz de explicar os dados disponíveis, integrando-os de forma coerente; e todas as outras hipóteses plausíveis, que permitam explicar os mesmos dados e que são compatíveis com a inocência do acusado, devem ter sido refutadas.[76] Não há dúvida de que esse *standard* expressa ao menos um inequívoco significado principal: a exigência de "um grau particularmente alto de confirmação probatória da culpabilidade do imputado, que se aproxima da certeza, dado que só admite a presença

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de Alicante, 2004, p. 323, tradução livre). Cf., no mesmo sentido, ACCATINO, Daniela. Certezas, dudas y propuestas en torno al estándar de la prueba penal. *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, Valparaíso, n. 37, 2011, p. 508. Disponível em: <http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-68512011000200012&lng=es&nrm=iso>. Acesso em: 16 mar. 2022.

75 FERRER BELTRÁN, Jordi. Uma concepção minimalista e garantista de presunção de inocência. *Revista Brasileira de Direito Processual Penal*, v. 4, n. 1, jan./abr. 2018, p. 176.

76 FERRER BELTRÁN, Jordi. *La valutazione razionale della prova*. Milão: Giuffrè, 2012, p. 53. Para uma formulação semelhante, cf. ACCATINO, Daniela. Certezas, dudas y propuestas en torno al estándar de la prueba penal. *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, Valparaíso, n. 37, 2011, p. 483-511. Disponível em: <http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-68512011000200012&lng=es&nrm=iso>. Acesso em: 16 mar. 2022.

de dúvidas 'irrazoáveis', com a evidente intenção de reduzir ao mínimo o risco de condenação de um inocente".[77]

Para além dessas diretrizes gerais a respeito do alcance do princípio da presunção de inocência como *regra de juízo* – em grande medida a partir do desenvolvimento jurisprudencial do *standard* da *prova para além da dúvida razoável* –, algumas concretizações dessa doutrina merecem especial atenção pela relevância que apresentam para a garantia da eficácia desse direito fundamental. Em particular, será examinado o modo como o princípio da presunção de inocência, nessa dimensão da exigência de certeza probatória para a condenação criminal, tem sido concretamente tutelado por tribunais constitucionais na supervisão de casos concretos. Para tanto, serão particularmente relevantes os precedentes do Tribunal Constitucional da Espanha e da Corte Constitucional da Colômbia.

3. A verificação de violações individuais ao princípio da presunção de inocência pelos tribunais constitucionais: mecanismos de controle da suficiência do *standard* probatório nas sentenças condenatórias

Na dogmática constitucional, diz-se que os direitos fundamentais possuem dupla dimensão – subjetiva e objetiva. A dimensão subjetiva dos direitos fundamentais corresponde à sua faceta de direitos subjetivos. Já a dimensão objetiva decorre do reconhecimento de que, além de direitos subjetivos, os direitos fundamentais também representam bens jurídicos extremamente importantes para as sociedades democráticas, que devem ser protegidos e promovidos pelo Estado e pela comunidade.[78] Entre as principais consequências dessa *dimensão objetiva*, figura a afirmação de um direito a *organização* e *procedimento* adequados à tutela efetiva dos bens jurídicos subjacentes aos direitos fundamentais.[79]

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[77] TARUFFO, Michele. *Simplemente la verdade:* El juez y la construcción de los hechos. Madrid: Marcial Pons, 2010, p. 249, tradução livre.

[78] Cf. HESSE, Konrad. *Elementos de Direito Constitucional da República Federal da Alemanha*. Porto Alegre: Sergio Antonio Fabris Editor, 1998, p. 302-310.

[79] Cf. ALEXY, Robert. *Teoria dos Direitos Fundamentais*. São Paulo: Malheiros, 2008, p. 472-474.

A existência de um direito à organização e procedimento parte da premissa realista de que os direitos não se efetivam por milagre ou prestidigitação, dependendo, portanto, de providências estatais como a instituição de órgãos públicos especializados ou, ainda, da criação de mecanismos procedimentais apropriados para que possam gerar os seus efeitos no mundo concreto.[80] Dessa maneira, os direitos fundamentais ao acesso à justiça e à tutela jurisdicional efetiva impõem que os instrumentos processuais sejam aptos a responder, de modo adequado, à violação dos direitos materiais que visam a salvaguardar.[81]

Nesse diapasão, o direito ao procedimento, subjacente à dimensão objetiva do acesso à justiça e da efetividade da tutela jurisdicional, recomenda o controle, por parte dos tribunais constitucionais, da observância, pelas instâncias inferiores, do conteúdo básico do princípio da presunção de inocência como *regra de juízo*. Afinal, pouco adiantaria proclamar a necessidade de que a condenação esteja fundada em certo nível de certeza probatória – *i.e.* "limiar mínimo de certeza quanto ao fato

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[80] Cf. MENDES, Gilmar Ferreira. Os direitos fundamentais e seus múltiplos significados na ordem constitucional. *Revista Jurídica Virtual*, v. 2, n. 13, jun. 1999; e CANOTILHO, J. J. Gomes. *Direito Constitucional e Teoria da Constituição*. Coimbra: Almedina, 1998, p. 440.

[81] É o que explica Luiz Guilherme Marinoni: "Será que o direito à tutela jurisdicional é apenas o direito ao procedimento legalmente instituído, não importando a sua capacidade de atender de maneira idônea o direito material? Ora, não tem cabimento entender que há direito fundamental à tutela jurisdicional, mas que esse direito pode ter a sua efetividade comprometida se a técnica processual houver sido instituída de modo incapaz de atender ao direito material. Imaginar que o direito à tutela jurisdicional é o direito de ir a juízo através do procedimento legalmente fixado, pouco importando a sua idoneidade para a efetiva tutela dos direitos, seria inverter a lógica da relação entre o direito material e o direito processual. Se o direito de ir a juízo restar na dependência da técnica processual expressamente presente na lei, o processo é que dará os contornos do direito material. Mas, deve ocorrer exatamente o contrário, uma vez que o primeiro serve para cumprir os desígnios do segundo. Isso significa que a ausência de técnica processual adequada para certo caso conflitivo concreto representa hipótese de omissão que atenta contra o direito fundamental à efetividade da tutela jurisdicional" (MARINONI, Luiz Guilherme. O direito à tutela jurisdicional efetiva na perspectiva da teoria dos direitos fundamentais. *Revista Peruana de Derecho Procesal*, n. 07, 2004, p. 199-258).

probando para que este deva ser dado como provado"[82] – se as sentenças condenatórias pudessem considerar o réu culpado com base em exame incompleto do material probatório ou em fundamentação completamente desprovida de razoabilidade.

Daí ter ganhado relevância no campo do direito processual penal a ideia de que o direito fundamental à presunção de inocência se torna operativo, em grande medida, em razão da possibilidade concedida à defesa de, por meio dos recursos, fragilizar "a tese acusatória assumida pelo julgador a partir do lastro probatório produzido, verificando se realmente foi superada a dúvida razoável".[83] O sistema recursal deve ser apto a propiciar um "controle objetivo sobre a dúvida",[84] de modo a permitir uma verificação segura sobre o atendimento, pela sentença condenatória, do *standard* probatório exigido pelo critério da culpa para além da dúvida razoável.

Conquanto se saiba que, via de regra, o meio adequado para o controle da suficiência da motivação da sentença condenatória é o recurso ordinário – *e.g.* apelação no sistema recursal brasileiro –, não se nega que os Tribunais constitucionais podem realizar um controle excepcional, embora de grande relevância estrutural, sobre o atendimento aos requisitos mínimos de fundamentação para que uma condenação seja compatível com a dimensão do direito à presunção de inocência ligada à demonstração lógica da inexistência de dúvida razoável sobre a tese acusatória.

Ademais, embora não sejam desprezíveis os riscos de subjetivismo na aplicação da fórmula da *prova para além da dúvida razoável*, esse *standard*

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[82] A expressão foi utilizada pelo Tribunal Constitucional de Portugal em PORTUGAL. Acórdão n° 521/2018, 3ª Seção, Rel. Cons. Gonçalo de Almeida Ribeiro, j. 17/10/2018. Disponível em: <https://www.tribunalconstitucional.pt/tc/acordaos/20180521.html>. Acesso em: 18 mar. 2022.

[83] VASCONCELLOS, Vinicius Gomes de. A prova no processo penal: a importância da valoração do lastro probatório e de seu controle por meio recursal. *Revista Eletrônica do Curso de Direito da UFSM*, Santa Maria, v. 13, n. 2, ago. 2018, p. 715.

[84] ALCÁCER GUIRAO, Rafael. *El derecho a una segunda instancia con todas las garantías*. Valencia: Tirant lo Blanch, 2013. p. 106-107 *Apud* VASCONCELLOS, Vinicius Gomes de. A prova no processo penal: a importância da valoração do lastro probatório e de seu controle por meio recursal. *Revista Eletrônica do Curso de Direito da UFSM*, Santa Maria, v. 13, n. 2, ago. 2018, p. 715.

desempenha, a partir da jurisprudência dos tribunais constitucionais, um importante papel de racionalização da fundamentação exigida para a condenação precisamente na medida em que impõe, no mínimo, um dever de eliminação justificada das hipóteses absolutórias. Esse patamar mínimo de motivação determinado pela regra de juízo contida no princípio da presunção de inocência foi bem resumido na doutrina espanhola:

> No entanto, a presunção de inocência não só reproduz o dever genérico de motivar senão estabelece uma forma específica (e mais exigente) de cumpri-lo. Vejamos; combinando o 'ônus probandi' da acusação com o 'in dubio pro reo', resulta que cabe à acusação provar que os fatos aconteceram desta ou daquela forma, bastando à defesa argumentar que não excluiu razoavelmente que os eventos poderiam ter acontecido de outra forma. Assim, infere-se, então, que a motivação de uma condenação deve enfrentar um duplo desafio: por um lado, justificar que a hipótese fática considerada é congruente com os elementos probatórios disponíveis e ademais coerente; por outro lado, desmontar a hipótese adversa pelos dados que ela deixa sem explicação e/ou porque a história resultante (reconstrução) é inverossímil.[85]

Ao menos nos países em que há acesso individual ao Tribunal Constitucional, percebe-se uma tendência de desenvolvimento de parâmetros que permitam o controle, ainda que em caráter excepcional, da legitimidade da condenação criminal à luz do princípio da presunção de inocência.

É verdade que, em toda parte do mundo, o percentual de condenações criminais anuladas ou revistas por tribunais constitucionais é baixo. E nem poderia ser diferente, já que não cabe ao tribunal constitucional aferir a justiça ou injustiça de cada decisão penal condenatória. Apesar disso, o acesso individual aos tribunais constitucionais pode dar uma especial contribuição à proteção efetiva da presunção de inocência. E a experiência comparada oferece importantes subsídios para confirmar essa ideia. A jurisprudência do Tribunal Constitucional da Espanha é

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[85] IGARTUA SALAVERRÍA, Juan. Motivación de las sentencias, presunción de inocencia, in dubio pro reo. In: Anuario de derechos humanos, núm. 2, 2001, p. 478-479.

particularmente importante a esse respeito. Apesar de reafirmar sistematicamente a máxima de que os recursos de amparo que alegam desrespeito ao direito à presunção de inocência devem ser examinados sob a ótica de que não cabe ao tribunal constitucional valorar a atividade probatória praticada no processo penal,[86] o tribunal também tem enfatizado que o escopo do controle da jurisdição constitucional nesse campo pode ser assim resumido:

> A função do tribunal de proteção do direito à presunção de inocência passa, em primeiro lugar, pela supervisão de que a atividade probatória foi realizada com as garantias necessárias à sua adequada valoração e à preservação do direito de defesa. Em segundo lugar, traz consigo a comprovação de que o órgão jurisdicional expõe as razões que o levaram a estabelecer o relato de fatos comprovados com base na atividade probatória realizada. Em terceiro e último lugar, do ponto de vista do resultado da avaliação, o trabalho do Tribunal limita-se a fiscalizar externamente a razoabilidade do discurso que relaciona a atividade probatória com o relato fático resultante. A função do tribunal não é julgar o resultado alcançado, mas o controle externo do raciocínio lógico seguido para alcançá-lo. O Tribunal Constitucional, em sua decisão, deve limitar-se a verificar que a prova existente foi obtida e praticada de acordo com a Constituição, que é exigível e que, consequentemente, os fatos declarados provados podem dela ser inferidos de forma razoável e não arbitrária.[87]

Com base nessa lógica voltada a garantir um patamar mínimo de proteção ao direito fundamental à presunção de inocência como *regra de juízo*, uma das principais consequências que o Tribunal Constitucional espanhol extrai da necessidade de controlar a *razoabilidade* e *racionalidade*

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[86] ESPANHA. Tribunal Constitucional, STC n° 189/1998, 2ª Sala, Rel. Carles Viver Pi-Sunyer, j. 28/09/1998. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/3691>. Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Constitucional, STC n°220/1998, 2ª Sala, Rel. Carles Viver Pi-Sunyer, j. 16/11/1998. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/3722>. Acesso em: 18 mar. 2022.

[87] ESPANHA. Tribunal Constitucional, STC n° 67/2021, Tribunal Pleno, Rel. Juan Antonio Xiol Ríos, j. 17/03/2021. Disponível em: <https://hj.tribunalconstitucional.es/es/Resolucion/Show/26650>. Acesso em: 18 mar. 2022.

com que a sentença condenatória valora as provas reside na exigência dirigida ao juiz criminal de *valoração integral do conjunto probatório*.[88]

A jurisprudência constitucional dos mais diversos quadrantes tem oferecido importante contribuição no tratamento da questão concernente ao controle da motivação das decisões que se omitem na apreciação de parte relevante do conjunto probatório. Nesse sentido, o Tribunal Constitucional da Espanha tem reconhecido a violação ao direito à tutela jurisdicional efetiva, na perspectiva que tem o jurisdicionado de obter uma resposta judicial motivada sobre a pretensão pleiteada, nos casos em que as sentenças não promovem a valoração expressa ou tácita do conjunto probatório como um todo. Tal omissão impede que as partes conheçam as razões que conduziram o órgão judicial a descartar a valoração de parte das provas produzidas.[89] A jurisprudência do Tribunal Constitucional da Espanha afirma ainda que o direito à tutela jurisdicional efetiva encontra máxima efetividade no campo do processo penal, no qual a preterição da prova introduzida pela defesa importa igualmente em vulneração ao princípio da presunção de inocência.[90]

De fato, a jurisprudência constitucional espanhola tem destacado que o controle que compete ao tribunal constitucional em relação às alegações de violação à presunção de inocência se estende a verificar se a versão ou a prova fornecida para a defesa não foi submetida a avaliação, exigindo a ponderação dos diferentes elementos probatórios.[91] Há

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88 A doutrina espanhola também tem enfatizado o dever do julgador de considerar todas as provas apresentadas pela parte perdedora no processo penal. Cf. IGARTUA SALAVERRÍA, Juan. *La Motivación de Las Sentencias, Imperativo Constitucional*. Madrid: Centro de Estudios Políticos y Constitucionales, 2003, p. 162.

89 ESPANHA. Tribunal Constitucional, STC n° 9/2015, 1ª Sala, Rel. Francisco Pérez de los Cobos Orihuel, j. 02/02/2015. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/24295>. Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Constitucional, STC n° 139/2009, 2ª Sala, Rel. Pascual Sala Sánchez, j. 17/07/2009. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6558>. Acesso em 18 mar. 2022.

90 ESPANHA. Tribunal Constitucional, STC n° 61/2019, 1ª Sala, Rel. Cándido Conde-Pumpido Tourón, j. 10/06/2019. Disponível em: <https://hj.tribunalconstitucional.es/es/Resolucion/Show/25927>. Acesso em 18 mar. 2022.

91 ESPANHA. Tribunal Constitucional, STC n° 104/2011, 2ª Sala, Rel. Elisa Pérez Vera, j. 20/06/2011. Disponível em: <https://hj.tribunalconstitucional.

precedente por meio do qual o tribunal considerou violado o direito à presunção de inocência em caso no qual a sentença deixou de valorar determinados depoimentos testemunhais favoráveis ao acusado. Em outra decisão, o tribunal constitucional considerou violado o direito à presunção de inocência em razão do fato de que o tribunal inferior deixara de valorar e considerar parte essencial da atividade probatória.[92]

Em igual direção, a jurisprudência da corte constitucional da Colômbia caracteriza a omissão da decisão em realizar a valoração integral do acerco probatório dos autos como um *defeito fático* sujeito a controle judicial estrito das instâncias revisoras.[93] O defeito fático se configura nas hipóteses em que o julgador ignora uma realidade probatória determinante para o resultado do processo. Nesses casos, a corte constitucional colombiana tem reiterado que o controle dos defeitos fáticos se fundamenta na premissa de que, apesar de a análise do acervo probatório ser orientado por certa margem de discricionariedade, o juiz deve decidir com base em critérios objetivos e racionais.[94]

Ainda segundo a jurisprudência da corte constitucional colombiana, a independência judicial "jamais poderá ser exercida de maneira arbitrária; sua atividade valorativa implica, necessariamente, a adoção de critérios objetivos, não simplesmente pressupostos pelo juiz, racionais, é dizer, que ponderem a magnitude e o impacto de cada uma das provas alegadas, e que materializem a função da administração da justiça que se exige dos funcionários judiciais sobre a base de provas colhidas".[95] Sob

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es/es-ES/Resolucion/Show/6886>. Acesso em: 18 mar. 2022.

92 ESPANHA. Tribunal Constitucional, STC n° 73/2019, 2ª Sala, Rel. Fernando Valdés Dal-Ré, j. 20/05/2011. Disponível: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/25936>. Acesso em: 18 mar. 2022.

93 COLÔMBIA. Corte Constitucional, Sentencia T-671/17, 1ª Sala de Revisão, Rel. Carlos Bernal Pulido, j. 07/11/2017. Disponível em: <https://www.corteconstitucional.gov.co/relatoria/2017/t-671-17.htm>. Acesso em: 18 mar. 2022.

94 COLÔMBIA. Corte Constitucional, Sentencia T-969/09, 2ª Sala de Revisão, Rel. María Victoria Calle Corre, j. 18/12/2009. Disponível em: <https://www.corteconstitucional.gov.co/relatoria/2009/t-969-09.htm>. Acesso em 18 mar. 2022.

95 COLÔMBIA. Corte Constitucional, Sentencia SU-074/14, Tribunal Pleno, Rel. Mauricio González Cuervo, j. 05/02/2014. Disponível em: <https://www.

essa perspectiva, o princípio do livre convencimento motivado não afasta a possibilidade do reconhecimento de um *defeito fático* por ausência de valoração do conjunto probatório.

A jurisprudência dos tribunais constitucionais da Espanha e da Colômbia mostra que é necessário construir parâmetros que permitam o controle por parte da jurisdição constitucional da violação pelas instâncias ordinárias do dever de motivação das decisões judiciais decorrente da omissão relevante na análise integral do conjunto probatório. Embora seja comum aos tribunais constitucionais a preocupação em evitar que a jurisdição constitucional seja acionada para revisar o exame das provas empreendido pelas instâncias ordinárias, a jurisprudência estrangeira tem mostrado a relevância do controle realizado pelos tribunais constitucionais da observância do dever de análise integral da prova, especialmente no âmbito do processo penal. Nessa perspectiva, incumbe aos tribunais constitucionais verificar se as decisões condenatórias proferidas pelas instâncias ordinárias estão racionalmente fundamentadas. Como adverte a doutrina espanhola, embora o Tribunal constitucional não possa substituir a decisão da Corte ordinária, pode "censurar a razoabilidade do discurso justificatório" por ela empregada na condenação.[96]

É relevante notar que o descumprimento desse dever de exame integral das provas produzidas em contraditório no processo penal passou a ser reconhecido por tribunais constitucionais como uma modalidade de violação direta das cláusulas constitucionais do direito fundamental à presunção de inocência. Além de enfatizar esse dever de valoração integral do conjunto probatório, o Tribunal Constitucional da Espanha chega até mesmo a controlar, em situações excepcionais, a legitimidade da *motivação* das decisões sobre os requerimentos probatórios.[97] Isso

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corteconstitucional.gov.co/relatoria/2014/SU074-14.htm>. Acesso em: 18 mar. 2022.

[96] IGARTUA SALAVERRÍA, Juan. Motivación de las sentencias, presunción de inocencia, in dubio pro reo. In: Anuario de derechos humanos, núm. 2, 2001, p. 471.

[97] ESPANHA. Tribunal Constitucional, STC n° 233/1992, 2ª Sala, Rel. Alvaro Rodríguez Bereijo, j. 14/12/1992. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2120>. Acesso em: 18 mar. 2022; e ESPANHA. STC n° 78/2001, 2ª Sala, Rel. Diego González Campos,

para garantir que esse conjunto probatório a que o juiz deve se referir de maneira completa não seja arbitrariamente formado em prejuízo do acusado. Nesse sentido, o tribunal espanhol tem afirmado a sua competência para, por meio de recurso de amparo – equivalente aos nossos recursos de natureza extraordinária – controlar a legitimidade constitucional de decisões que indeferem a produção de provas relevantes sem motivação alguma, mediante a interpretação irrazoável ou aplicação arbitrária da lei,[98] anulando-as sempre que da falta imotivada da produção da prova relevante requerida decorrer prejuízo ao direito de defesa.[99]

Ainda nesse contexto, a jurisprudência do Tribunal Constitucional da Espanha firmou-se no sentido de que o procedimento constitucional de amparo – que, naquele país, é recurso análogo aos nossos recursos de natureza extraordinária – é o veículo adequado para que o tribunal constitucional promova a revisão das decisões tomadas pelos órgãos jurisdicionais que tenham promovido uma análise incompleta do acervo probatório. De acordo com o tribunal constitucional daquele país, a possibilidade de controle judicial da motivação das decisões que valoram provas se insere no âmbito do direito à tutela jurisdicional efetiva.[100] Exatamente no mesmo sentido é a orientação jurisprudencial da Corte Constitucional da Colômbia firmada a propósito dos *defeitos fáticos*.[101]

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j. 26/03/2001. Disponível em: <https://hj.tribunalconstitucional.es/ca-ES/Resolucion/Show/4374>. Acesso em: 18 mar. 2022.

98 ESPANHA. Tribunal Constitucional, STC n° 30/1986, 2ª Sala, Rel. Antonio Truyol Serra, j. 20/02/1986. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/593>. Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Constitucional, STC n° 69/2001, 2ª Sala, Rel. Antonio Truyol Serra, j. 17/03/2001. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/593>. Acesso em: 18 mar. 2022.

99 ESPANHA. Tribunal Constitucional, STC n° 1/1996, 2ª Sala, Rel. Tomás S. Vives Antón, j. 15/01/1996. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/3053>. Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Constitucional, STC n° 101/1999, 2ª Sala, Rel. Carles Viver Pi-Sunyer, j. 31/03/199. Disponível em: <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/3843>. Acesso em: 18 mar. 2022.

100 ESPANHA. Tribunal Constitucional, STC n° 61/2019, 1ª Sala, Rel. Cándido Conde-Pumpido Tourón, j. 06/05/2019. Disponível em: <https://hj.tribunalconstitucional.es/es/Resolucion/Show/25927>. Acesso em: 18 mar. 2022.

101 COLÔMBIA. Corte Constitucional, Sentencia SU-774/14, Tribunal Pleno, Rel. Mauricio González Cuervo, j. 16/10/2014. Disponível em: <https://

No Brasil, o nosso Supremo Tribunal Federal, antes da promulgação da Constituição de 1988, já conheceu de recursos extraordinários que versavam sobre a omissão na valoração da prova.[102] Essa tradição foi abandonada pela jurisprudência do STF nas últimas três décadas. Embora seja correto afirmar que, em regra, o controle da observância do dever de análise integral do conjunto probatório deva ser exercido pelos Tribunais ordinários e, excepcionalmente, pelas cortes de cassação, não há dúvida de que as cortes constitucionais possuem relevante função subsidiária na fiscalização da observância desse importante requisito de validade das sentenças penais condenatórias.

A dimensão objetiva do direito fundamental à presunção de inocência envolve a existência de um direito à organização e procedimento adequados para a sua efetivação. E isso se realiza, em grande medida, por meio da adoção de mecanismos procedimentais que permitam o controle por parte do tribunal constitucional da observância, por parte dos juízes e Tribunais, do dever de análise integral do conjunto probatório e de motivação adequada – racional e logicamente sustentável – quanto à formação da culpa para além de qualquer dúvida razoável. Para garantir que essa valoração global das provas seja efetivamente implementada, o Tribunal Constitucional da Espanha afirma possuir competência para "verificar se há violação do direito à presunção de inocência porque não há provas válidas suficientes, porque a argumentação que liga a prova ao facto provado é desarrazoada porque é ilógica ou insuficiente, ou porque o resultado da sua apreciação não foi motivado".[103]

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www.corteconstitucional.gov.co/relatoria/2014/SU774-14.htm>. Acesso em 18 mar. 2022; e COLÔMBIA. Corte Constitucional, Sentencia T-926/14, 6ª Sala de Revisão, Rel. Gloria Stella Ortiz Delgado, j. 02/12/2014. Disponível em: <https://www.corteconstitucional.gov.co/relatoria/2014/T-926-14.htm>. Acesso em: 18 mar. 2022.

[102] Conferir, nesse sentido, exemplificativamente, BRASIL. Supremo Tribunal Federal, RE nº 27990, 1ª Turma, Rel. Min. Afrânio Costa (Convocado), j. 24/10/1955. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=128918>. Acesso em 18 mar. 2022; e BRASIL. Supremo Tribunal Federal, RE nº 86.082, 2ª Turma, Rel. Min. Moreira Alves, j. 16/11/1976. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=180151>. Acesso em: 18 mar. 2022.

[103] ESPANHA. Tribunal Constitucional, STC n° 187/2003, 1ª Sala, Rel. Pablo García Manzano, j. 27/10/2003. Disponível em: https://hj.tribunalconstitucional.

No que diz respeito ao controle da racionalidade e logicidade da motivação da sentença na valoração do conjunto probatório, o Tribunal Constitucional espanhol tem afirmado, com base no princípio da presunção da inocência, que "toda condenação deve se basear em provas válidas, suficientes e decisivas" e também que essa idoneidade incriminadora do conjunto probatório "deve ser não apenas apreciada pelo juiz, mas também refletida na sentença, de modo que a falta ou insuficiência de motivação quanto à avaliação da prova e à fixação dos fatos provados acarretará ofensa ao direito fundamental à presunção de inocência".[104] Isso porque, como bem advertiu a Corte Constitucional da Colômbia, a amplitude da liberdade de apreciação da prova pelo juiz jamais pode se degenerar em arbitrariedade: "sua atividade de avaliação probatória implica necessariamente a adoção de critérios objetivos, não simplesmente supostos pelo juiz, racionais, ou seja, que ponderem a magnitude e o impacto de cada uma das provas prestadas".[105]

A jurisprudência do STF, no Brasil, trilhou outro caminho ao afirmar indiscriminadamente a ausência de repercussão geral nos recursos extraordinários criminais que versam sobre a violação do dever de motivação.[106] Com base nesse entendimento, o tribunal abriu mão da possibilidade de construção, pela via do recurso extraordinário, de parâmetros adequados de controle por parte da jurisdição constitucional do dever de análise integral do conjunto probatório no campo processual penal e de motivação racional e lógica quanto à avaliação da prova e à fixação dos fatos provados.

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es/es-ES/Resolucion/Show/4962 . Acesso em: 18 mar. 2022; e ESPANHA. Tribunal Constitucional, STC n° 115/2006, Tribunal Pleno, Rel. Pablo Cachón Villar, j. 24/03/2006.

[104] ESPANHA. Tribunal Constitucional, STC n° 340/2006, 1ª Sala, Rel. Jorge Rodríguez-Zapata Pérez, j. 11/12/2006. Disponível em: <https://www.boe.es/diario_boe/txt.php?id=BOE-T-2007-868>. Acesso em: 18 mar. 2022.

[105] COLÔMBIA. Corte Constitucional, Sentencia SU-159/02, Tribunal Pleno, Rel. Manuel José Cepeda Espinosa, j. 06/03/2002. Disponível em: <https://www.corteconstitucional.gov.co/relatoria/2002/SU159-02.htm>. Acesso em: 18 mar. 2022.

[106] BRASIL. Supremo Tribunal Federal, AI nº 791.292 QO-RG, Tribunal Pleno, Rel. Min. Gilmar Mendes, j. 23/06/2010. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=613496>. Acesso em: 18 mar. 2022.

É verdade que o STF admite amplamente a impetração de *habeas corpus* contra decisões judiciais que interfiram na liberdade de ir e vir. Isso poderia viabilizar a construção de uma jurisprudência mais densa acerca dessa dimensão da presunção de inocência ligada à exigência da demonstração motivada da presença de certo nível de certeza probatória para que a condenação criminal seja legítima. O Supremo Tribunal Federal, no Brasil, chegou a conceder ordens de *habeas corpus* para invalidar sentenças condenatórias por violação direta ao princípio da presunção de inocência.[107] Mas esses precedentes não representam o sentido geral da jurisprudência do tribunal, segundo a qual não cabe *habeas corpus* para discutir suposta violação ao princípio da presunção de inocência em função do não atendimento ao *standard* da prova para além da dúvida razoável.[108] Os casos em que o STF aplica esse parâmetro da *prova para além da dúvida razoável* estão quase exclusivamente circunscritos às ações penais originárias em que o tribunal funciona como típico juízo criminal.[109]

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[107] Cf., nesse sentido, os excepcionais precedentes firmados nos seguintes julgamentos: BRASIL. Supremo Tribunal Federal, HC nº 83.864, 1ª Turma, Rel. Min. Sepúlveda Pertence, J. 20/04/2004. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=79491>. Acesso em 18 mar. 2022; e BRASIL. Supremo Tribunal Federal, HC nº 96.356, 1ª Turma, Rel. Min. Marco Aurélio, j. 24/08/2010. Disponível em: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=614452 . Acesso em: 18 mar. 2022. E, mais recentemente, o seguinte precedente: "A comprovação da deficiência mental da vítima, circunstância passível de ser demonstrada por perícia, constitui núcleo indispensável do tipo previsto no artigo 217, § 1º, do Código Penal, de modo que a existência de conclusões divergentes nos laudos, deixando as instâncias ordinárias de proceder à análise comparativa entre os resultados em sentido opostos, revela situação de dúvida razoável concernente à configuração do crime, que, considerado o princípio constitucional da não culpabilidade, há de ser interpretada em benefício do acusado." (BRASIL. Supremo Tribunal Federal, HC nº 170.117, 1ª Turma, Rel. Min. Marco Aurélio, j. 19/05/2020. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754035067>. Acesso em: 18 mar. 2022).

[108] Cf., por todos, BRASIL. Supremo Tribunal Federal, HC nº 80.320, 1ª Turma, Rel. Min. Ilmar Galvão, j. 19/09/2000. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=78345>. Acesso em: 18 mar. 2022; e BRASIL. HC nº 100.249-AgR, 1ª Turma, Rel. Min. Cármen Lúcia, j. 31/08/2010. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=618131>. Acesso em: 18 mar. 2022.

[109] Cf., por todos, as seguintes decisões proferidas em julgamentos de ações penais originárias: "A presunção de inocência, princípio cardeal no processo

4. Conclusões

A jurisdição constitucional tem contribuído, nos quais diversos quadrantes, para a atribuição de um conteúdo mais preciso ao princípio da presunção de inocência, especialmente por meio do desenvolvimento da doutrina da prova "para além da dúvida razoável". As tentativas mais bem-sucedidas no direito comparado de racionalizar esse *standard* probatório subordinam a demonstração da tese acusatória à satisfação, no mínimo, das seguintes condições: a hipótese incriminatória deve ser capaz de explicar os dados disponíveis, integrando-os de forma coerente, e todas as outras hipóteses plausíveis, que permitem explicar os mesmos dados e que são compatíveis com a inocência do acusado, devem ter sido definitivamente refutadas.

A dimensão objetiva do direito fundamental à presunção de inocência envolve a existência de um direito à organização e procedimento adequados para a sua efetivação. E isso se realiza, em grande medida, por meio da adoção de mecanismos procedimentais que permitam o controle pelo tribunal constitucional da observância, por parte dos juízes e Tribunais, do dever de análise integral do conjunto probatório e de motivação adequada – racional e logicamente sustentável – quanto à formação da culpa para além de qualquer dúvida razoável. Nesse contexto, cabe aos tribunais constitucionais, em ordem a garantir um patamar mínimo de proteção ao direito fundamental à presunção de inocência, controlar a *razoabilidade* e *racionalidade* com que a sentença condenatória valora as

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criminal, é tanto uma regra de prova como um escudo contra a punição prematura. Como regra de prova, a formulação mais precisa é o standard anglo saxônico no sentido de que a responsabilidade criminal deve ser provada acima de qualquer dúvida razoável (*proof beyond a reasonable doubt*), o qual foi consagrado no art. 66, item 3, do Estatuto de Roma do Tribunal Penal Internacional" (BRASIL. Supremo Tribunal Federal, AP nº 676, 1ª Turma, Rel. Min. Rosa Weber, j. 17/10/2017. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14300838>. Acesso em: 18 mar. 2022); "Inexistência de provas produzidas pelo Ministério Público na instrução processual ou de confirmação em juízo de elemento seguro obtido na fase inquisitorial e apto a afastar dúvida razoável no tocante à culpabilidade do réu" (BRASIL. Supremo Tribunal Federal, AP nº 883, 1ª Turma, Rel. Min. Alexandre de Moraes, DJe 11/05/2018. Disponível em: <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?idDocumento=14801986>. Acesso em: 20 mar. 2022).

provas, a partir da exigência dirigida ao juiz criminal de *valoração integral do conjunto probatório*.

O uso de precedentes estrangeiros em decisões judiciais brasileiras tem crescido exponencialmente nos últimos anos. Esse fenômeno é particularmente importante nas decisões do Supremo Tribunal Federal. A tendência crescente de invocação do direito comparado na interpretação constitucional é um sinal positivo de constante aperfeiçoamento da jurisdição constitucional brasileira. Afinal, o diálogo entre os Ministros do STF e a jurisprudência das cortes constitucionais de outros países decorre de uma salutar disposição para a aprendizagem recíproca, cujos resultados podem ser bastante positivos. A observação de decisões de outros tribunais constitucionais nos permite identificar "pontos cegos" no debate nacional, além de ampliar nossos horizontes argumentativos, mostrando novas soluções para superação de impasses comuns. A jurisprudência constitucional comparada produzida para densificar o conteúdo do princípio da presunção de inocência – notadamente na dimensão relacionada à exigência de certificação de um grau mínimo de certeza probatória desenvolvida a partir do desenvolvimento da doutrina da prova "para além da dúvida razoável" – pode contribuir para o aperfeiçoamento da jurisdição constitucional brasileira nesse campo tão decisivo para a conformação democrática do processo penal.

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Entre a decisão e o conselho: como a jurisprudência do Supremo Tribunal Federal dificulta a instalação de uma etapa intermediária no processo penal brasileiro.

Between deciding and advising: how the Brazilian Supreme Court case law deter an intermediate stage in the criminal procedure.

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Resumo: Por meio de revisão bibliográfica e do exame de acórdãos a respeito da fundamentação no recebimento da denúncia, procurei compreender como o Supremo Tribunal Federal adaptou seus discursos para dar uma resposta homogênea a diferentes formas de regular o juízo de admissibilidade da ação penal. Foi possível constatar que os diferentes esforços regulatórios para impor ônus argumentativos ao controle da viabilidade do processo são, na prática brasileira, ignorados. Quando o Supremo Tribunal Federal é provocado sobre a falta de motivação em um caso concreto, as decisões ora afirmam ser ela recomendável, mas, de acordo com seus precedentes, desnecessária; ora afirmam que um mínimo de fundamentação é necessário, e que expressões vagas e lacônicas cumprem com tal necessidade. O artigo dialoga com pesquisas empíricas recentes a respeito do recebimento da denúncia nos Tribunais Superiores e, especialmente, joga luz a algo que não pode ser naturalizado: as pessoas têm o direito de saber os motivos pelos quais o Poder Judiciário entendeu ser juridicamente válido submetê-las a um processo criminal.

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Palavras-chave: Pesquisa empírica; Processo Penal; recebimento da denúncia; fundamentação, jurisprudência.

Abstract: *In this article, I review the literature and examine Brazilian Supreme Court rulings on the grounds for the admission of indictments. I investigate how the Court adapted its discourses on the topic to give a homogeneous response to different ways of regulating the appraisal of the viability of criminal charges. The research shows that different regulatory efforts to impose argumentative burdens on the control of the viability of criminal proceedings are, in practice, ignored. When the Brazilian Supreme Court is asked about the lack of motivation in a concrete case, the decisions sometimes state that it is advisable, but, according to its precedents, unnecessary; sometimes they state that a minimum of motivation is necessary, and that vague and laconic expressions fulfill this need. The findings dialogues with recent empirical research on the subject and, especially, sheds light on something that cannot be naturalized: people have the right to know the reasons why the Judiciary considered it valid to subject them to criminal proceedings.*

Keywords: *qualitative research; judicial opinion; indictment appraisal; justification; case law.*

1. Introdução

As próximas linhas são dedicadas à compreensão de como o Supremo Tribunal Federal julga casos em que é instado a manifestar-se sobre a necessidade de fundamentação no recebimento da denúncia. Com isso, procurei entender de que modo as normas processuais penais asseguram às pessoas processadas o direito de saber em que termos o Poder Judiciário considera a acusação contra elas como viável.

Diversas autoras e diversos autores vêm reportando que o STF "*entende tratar-se de mero despacho de expediente, sem conteúdo decisório e, portanto, fora do âmbito de aplicação do art. 93, IX, da Constituição da República*" (Silveira, 2010)[2]. Porém, do ponto de vista dogmático, os tra-

[2] Entre muitos outros no mesmo sentido Fernandes (2002, p. 131), Gomes Filho, (2001, p. 209) e mais recentemente, Dezem e Souza (2019, p. 144).

balhos sobre o tema publicados após a promulgação da Constituição de 1988 se manifestam amplamente em sentido contrário[3]. Não foi possível encontrar arrazoados sobre a tese de que um juiz não precisa motivar o recebimento da denúncia, embora tenha localizado autores contemporâneos mencionando tal entendimento[4].

Diante desse quadro de divergência, a pergunta que o artigo procura responder é: como essa tensão entre doutrina e jurisprudência se perpetua? Essa dúvida teórica também procura contribuir com ideias sobre um problema concreto e rotineiro no Brasil de como implementar uma etapa intermediária (Silveira, 2021)[5], algo que "contribuiria para

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Nota-se que mesmo entre essas descrições, os autores não são unânimes ao afirmar se o STF entende que o ato tem conteúdo decisório ou não.

[3] Para trabalhos monográficos ver Costa (2006), Pilati (2015), Peixoto Junior (2019). Marco Aurélio Nunes da Silveira já abordou o assunto em vários aspectos, inclusive quanto ao mais novo esforço de reforma processual. Por meio de estudos dogmáticos, o autor já discorreu sobre a especificidade das condições da ação penal (2016), sobre os fundamentos filosóficos-políticos para a motivação no recebimento da denúncia (2016) e, recentemente, apresentou sua proposta sobre a etapa intermediária do processo (2021). O tema já foi objeto de comentários de autores vinculados a diferentes universidades brasileiras. Cito, entre outros Coutinho (2012), Badaró (2019, p. 617), Costa e Malan (2000), Tourinho Filho (2010, p. 324), Barros (2008), Lopes Junior e Morais da Rosa (2014) e Vasconcellos (2018).

[4] É possível encontrar defesas dessa tese por meio de opiniões. Chamo de opinião um argumento cuja validade é medida a partir da credibilidade do autor e não do raciocínio por ele expresso. Nesse sentido, são afirmações como a de que "como regra, o juiz não precisa fundamentar a decisão de recebimento da denúncia ou queixa, pois se trata de mera decisão interlocutória simples. O juiz pode se limitar a receber a denúncia ou queixa" (Feitoza, 2009, p. 300). Também foi possível localizar autores afirmando "desnecessária uma maior fundamentação" na fase do art. 395 do CPP, visto não caber recurso contra tal decisão", e que esse baixo grau de motivação seria suprido por uma fundamentação na fase do art. 399 do mesmo diploma (Lima, 2014).

[5] Como aponta Silveira (2021), o conceito de etapa intermediária tem como objetivo associar algumas funções atribuídas ao juiz quando do exame de admissibilidade dos processos. Ela serve como um "diafragma" (p. 4), tanto para que seja feita uma triagem de acusações infundadas, como para impedir que o julgamento de mérito seja contaminado por elementos cognitivos obtidos sem o contraditório. Ela também serve como uma maneira de preparar o processo para um juízo de mérito, delimitando o objeto do processo, a admissibilidade de provas e a presença de outros aspectos formais da acusação (Silveira, 2021, p. 4). Ainda que se possa debater se as regras atuais do CPP já

impedir a formulação de imputações precipitadas e temerárias e diminuiria, via de consequência, a impetração de *habeas corpus*, visando ao trancamento da ação penal por falta de justa causa" (Moura, 2001, p. 225).

No esforço de diagnosticar o nosso problema conjuntural e de contribuir para os prognósticos sobre a implementação das reformas processuais, a ideia do artigo é elaborar hipóteses sobre fatores associados com a manutenção de um descompasso entre teoria jurídica e prática forense. Por meio de exame bibliográfico e de acórdãos do Supremo Tribunal Federal, investigo de que forma variações nos procedimentos para o juízo de viabilidade da ação penal, aparentemente, não geraram mudanças significativas no resultado de julgamentos questionando a necessidade de fundamentação.

Antes de expor, no próximo tópico, as estratégias metodológicas e o percurso dessa pesquisa primordialmente indutiva, é preciso situá-la no campo teórico. Por isso, dedico as linhas seguintes a descrever a minha leitura sobre pesquisas empíricas recentes a respeito do tema e a explicar de que forma pretendo contribuir para o diálogo acadêmico com essas autoras e autores.

2. As pesquisas empíricas sobre o recebimento da denúncia nos tribunais superiores

Inobstante existam numerosas obras descrevendo que o recebimento da denúncia não precisa ser motivado por força da jurisprudência, são escassos os trabalhos que se dedicaram a observar em detalhes os acórdãos em que esse tema foi veiculado. Para os fins deste artigo, importa destacar três pesquisas recentes tratando especificamente da questão, e de que forma elas influenciaram a análise dos dados.

Por meio de revisão bibliográfica e pesquisa jurisprudencial, e no âmbito de uma dissertação de mestrado, Aline Gidalli Pilati (2015)

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permitem essa prática institucional, ou se ela depende das alterações previstas na Lei nº 13.846/19, importa destacar que é por meio da fundamentação das decisões proferidas que se poderá avaliar a racionalidade com que as referidas tarefas foram executadas.

procurou compreender e se posicionar sobre quando deve ser considerado o recebimento da denúncia e sobre a necessidade de motivação nessa etapa.

A forma com que Pilati construiu seus argumentos, inicialmente invocando as teorias sobre a ação penal, ilustra como, subjacente ao tema da motivação no recebimento da denúncia, existe uma tomada de posição a respeito dos fins do processo penal. Construindo o seu quadro teórico a partir de uma "sucessão de teorias sobre o processo" (2015, p. 81), a autora inicia em Bülow, perpassa Goldshmidt e desembarca em Fazzalari, na ideia de um procedimento em contraditório. A partir dessas bases, a autora apresenta a sua leitura sobre o juízo de admissibilidade.

A pesquisadora recorre a esse nível de abstração para demonstrar a importância do contraditório como forma de, digo eu, co-construção da decisão judicial. A pesquisa ressalta que "*de nada adiantaria conceber*" esse postulado "*da forma aqui defendida se não tiver o juiz o dever de fundamentar o recebimento ou a rejeição da inicial acusatória*" (Pilati, 2015, p. 79).

Ao tratar especificamente do dever de motivação, o trabalho aponta como os autores divergem quanto ao que, juridicamente, deve ser avaliado no recebimento da inicial. Ao posicionar-se sobre a interpretação dos artigos 43, 395 e 399 do CPP, o trabalho indica como a dogmática se divide quanto à existência de condições exclusivas da ação penal, ou se as condições da ação devem ser classificadas de forma semelhante às tradicionais categorias do processo civil, com adaptações (Pilati, p. 2015, p. 106-126).

Portanto, nota-se a existência de diversas soluções dogmáticas - esse é o aspecto que precisa ser destacado - para auxiliar os magistrados a participar ativamente do controle de viabilidade do processo e a justificá-lo por meio dos requisitos de aptidão da inicial e das condições da ação. Nesse ponto, importa perceber que, muito embora exista convergência sobre o dever de motivação, há divergências sobre como fazê-lo, situadas em embates sobre o que se considera como controle do exercício do poder de punir, o que se considera como mérito e as possibilidades de pré-julgamento do mérito (Pilati, 2015, p. 127-142).

Se os teóricos avançam em complexidade, a jurisprudência do STF indica que a prática jurídica não caminhou no mesmo ritmo. A autora localizou um conjunto de decisões "responsáveis por consolidar o entendimento da Corte e influenciar os demais tribunais" (p. 16), indicando

como a formação da jurisprudência não foi unânime. Pelo contrário, as posições dos ministros se deram de forma dividida sem que tenha havido um pronunciamento definitivo sobre a natureza jurídica do recebimento da inicial. A autora sintetizou em cinco os argumentos utilizados nos acórdãos para justificar o entendimento da desnecessidade de motivação[6], enfrentou e rechaçou cada um deles, concluindo pela necessidade de mudança de entendimento. Defende exigir "*que o magistrado reflita e decline por que concluiu pela procedência da ação penal*" para, com isso, permitir "*ao acusado que conheça quais elementos foram considerados pelo juiz como razão de decidir*" (2015, p. 151).

Como não era escopo da sua pesquisa, a autora não tentou indicar os motivos pelos quais os acórdãos antigos continuavam sendo considerados pelos ministros como os precedentes da Corte. Se Pilati descreveu *o que* o STF decide e se posicionou quanto esses argumentos, meu enfoque foi em saber *como* o STF decide, para compreender se a corte enfrenta ou deixa de enfrentar as críticas doutrinárias atuais, bem como investigar como ela se mantém julgando com base nos precedentes antigos[7].

Essa estratégia de pesquisa também pretende dialogar com os achados de Santoro, Borges Neto e Pompílio da Hora (2019). Examinando acórdãos proferidos pelo Superior Tribunal de Justiça a respeito da exigência constitucional de fundamentação das decisões que ratificam o recebimento da denúncia, os autores buscaram decisões colegiadas no banco de dados eletrônico do Tribunal, a partir de um conjunto de palavras-chave no espaço temporal entre junho de 2008 e julho de 2016. Após desprezar um grupo de decisões que entenderam irrelevantes, os

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[6] São eles: (i) a irrecorribilidade do ato; (ii) a sua equiparação com o despacho que ordena a citação do réu no processo civil; (iii) poder ser implícita a admissão da ação e não estar o ato alcançado pelo disposto no artigo 93, inciso IX, da Constituição; (iv) ser o ato mero despacho de admissão da ação penal em juízo; e (v) evitar o pré-julgamento do mérito da causa na fase do recebimento da peça acusatória.

[7] Não foi possível atualizar o percurso metodológico do referido trabalho porque o texto não indica como a base foi criada e como a amostra de sete acórdãos, observados em profundidade, permitiu a generalização sobre a população de "mais de mil" decisões (Pilati, 2015, p.16). Também não foi possível, em 2021, localizar um desses sete acórdãos (HC 31.078) na base de jurisprudência e de processos do *site* do Tribunal.

autores procederam a um exame qualitativo de 54 acórdãos, dividindo os resultados em categorias.

A partir de uma exposição quanto aos pressupostos normativos adotados, no sentido da demanda constitucional (art. 93, IX, da CR) pela motivação das decisões judiciais, da natureza de decisão ao ato que ratifica o recebimento da denúncia autores e do dever de motivação explícita, os autores classificaram os resultados quanto ao que a corte disse a respeito da fundamentação.

Santoro e outros apontam como há nesse debate acórdãos que se referem ao caso concreto ou aos *standards* de prova para o prosseguimento da ação penal. Os autores notaram que o STJ só impõe um ônus argumentativo nas decisões que consideram os casos inviáveis e que "*há uma ineficácia do instituto decorrente justamente do fato de os Tribunais, sobretudo o Superior Tribunal de Justiça, reconhecerem como satisfatórias diversas decisões cuja fundamentação é claramente questionável do ponto de vista constitucional*" (p. 88). A pesquisa indicou que:

> (i) o STJ atribui maior ônus argumentativo às decisões que promovem a absolvição sumária, em detrimento das que ratificam o recebimento da denúncia; (ii) por vezes, o Tribunal afirma que o ato decisório que ratifica o recebimento da denúncia possui natureza de despacho meramente ordinatório, afastando, por conseguinte, a incidência do imperativo contido no art. 93, IX, da Constituição da República; (iii) o STJ presume que o Juízo singular apreciou todas as teses defensivas, mesmo que tenha afirmado tão somente que inexistem fundamentos para a absolvição sumária; (iv) dentro do universo da pesquisa, em todas as decisões em que o STJ fez referência, ainda que indiretamente, ao material fático probatório foi para desconstituir decisão de primeira instância cuja fundamentação era completa e promovia a absolvição sumária do acusado; (v) há decisões da Corte que demonstram, ainda que implicitamente, que é inexigível a fundamentação da decisão que nega o pedido de absolvição sumária; (vi) em alguns casos a Corte decide mediante decisões dotadas apenas de justificação interna; (vii) entende o STJ que da inexistência de justificação externa da decisão que ratifica o recebimento da denúncia não se presume o exame precário das teses defensivas, mas o legítimo convencimento do magistrado; (viii) verifica-se aparente falta de coerência entre

> as decisões da Corte, pois ao apreciar decisões monocráticas iguais, no que se refere à motivação, obteve conclusões opostas para cada uma delas (2019, p. 110/111)[8].

A questão central do texto parece ser se a fundamentação que o STJ considera válida é a fundamentação a que aludem a Constituição e a dogmática processual. Mas, o grande aporte do artigo é a forma como ele captou nuances. Saindo de uma dicotomia entre decisões afirmando a insubmissão do ato ao art. 93, IX, da CR, e acórdãos que reconhecem a insuficiência de fundamentação com base nesse mandamento constitucional, os autores observaram discursos sobre decisões que atenderiam minimamente a exigência, ou que enxergaram gradações na fundamentação, afirmando a validade daquela considerada como concisa/sucinta.

Como será objeto de tópico próprio, foi por meio dessa lente de análise que procura gradientes, dessas possibilidades de construções argumentativas mais conceituais ou mais casuístas, que procurei examinar os acórdãos do STF de uma forma abrangente. Em vez de concentrar a análise nas decisões que ratificam o recebimento da inicial, procurei compreender se a mudança no texto do CPP, que criou essa etapa de contraditório, está associada com alguma mudança na forma de o STF interpretar o juízo de viabilidade da ação penal.

Mais recentemente, Uinie Caminha e outros (2021) também examinaram decisões do Superior Tribunal de Justiça a respeito da admissibilidade da denúncia. Partindo de premissas dogmáticas quanto à necessidade de fundamentação no juízo de viabilidade da ação penal e expondo a sua dinâmica, a autora e os autores se propuseram a responder

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[8] Por justificativas "interna" e "externa", os autores invocam o magistério de Gomes Filho para explicar que, nas minhas palavras, a primeira envolve um juízo de coerência e a segunda, de consistência. Quanto à primeira, "constata-se a justificação em seu primeiro nível (interno), quando não há, entre os diversos enunciados de uma decisão, qualquer incompatibilidade. Neste nível de justificação, basta que não exista uma contradição dentro do contexto da própria decisão". Já a segunda, "é construída com base nas premissas evidenciadas pela justificação interna. Trata-se de atividade de maior complexidade, consistente em aduzir razões válidas, persuasivas, convincentes, em favor da escolha das premissas utilizadas para desenvolvimento do raciocínio decisório, tendo em vista que a natureza dessas razões variará de acordo com o tipo de premissas necessária à decisão" (2019, p. 102).

"de que forma" o STJ "está se posicionando sobre o assunto". A pesquisa então selecionou argumentos utilizados com frequência pela Corte para denegar pedidos defensivos e apresentou críticas.

No capítulo metodológico do que chamaram ser uma "pesquisa quali-quantitativa", é possível notar que a procura de acórdãos se deu no período entre 2008 e 2019, e foram selecionados 204 acórdãos de *habeas corpus* e recurso em *habeas corpus* a partir da expressão "juízo de admissibilidade da acusação". Extraindo as decisões que versavam sobre o rito do júri, a amostra analisada totalizou 107 acórdãos. A parte quantitativa foi uma contagem das variáveis binárias espécie processual (RHC ou HC), referência ao art. 93, IX, da CR (sim ou não) e turma responsável (5ª ou 6ª), além da variável resultado do julgamento (provido, improvido ou parcialmente provido). Além disso, a autora e os autores construíram quatro categorias a partir de expressões utilizadas nos julgados com maior frequência[9].

Inobstante a pergunta de pesquisa tenha sido descritiva ("de que forma" o STJ julga), a autora e os autores parecem ter concentrado seus esforços no plano normativo, tratando da validade jurídica dos argumentos mais frequentemente usados pelo STJ nos acórdãos que contiveram a expressão "juízo de admissibilidade". Talvez seja por esse motivo que o artigo se limitou a afirmar uma confirmação dos achados de Santoro e outros, "no tocante à insubmissão destas decisões à necessidade de fundamentação, em descompasso com o texto constitucional" (2021, p. 522, nota de rodapé 41).

Entretanto, o confronto entre os resultados dessas duas pesquisas revela que a Corte, quando provocada a decidir sobre a validade do ato praticado pela autoridade coatora em *habeas corpus*, acaba com frequência fazendo o próprio juízo de admissibilidade. Nessa tarefa, o STJ tende a considerar viáveis as acusações.

Como se observa, as pesquisas conduzidas até o momento a respeito da jurisprudência quanto à necessidade de fundamentação do

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[9] Foram elas: "i) *in dubio pro societate*; ii) a decisão de recebimento possui natureza interlocutória cautelar; iii) o juízo deve ater-se à admissibilidade da imputação; e, por último, iv) o argumento da exigência da fundamentação em concreto" (2021, p. 525).

juízo de admissibilidade da acusação não divergem do ponto de vista dogmático. Elas apresentam um tom crítico.

Com diferenças nas estratégias metodológicas, os estudos sobre os acórdãos dos Tribunais Superiores indicam que o artigo 93, IX, da Constituição da República não é considerado como caracterizador de ônus argumentativo para os juízes de primeiro grau afirmarem a validade das acusações. Somente para rejeitar um processo é que seria necessária maior fundamentação.

As pesquisas sugerem que, para o STJ, a possibilidade de se estabelecer um contraditório prévio na resposta à acusação não alterou esse tipo de resposta institucional. Daí a necessidade de compreender se, e de que forma, a texto legal e a dogmática construída em torno dele podem induzir uma mudança no comportamento dos magistrados.

3. A construção da amostra e o percurso metodológico

Após um exame exploratório da jurisprudência e da doutrina a respeito do juízo de admissibilidade da ação penal, notei diferenças regulatórias quanto ao que deve ser feito pelo juiz quando se trata de casos envolvendo a antiga lei de falências[10], o rito dos crimes praticados por funcionários públicos[11], a lei de tóxicos[12], foro prerrogativa de função[13], e as decisões dos arts. 395 e 399 do CP[14]. Por isso, entendi importante

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[10] Decreto-Lei nº 7661, de 21 de junho de 1945. No artigo 109, § 1°, constava que o juiz, se recebesse a denúncia, enviaria o caso ao juízo criminal em despacho fundamentado. Do pondo de vista de divisão de tarefas nessa etapa, é o procedimento mais semelhante possível ao que se prevê acontecer com o juiz de garantias.

[11] Arts. 513 a 518 do CPP. Nesses casos, há previsão de resposta do acusado antes do recebimento da denúncia (art. 514).

[12] A Lei nº 11.343/2006 também prevê uma manifestação defensiva prévia ao recebimento da denúncia (art. 55).

[13] O artigo 4º da Lei nº 8.038/90 também prevê um contraditório prévio, além de estabelecer que o recebimento se dá por órgão colegiado.

[14] Há uma intensa discussão a respeito da dinâmica do recebimento da denúncia. O importante a destacar é a previsão de um exame sobre a viabilidade do processo após a resposta à acusação. Especificamente sobre isso, ver Peixoto Júnior, (2019).

compreender se algum desses fatores induziu uma resposta diferente do Supremo Tribunal Federal. Nesse sentido, procurei checar se a previsão de contraditório prévio, ou do texto expresso de que a decisão deve ser fundamentada, produzem alguma diferença no resultado dos julgamentos[15].

O banco de dados[16] reflete uma consulta à base de jurisprudência do Supremo Tribunal Federal com os termos "recebimento E denuncia E fundamentacao", feita no dia 10 de maio de 2021. Trata-se de 378 acórdãos: o mais antigo é o RHC 47.578, Rel. Min. Thompson Flores, publicado em 28.8.1970 e o mais recente é o RHC 114.971, Rel. Min. Marco Aurélio, publicado em 5.5.2021[17].

Depois de baixar os acórdãos, a primeira classificação extraiu da base 108 acórdãos que não tratavam do juízo de admissibilidade da ação penal. São temas como prisão preventiva, ilicitude de provas, vícios na

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[15] Diante do caráter aberto das perguntas, resolvi dividir o trabalho em duas etapas: uma predominantemente qualitativa, em que o exame dos acórdãos buscou elaborar hipóteses e compreender com maiores detalhes a composição da minha amostra; e uma etapa de predomínio quantitativo, em que procurei testar estatisticamente como essas diferentes variáveis estão associadas com o universo de decisões do Tribunal. Este artigo apresenta os resultados da primeira etapa.

[16] . O banco de dados criado para essa pesquisa, contendo todas as decisões colhidas, está disponível em <https://www.openicpsr.org/openicpsr/project/166701/version/V1/view>. Ele não necessariamente reflete todos os casos em que o STF já discutiu a necessidade de fundamentação no juízo de viabilidade da denúncia. Notei em outra pesquisa a referência a "mais de mil julgados" (Pilati, 2015, p. 16). Tentando compreender como a autora chegou a esse resultado, e lendo as decisões do meu banco de dados, imaginei que ela também se refira a decisões monocráticas, ou a precedentes antigos não constantes no *site* do STF nem para consulta por processo, e precedentes que, embora contenham as palavras-chave, não foram selecionados na ferramenta de busca do tribunal. Embora acredite ter pesquisado com termos amplos e lido uma quantidade substancial de decisões, não chequei se as palavras-chave escolhidas contemplam o universo de vezes em que a corte se pronunciou sobre o tema.

[17] O banco de dados não contemplou as decisões monocráticas porque o pressuposto normativo dessas decisões é a existência de jurisprudência da Corte em determinado sentido, ou seja, os dados seriam necessariamente uma saturação de um tipo de entendimento. Ainda que do ponto de vista empírico os Ministros possam decidir de forma monocrática situações não pacificadas, essa escolha permitiu que os dados, em menor número, fossem observados com maior proximidade.

sentença e excesso de prazo na tramitação de inquérito policial. Também foram retirados 51 acórdãos em que o tema era apenas tangenciado, como a competência para o recebimento em situações de crime por prerrogativa de função, nulidade do processo se o recebimento for anterior à resposta do acusado, participação de desembargador suspeito no juízo de recebimento feito pelo Tribunal etc.

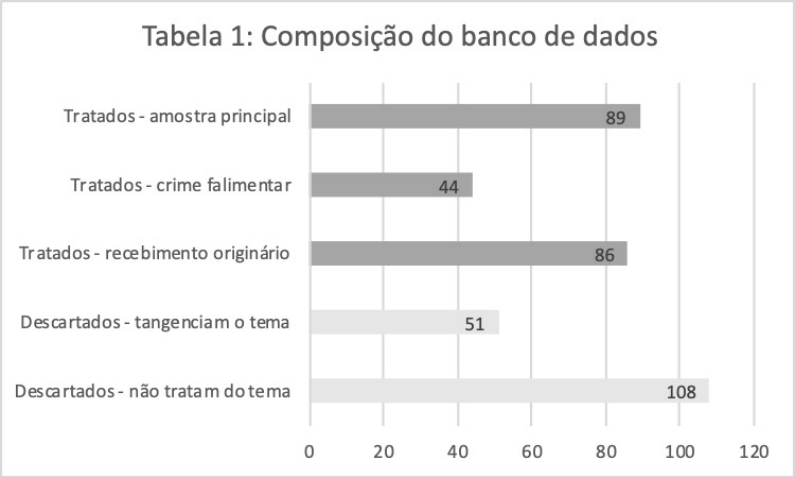
Examinando as decisões mais antigas, foi possível notar que o Supremo Tribunal Federal diferenciava os crimes comuns dos crimes falimentares e havia uma Súmula[18] no sentido de que a decisão de recebimento devia ser fundamentada. São 44 acórdãos em que a Corte se debruçou sobre o recebimento da denúncia nos crimes falimentares, o mais antigo é o RHC 47.578, Min. Thompson Flores, DJ 28.8.1970 e mais o recente deles é o RHC 90.632, Rel. Min. Sepúlveda Pertence, DJ 22.6.2007. Como será mais bem desenvolvido em tópico próprio, resolvi examinar esses casos em separado porque imaginei que haveria neles um fator regulatório que impactou o entendimento da Corte.

Além disso, boa parte dos resultados (86 acórdãos) se referia a processos originários em que as palavras-chave apareceram quando a Corte estava procedendo ao juízo de viabilidade do processo criminal e não julgando como outros magistrados o fizeram. Também durante a análise, como será esclarecido em tópico próprio, resolvi não desprezar esses resultados e tentar entender se existia uma diferença entre o que os Ministros fazem nos processos originários e o que reputam ser pronunciamentos válidos de outros magistrados. Isso porque nesse tipo de caso é feito um juízo de viabilidade em colegiado, para casos específicos envolvendo autoridades de alto nível.

Restaram 89 acórdãos, que foram classificados quanto ao resultado do julgamento e categorizados quanto ao argumento de que o recebimento da denúncia precisa ou não ser fundamentado. Examinei, também, como se davam as referências à doutrina e à jurisprudência. Nas decisões que considerei típicas, procurei examinar uma a uma as

[18] Enunciado nº564 da Súmula do STF: *A ausência de fundamentação do despacho de recebimento de denúncia por crime falimentar enseja nulidade processual, salvo se já houver sentença condenatória.*

referências para checar, como se verá a seguir, qual é a base argumentativa utilizada pelos Ministros.



Fonte: autoria própria.

Como mencionei acima, a estratégia de pesquisa foi elaborada para conhecer a dinâmica de reprodução de um entendimento. Ela não trata, dogmaticamente, da validade jurídica das teses dos Ministros, e sim, quer compreender como os acórdãos mobilizam seus argumentos ao longo do tempo e quais fatores estão associados com determinadas formas de interpretar o direito[19].

Feitas essas ressalvas, a leitora e o leitor ficam convidados a examinar um esforço de generalização desse *corpus*, e a consequente descrição de como o Supremo Tribunal Federal continua validando decisões vagas, adaptáveis a todo e qualquer processo. Além disso, serão apresentadas algumas condições em que, agindo assim, a corte substitui o juiz de primeiro grau no juízo sobre a viabilidade da acusação.

[19] Por conta disso, e para deixar a apresentação dos resultados mais limpa, as menções aos acórdãos serão feitas apenas pela classe e número do processo, sem conter a identificação do relator ou data de publicação.

Passo, portanto, aos resultados do exame dos acórdãos, que se inicia por uma descrição geral da amostra e depois narra as especificidades dos acórdãos proferidos em casos falimentares e em casos de foro por prerrogativa de função. Apresento os julgados que entendi serem exceções, e, ao final, trato do corpo de acórdãos que entendi exibir determinadas características.

4. Resultados da pesquisa

A amostra efetivamente tradada e analisada contém 219 decisões, divididas entre 44 casos de crimes falimentares, 86 casos de exame de admissibilidade feitos pelo STF em ações penais originárias e 89 decisões restantes, em que o STF foi provocado a discutir algum aspecto do juízo de viabilidade da ação penal. Em apenas 3 casos desse último grupo houve a anulação do processo com base na carência de motivação[20].

Conquanto o *corpus* contenha uma variedade de atos relacionados ao controle de viabilidade da ação penal, os dados indicam que em todos esses tipos de casos há tolerância com decisões vagas, que se limitam a afirmar presentes os requisitos legais ou ausentes impeditivos[21].

A resposta institucional não foi sensível às diferenças regulatórias nos procedimentos nem à previsão na lei de que o ato deve ser feito em decisão fundamentada. Além disso, a oportunidade de a Defesa se manifestar antes do recebimento da inicial não é associada a um ônus argumentativo para que o juiz aprecie as teses defensivas ou explique os motivos ensejadores do recebimento.

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[20] Em dois outros casos tratando de ações penais originárias cujo recebimento aconteceu previamente à remessa ao STF (questões de ordem na AP 945 e na AP 933), o Tribunal apontou a necessidade de fundamentação, mas a solução jurídica não foi a anulação, e sim uma nova análise.

[21] Os acórdãos trataram tanto das decisões referentes ao artigo 395 do CPP, quanto das proferidas na fase dos arts. 397 e 399 do mesmo dispositivo, e ainda, dos recebimentos feitos em ações penais originárias por outros tribunais, aqueles feitos nos casos envolvendo tóxicos e funcionários públicos.

4.1. Os casos excepcionais

Ao observar em decisões mais antigas a ressalva de que "*os precedentes do Supremo Tribunal Federal*" só "*exigem*" a fundamentação nos casos de crimes falimentares (HC 68.302, AG no AI no RE 158.880)[22], imaginei ser possível localizar algum indutor de uma resposta institucional diferente quanto ao recebimento da denúncia.

Nesse tipo de caso, a lei de regência (DL 7.661/45) era expressa no sentido de que o ato seria fundamentado e, especialmente, havia uma diferenciação entre o juiz que avaliava a admissibilidade do processo e aquele que conduzia a instrução, tal qual ocorrerá caso o STF não considere inconstitucional a figura do juiz de garantias.

Além disso, no rito próprio, havia uma manifestação defensiva prévia (art. 109), tal como dispõe o artigo 516 do CPP para o procedimento que envolve funcionários públicos. Mas, especificamente nesse tipo de casos, havia um outro fator: em março de 1977 foi publicado o Enunciado nº 564 da Súmula do STF no sentido de que "*a ausência de fundamentação do despacho de recebimento de denúncia por crime falimentar enseja nulidade processual, salvo se já houver sentença condenatória*"[23].

Por conta desses achados, decidi examinar em separado os acórdãos envolvendo crimes falimentares e procurar na amostra como os diferentes *inputs* regulatórios poderiam estar associados com os *outputs* decisórios. Afinal, como disse acima, dada a pluralidade de procedimentos, as diferenças no plano normativo poderiam acarretar diferentes respostas do Tribunal. A princípio, algo na antiga Lei de Falências teria induzido a Corte a fazer uma diferenciação e a exigir decisões motivadas no recebimento da denúncia.

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[22] Os 45 acórdãos que tratam de crimes falimentares correspondem a decisões publicadas entre 26.8.1970 (HC 47.578) e 22.6.2007 (RHC 90.632).

[23] Na época, o Plenário havia se manifestado sobre a invalidade de "despacho não fundamentado" (HC 54.216).

No entanto, mesmo sob vigência de uma Súmula, os acórdãos continuaram reputando como válidas decisões vagas[24][25]. A hipótese inicial de

[24] Por decisões vagas, refiro-me àquelas lacônicas, que por exemplo, afirmam constituírem, em tese, crimes, os fatos descritos na denúncia, ou que estão presentes os requisitos do art. 41 do CPP. Minha referência sobre o que é uma decisão vaga, neste artigo, é o art. 315, § 2º do CPP: "Não se considera fundamentada qualquer decisão judicial, seja ela interlocutória, sentença ou acórdão, que: I - limitar-se à indicação, à reprodução ou à paráfrase de ato normativo, sem explicar sua relação com a causa ou a questão decidida; II - empregar conceitos jurídicos indeterminados, sem explicar o motivo concreto de sua incidência no caso; III - invocar motivos que se prestariam a justificar qualquer outra decisão; IV - não enfrentar todos os argumentos deduzidos no processo capazes de, em tese, infirmar a conclusão adotada pelo julgador; V - limitar-se a invocar precedente ou enunciado de súmula, sem identificar seus fundamentos determinantes nem demonstrar que o caso sob julgamento se ajusta àqueles fundamentos; VI - deixar de seguir enunciado de súmula, jurisprudência ou precedente invocado pela parte, sem demonstrar a existência de distinção no caso em julgamento ou a superação do entendimento".

[25] É importante situar o leitor para os limites das inferências possíveis a partir dos dados. Não é possível, a partir deles, descrever como juízes em primeiro grau decidem, apenas afirmar que determinados tipos de decisão submetidos ao Supremo Tribunal Federal foram reputados como válidos. O exame se deu a partir dos acórdãos, e não do inteiro teor de processos, então só é possível compreender o que fora decidido pelo juízo em primeiro grau a partir da transcrição ou menção a dessas decisões nos acórdãos. É possível ver passagens com a reprodução da decisão, em aspas, tal como ocorreu no RHC 67.033: "verifico, pelo exame destes autos de inquérito judicial, que a narrativa constante da denúncia ofertada pelo Dr. Curador Fiscal de Massas Falidas, ajusta-se ao conteúdo dos autos, e que os fatos nela descritos amoldam-se ao tipo de conduta previsto no art. 188, III, da Lei de Falências. Diante disso, recebo a denúncia (...)". Também é possível encontrar menções como a feita no HC 64.499 "vê-se às fls. 14 que ao receber a denúncia o Magistrado se reportou o inquérito judicial consignando que os crimes imputados restaram plenamente evidenciados no procedimento investigatório. Trata-se de despacho sucinto (...)". Há ainda situações em que o contexto indica como fora procedido o exame da denúncia, como no HC 65.368, em que o acórdão cita decisão do Tribunal de Justiça que, por sua vez, relata que a impetração afirmava que o recebimento era infundado porque não apreciou um pedido defensivo requerido pela defesa, e afirma que "o juiz de direito não estava obrigado a apreciar o pedido de realização de perícia, podendo indeferi-lo implicitamente, com a determinação de abertura de vista dos autos ao Ministério Público, que deliberou ofertar denúncia desde logo, em demonstração inequívoca que um e outro estavam satisfeitos com os dados existentes nos autos". Para que a leitora e o leitor

que algum fator no procedimento Lei de Falências estaria associado com um maior rigor na apreciação da validade dos atos judiciais foi descartada.

Interpretando a norma, as decisões afirmam ser "*desnecessário repetir o que já se encontra declarado na denúncia*" (HC 63.528). Os pronunciamentos vagos foram considerados como fundamentação "*sintética*". Quanto ao sentido da Súmula, a "ausência" de fundamentação foi interpretada como a "*total falta*", e "*não é o mesmo que fraca, deficiente, muito pouca, quase nenhuma fundamentação. Ausência de fundamentação é igual a fundamentação nenhuma. Nada de fundamentação*" (RHC 59.641, grifos do original).

Contrariando parecer da Procuradoria-Geral da República, o Supremo entendeu fundamentado, embora mediante "despacho muito resumido", um ato que referiu ter sido atribuída a "*prática dos fatos delituosos apontados na denúncia de fls*" aos acusados, e complementa: "*Recebo a denúncia*" (RHC 60.058)[26].

Não foi possível, no escopo desse trabalho, compreender se o fato de não haver acórdãos recentes na base de dados se deve a mudanças no regime de recuperações judiciais, a mudanças na redação do artigo procedimental que não mais continha a expressão "fundamentada" (art. 185), a mudanças quanto à autoridade responsável por esse ato ou, mesmo, a limitações das palavras-chave.

Porém, esses achados indicam como a divisão de tarefas entre juízes, a menção expressa quanto à necessidade de fundamentação, a previsão de oferecimento de uma resposta defensiva prévia e a edição de uma Súmula não estão associadas com a invalidade de decisões vagas no rito da lei de falências. Esses fatores apenas serviram como argumento para que a Corte justificasse a validade de decisões infundadas em casos que tramitaram no rito ordinário.

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possam se aprofundar na descrição dos possíveis matizes do juízo de admissibilidade feito em primeiro grau, o banco de dados com as decisões está disponível em <https://www.openicpsr.org/openicpsr/project/166701/version/V1/view>.

[26] No mesmo sentido, entre outros HC 79.106, RHC 60.030. Em sentido contrário RE115.000 (interposto pelo Ministério Público contra decisão que invalidou recebimento da inicial).

4.1.1. O Supremo Tribunal Federal sabe identificar o que não é fundamentado e os problemas da vagueza.

Foi possível localizar, entre todas as decisões analisadas, três que anulam processos afirmando a necessidade de fundamentação no recebimento da inicial (HC 75.846, HC 76.256 e RE 456.673). Em comum, as três decisões se referem a juízos de admissibilidade feitos por Tribunais em situações envolvendo autoridades com foro por prerrogativa de função, e não pelo juízo de primeiro grau.

Os acórdãos proferidos nos HCs 75.846 e 76.256 não são exceções só pelo resultado do julgamento, embora os argumentos dos votos condutores continuem sendo reproduzidos atualmente. Eles mencionam como é possível distinguir uma decisão válida e localizam quais as consequências de manter um processo iniciado por um recebimento vago.

Diz o primeiro que isso deve ocorrer mesmo nos casos em que o recebimento da denúncia se dá pelo juízo singular. Examinando uma decisão que mencionava apenas a presença de "*todos os requisitos formais mencionados no art. 41 do CPP*", o acórdão afirma ser "*tão elevados os níveis de abstração e generalidade desta decisão, que ela pode ser utilizada, por cópia impressa ou xerográfica, para o recebimento de toda e qualquer denúncia apresentada ao Poder Judiciário, em qualquer nível de jurisdição, sem a mínima restrição*".

No HC 76.256, que ressalva ser específico quanto às ações penais originárias, pois nos casos comuns "*não há contraditório*", o voto condutor menciona jurisprudência no sentido de dispensar fundamentação, ressaltando a necessidade de indagar tal entendimento a partir do art. 93, IX, da CR. O voto ressalva que "*a melhor prova da ausência de motivação de um julgado é que a frase enunciada, a pretexto de fundamentá-lo, sirva, por sua vaguidão, para a decisão de qualquer outro caso*". Por fim, menciona como consequências da ausência de motivação que o Tribunal passa a atuar mediante supressão de instância e com uma cognição diminuída sobre as teses defensivas, eis que se trata de *habeas corpus*[27].

O terceiro caso se refere a um recurso extraordinário interposto contra decisão que, de forma lacônica, deu provimento a um recurso em

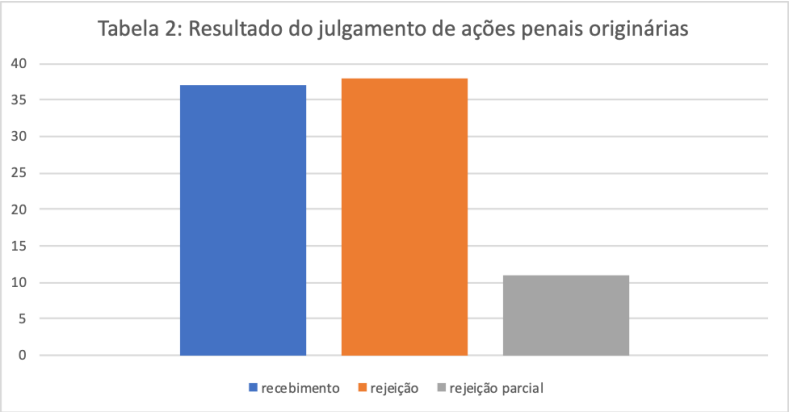
[27] Esses dois aspectos serão desenvolvidos adiante.

sentido estrito que, por sua vez, anulara a rejeição de uma denúncia. O recurso não foi conhecido, mas fora concedido *habeas corpus* de ofício para que a Corte *a quo* avaliasse todos os requisitos de viabilidade da ação, e não apenas afirmasse um ponto no qual entendeu que a rejeição não se sustentava.

Essa particularidade de os resultados *outliers* terem em comum o fato de serem proferidos contra decisões de Tribunais me fez voltar a dados que haviam sido desprezados em um primeiro momento. São 86 acórdãos em que os Ministros discutem a viabilidade dos processos no âmbito de recebimento da denúncia em casos de ação penal originária. Esses acórdãos foram selecionados para a base de dados por conterem as palavras-chave "recebimento E denúncia E fundamentação", mas não abordam especificamente a necessidade ou não de fundamentação.

Não se trata, portanto, nem do universo de decisões em que o Supremo Tribunal Federal avaliou a viabilidade de ações penais originárias, e nem de uma amostra completamente aleatória extraída desse universo. Entretanto, não reputei ter havido um viés de seleção na circunstância de os acórdãos conterem essas três palavras. Por isso, resolvi checar o resultado desses julgamentos.

A amostra apresentou 37 recebimentos da denúncia (43,02%), 38 rejeições (44,18%) e 11 rejeições parciais (12,78%). Por falta de dados, não foi possível comparar se existe uma diferença significativa entre a média de rejeição nos casos originários e a média quando o exame de viabilidade é feito por juízes de primeiro grau. Além disso, do ponto de vista normativo, essa diferença não é necessariamente boa ou ruim, ela dependeria de exames adicionais para se compreender se o exame de viabilidade dos casos é mais ou menos condizente com o modelo processual.



Fonte: autoria própria.

Entretanto, comparando o tamanho dos acórdãos, a complexidade das discussões e os recebimentos vagos, certamente é possível afirmar a partir desses dados que, em casos de ações penais originárias, as decisões fornecem muito mais informações sobre como os juízes exerceram a tarefa de controle de admissibilidade. Esses dados sugerem que, quando o juízo de viabilidade é feito diretamente no caso, e não por meio de *habeas corpus*, há uma triagem de processos inviáveis, um filtro de acusações excessivas e, mais importante, há publicidade sobre os motivos dos recebimentos e das rejeições.

Mas, não foi possível compreender os motivos desse tratamento diferenciados aos "*acusados VIPs*" (Lopes Jr. e Rosa, 2014), ou seja, se essa exigência decorre do rito previsto pela da Lei nº 8.038/90, do fato de os Ministros considerarem mais importantes os casos envolvendo prerrogativa de função, da circunstância de essa discussão não estar sendo feita no âmbito de *habeas corpus*, ou ainda, da noção de haver menos possibilidade de controle recursal no âmbito originário.

Além disso, é preciso ressaltar que a variável "foro por prerrogativa de função" não necessariamente induz a uma exigência de motivação tal qual a feita diretamente pela Corte. Não é possível notar o teor de todos os recebimentos, mas, lendo o relatório do RHC 122.806, é possível extrair que o STF considerou válida situação em que o Tribunal *a quo*

ressalva a possibilidade de "*críticas*" ao ato realizado, pois teriam restado "*implicitamente rejeitadas as teses defensivas preliminarmente levantadas*".

Será que o Supremo Tribunal Federal esqueceu dos argumentos suscitados nos casos *outliers*, ou ele simplesmente os ignora? Os dados sugerem a segunda hipótese.

Foi possível constatar pronunciamentos do Ministro Marco Aurélio, como único voto vencido, no sentido de que "*a não exposição de fundamentação em juízo positivo de denúncia implica afronta ao artigo 93, inciso IX, da Constituição Federal*"[28]. Pondera o Ministro que se no âmbito civil é considerado vício de motivação a "*sentença na qual são evocados motivos que se prestariam a justificar qualquer decisão ou se deixa de enfrentar todos os argumentos deduzidos no processo capazes de, em tese, infirmar a conclusão adotada pelo julgador, o que dizer na seara processual penal, a revelar direitos indisponíveis*?" (AG no ARE 749.864). No entanto, não se vê decisões em que ele anula algum recebimento da inicial[29].

Nos votos recentes que relatou sobre essa tese, Marco Aurélio considerou que "*a referência, no ato de recebimento da denúncia, ao atendimento ao figurino instrumental, implica fundamentação razoável*" para afirmar a correção de ato em que o juiz "*firmou preenchidos os requisitos do artigo 41 do Código de Processo Penal, bem assim afastou a incidência do artigo 395 do diploma legal*", e fez "*constar não haverem sido articulados, na defesa prévia, argumentos a inviabilizarem o recebimento da denúncia*" (HC 144.268 e, em sentido semelhante HC 11.971, HC 159.510, HC 187.980).

Essas diferenças entre o controle de viabilidade dos processos feito em debate colegiado, a partir da denúncia, e a validade do controle feito pelo juízo em primeiro grau, sugerem que a corte tem ciência do que significa o início de uma ação penal contra alguém e tem conhecimento de que uma decisão replicável a qualquer caso não se considera fundamentada. Mas, parece haver subjacente a esse debate uma regra de que o juiz não deva se pronunciar nessa fase quando julga sozinho.

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[28] No mesmo sentido (HC 101.971).

[29] Em uma decisão (AgRg no RE 1.194.050) o Ministro vota vencido para dar provimento a um recurso extraordinário dada a ausência de motivação do recebimento da inicial.

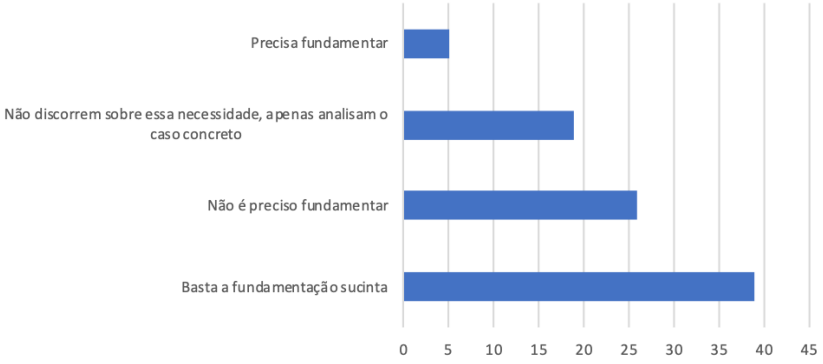
4.2. Hipóteses sobre a dinâmica da jurisprudência do STF.

A principal indagação dessa pesquisa era compreender como um entendimento anterior à Constituição de 1988 a respeito da natureza jurídica do recebimento da denúncia se tornou hegemônico (não seria fruto de novos debates entre os Ministros). Ele não só se manteve a despeito das críticas doutrinárias, como foi alargado para situações não discutidas na época, como os controles de viabilidade realizados no rito da lei de tóxicos e na apreciação da resposta à acusação.

Havia uma ideia inicial de classificar os acórdãos de acordo com a natureza jurídica que mencionavam ter o controle de viabilidade naqueles atos diferentes. Afinal, nos votos é possível notar menções a despacho, decisão, decisão interlocutória simples, bom como a ato desprovido de caráter decisório. A hipótese era entender se o argumento do caráter decisório era mobilizado com frequência.

Além disso, também se fez necessária uma prévia classificação dos acórdãos quanto ao pronunciamento a respeito da necessidade de fundamentar. Ela se deu inicialmente a partir das categorias formuladas por Santoro e outros (2019). Os acórdãos atuais refletem o predomínio da categoria da fundamentação sucinta ou concisa, para qualificar tanto decisões que apreciam as teses defensivas de forma abreviada, como decisões vagas que afirmam a viabilidade do processo.

Tabela 3: Tipo de resposta sobre a necessidade de fundamentação



Fonte: autoria própria.

No entanto, notei que em algumas situações foi difícil enquadrar o caso em uma categoria ou outra, tal como fizeram os autores, pois os acórdãos somavam ressalvas, tanto sobre a necessidade de motivação, quanto sobre o cumprimento ou não daquele dever no caso concreto. Foi frequente notar decisões apontando não ser necessário fundamentar a decisão, embora conveniente e oportuno. Mesmo assim, considerou-se que aquela estava fundamentada, de forma sucinta (HC 70.763).

Além disso, não foi possível encontrar um critério objetivo quanto ao que consiste em uma fundamentação válida. As hipóteses de fundamentação qualificada (isto é, seguida de algum adjetivo como sucinta, concisa etc.) variavam entre decisões. Essas expressões se referem tanto a uma decisão em que o juiz simplesmente afirmou que "não está presente nenhuma hipótese de absolvição sumária" (HC 111.127) quanto em um caso que a juíza explicou o que entende serem os requisitos do art. 41 do CPP, porque eles estavam presentes no caso, o que considera justa causa e porque ela estaria presente no caso. Além disso, se pronunciou sobre o tamanho da denúncia, sobre as diligências feitas e as requeridas pela defesa (Ag no HC 190.673).

Por tais motivos, um novo esforço de generalização se deu no sentido de compreender como a Corte estava se relacionando com os juízes de primeiro grau quando decidiam, porque não consegui localizar na amostra: *i*) no que consistem as barreiras entre o fundamentado, o não fundamentado e o fundamentado de forma concisa, sucinta ou suficiente e nem *ii*) um pronunciamento harmônico sobre a natureza jurídica do ato.

Daí foi possível voltar a atenção para o argumento reproduzido nos acórdãos no sentido de não anular decisões vagas, mas afirmar que a fundamentação é "conveniente", é "desejável" (HC 93.056). Como se vê, o Supremo Tribunal Federal parece não estar julgando a validade ou invalidade dos atos praticados por juízes de primeiro grau, mas os aconselhando sobre como agir. A tolerância dos acórdãos quanto à vagueza dos pronunciamentos judiciais, junto com a observação sobre o que seriam boas práticas, se dá por meio de categorias intermediárias em que não se faz necessário decidir de forma dicotômica nem o que é, nem o que deve ser fundamentado.

4.2.1. A cada citação, uma interpretação

Após classificar os acórdãos de acordo com a doutrina e os precedentes citados, foi possível notar que os acórdãos fazem referências à jurisprudência do STF sem se atentar para a especificidade dos julgados quanto às diferenças regulatórias do juízo de admissibilidade.

Com base em um exame retrospectivo das referências feitas a partir do AgRg no HC 138.413, é possível notar essa dinâmica. Observando as referências a julgados, localiza-se o nexo entre uma não debatida jurisprudência sobre a ratificação do recebimento da denúncia (art. 399 do CPP) e a citação de antigos acórdãos do TACRIM-SP sobre a aplicação do art. 93, IX, da CR no recebimento da inicial (art. 395 do CPP).

No caso, os impetrantes questionavam a validade de uma decisão vaga, proferida no exame da resposta à acusação. Na ementa, consta que "*a decisão judicial que rejeita a absolvição sumária, com fundamento na regularidade da denúncia e na falta de comprovação das hipóteses do art. 397 do CPP, não viola o art. 93, IX, da CF/88*". No entanto, no voto condutor, não há uma discussão dos ministros sobre a natureza jurídica dessa decisão que ratifica o recebimento e a aplicação a ela do dispositivo constitucional.

Para sustentar essa tese, o acórdão se vale da menção a decisões proferidas no caso pelo Tribunal de Justiça e pelo Superior Tribunal de Justiça no sentido da desnecessidade de motivação do ato e afirma que essa posição "*está em conformidade com a jurisprudência do STF*", referindo-se "*por amostragem, ao HC 101.971* (...)". Além disso, o voto cita um trecho de acórdão que, por sua vez, se referia ao decidido na questão de ordem no AI 791.292, no sentido de que "*a decisão judicial tem de ser fundamentada (art. 93, IX), ainda que sucintamente, sendo prescindível que a mesma se funde na tese suscitada pela parte*".

Todavia, lendo a questão de ordem referida, nota-se que ela não tratava da rejeição da resposta à acusação ou do recebimento da denúncia, e sim de uma discussão sobre o alcance do artigo 93, IX, da Constituição, nas decisões proferidas pelo TST. Mais que isso. Nela, o STF não decidiu ser "*prescindível*" que a decisão se funde "*na tese suscitada pela parte*". A corte afirmou que "*o art. 93, IX, da Constituição Federal exige que o acórdão ou decisão sejam fundamentados, ainda que sucintamente, sem determinar,*

contudo, o exame pormenorizado de cada uma das alegações ou provas, nem que sejam corretos os fundamentos da decisão" (destaquei).

Lendo, dessa vez, o HC 101.971, referido "*por amostragem*", nota-se que ele também não tratou da resposta à acusação, e sim da necessidade de recebimento fundamentado da denúncia em um caso da lei de tóxicos. Nele, a ementa e o voto condutor limitaram-se a reproduzir o teor do HC 93.056, considerado como "*precedente específico (...) em caso análogo*"[30].

Caminhando agora para o teor do HC 93.056, nota-se que os Ministros não discutiram em nenhum momento se o recebimento da denúncia na lei de tóxicos demanda uma resposta diferente do juiz do que o recebimento nos demais casos.

Esse acórdão, muito referido por outras decisões (e mencionado no trabalho de Pilati como um dos precedentes que resume a discussão na corte), reproduz uma outra decisão, proferida no HC 70.763. Nela, o STF afirma que o recebimento seria um ato sem poder decisório, e por isso, não aplicável a ela o mandamento constitucional.[31].

Como disse, não é objeto desse artigo avaliar a validade jurídica dos argumentos. No entanto, importa destacar que a tese do ato que não é decisão para fins constitucionais aparenta ter sido fixada neste precedente. A decisão é longa e cita diversas referências. Especificamente quanto à constitucionalidade, no entanto, o argumento do acórdão está embasado na reprodução de dois trechos de acórdãos do TACRIM/SP no sentido de que o recebimento da denúncia "*não é ato judicial que pode ser equiparado a sentença, não se constituindo em 'decisão' ou julgamento'*, e "*não é ato decisório a que alude o art. 93, IX, da CF*". Desde então, essas considerações vêm sendo reproduzidas como a inteligência do Supremo

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[30] Nesse caso, houve um voto divergente do Min. Marco Aurélio afirmando necessária a fundamentação, dado o contraditório prévio, mas, ante a constatação de que o juízo afirmou presentes os requisitos legais, considerou a decisão fundamentada.

[31] A tese da necessidade de fundamentação acabou sendo lateral para o acórdão, publicado em 23.9.1994. Ressalvando a excepcionalidade para a concessão do *writ*, o acórdão enfrenta a viabilidade da ação e, ao longo de 23 páginas, examina a falta de justa causa e concedeu o *habeas corpus* por reconhecer a inépcia da denúncia.

Tribunal Federal. O mais importante debate da aplicação do mandamento constitucional aparenta se resumir a essas citações.

A dinâmica é essa: por meio de analogias ao teor tácito de julgados, o Tribunal foi estendendo até os dias de hoje o que se considera a jurisprudência predominante da Corte. Considerações feitas pelo Tribunal nos anos 1940-1960 e autores daquela época ainda ecoam mediante uma atualização de seus argumentos. Sutilmente, algo que se disse logo após o Decreto-Lei nº 3.689, de 1941 ser promulgado vale como demonstração da tese de que a decisão dos art. 397 e 399 do CPP (criada em 2008) não precisa ser fundamentada.

Importa destacar que, no âmbito do HC 95.354, o Tribunal se pronunciou em caso que unicamente discutia a necessidade de fundamentação do recebimento da inicial no rito da lei de tóxicos (11.343/06). Nessa oportunidade, o voto condutor expõe os motivos pelos quais "*os acusados aos quais se imputem delitos*" previstos nessa lei "*não possuem o direito subjetivo a verem a denúncia que lhes atribui tais práticas recebida mediante decisão que obedeça maior rigor de fundamentação que as demais decisões que instaurem ações penais*". A lógica seria de que

> "a compreensão que possui esta Corte acerca da desnecessidade de fundamentação da decisão de instauração de feito criminal verbera em todo o sistema processual penal, não se admitindo diferenciações oriundas dessa lei específica. Nem poderia ser diferente, pois, ao fazê-lo, a lei infraconstitucional criaria uma condição de processamento diferenciada, que acarretaria redução ou ampliação dos requisitos mínimos para instauração de um feito criminal, modificando, nesse particular, o perfil constitucional dos direitos fundamentais de natureza processual" (HC 95.354).

Como se vê, o Tribunal não entende que a lei possa modificar a interpretação do STF. Ao conceder a acusados o direito de terem decisões mais bem fundamentadas, haveria uma violação dos "direitos fundamentais de natureza processual" de alguém. A interpretação, portanto, não é no sentido de reconhecer a necessidade de motivação a partir da nova lei, e estender essa garantia a todas as pessoas. Ela recusa a alteração legislativa, dizendo haver violação do direito fundamental das pessoas

que tem decisões mal fundamentadas se outras pessoas puderem saber por qual motivo são acusadas.

4.2.2. A forma de reprodução dos textos doutrinários

A manutenção do entendimento vigente também se dá pela reprodução de citações doutrinárias que não sustentam o argumento do acórdão, incluindo aí autores que lhe são expressamente contrários.

O acórdão com mais referências doutrinárias é o AgRg no HC 170.463 em que os impetrantes, entre outros pedidos, requereram anulação do recebimento da denúncia por ausência de apreciação da tese de falta de justa causa. São citados 11 trabalhos dogmáticos que dariam apoio aos argumentos sobre a não exigência de fundamentação.

Dois deles (Feitoza, 2009 e Demercian, 2009) representariam o magistério da doutrina no sentido de afastar a exigência "de que seja fundamentado o ato de recebimento da denúncia". Lendo as passagens, todavia, nota-se que o "magistério" aparentemente se refere a opiniões ou descrições dos autores, pois não se consegue distinguir ao certo se referem-se ao entendimento atual ou à dogmática jurídica[32].

Três dos textos são citados como "*o magistério doutrinário*" de que "*o ato de recebimento da denúncia não veicula manifestação decisória*" e seria "*simples despacho de caráter ordinatório ou de natureza simplesmente interlocutória*", "*de tal modo que sobre ele não incide a prescrição constante do art. 93, IX, da Carta Política*".

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[32] Em um livro intitulado "Direito Processual Penal, Teoria, Crítica e Práxis", Feitoza se resume à afirmação de que "*como regra, o juiz não precisa fundamentar a decisão de recebimento da denúncia ou queixa, pois se trata de mera decisão interlocutória simples*", de modo que não é possível afirmar se essa é a teoria, a práxis ou a crítica do autor. Demercian (2014) também afirma algo semelhante a uma opinião no sentido de que "*o despacho de recebimento da denúncia, em regra, não é fundamentado. A sua motivação é implícita, ou seja, pressupõe-se que estão atendidos os requisitos formais estabelecidos no art. 41 do CPP, além de estarem presentes as condições da ação*" e cita a posição do STF nesse sentido. Todavia, no que tange à decisão que ratifica a denúncia, objeto do HC, o autor ressalva que "*não teria sentido permitir ao acusado expor as suas razões para o não recebimento da denúncia e o magistrado simplesmente decidir de forma sucinta, sem qualquer justificação, pelo seu recebimento*." (p. 134-135).

Porém, esses três livros (Espínola Filho, 1965, Câmara Leal, 1942, e Florêncio de Abreu, 1945) foram editados antes da Constituição de 1988, e o acórdão não explicita como é possível chegar a essa inferência. Esses autores, inclusive, divergem sobre o que caracteriza uma decisão interlocutória simples, e o primeiro afirma que as decisões sobre a decretação de prisão e aplicação de medida de segurança possuem essa mesma natureza jurídica[33].

O voto também cita "*afirmação de Frederico Marques (...) no sentido de que o despacho que recebe a denúncia assume 'conteúdo precipuamente ordinatório'*", embora a própria citação localize essa frase em uma ressalva. Nela, o autor afirma que "*apesar*" desse conteúdo, haveria implícito um juízo de admissibilidade. O acórdão silencia quanto ao argumento do autor sobre esse aspecto.

Há ainda a citação de quatro obras (Gomes Filho, Badaró e Toron, 2018; Pacelli, 2017; Lima, 2017; Lima, 2014) que representariam o "*beneplácito de expressivo magistério doutrinário*" à tese de que, na linha da jurisprudência do STF, "*tem reputado plenamente motivado o ato decisório que examina, ainda que de forma sucinta, as teses defensivas arguidas na resposta à acusação*". Ocorre que essas passagens são, todas, contrárias ao entendimento atual do Supremo Tribunal Federal[34]. Não é

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[33] A citação de Florêncio de Abreu se refere a uma passagem em que o autor cita Câmara Leal (1942, p. 19). Nela, não se é referido expressamente quanto ao recebimento da denúncia, e sim que "as decisões interlocutórias simples (...) são meramente ordinatórias do processo, não se anularão por incompetência do juiz que as proferiu" e que "no processo penal devem ser tidas como decisões, sujeitas à anulação por incompetência do juiz, a de pronúncia ou impronúncia, nos processos da competência do júri, e a sentença absolutória ou condenatória, bem como as decisões que impõem a prisão preventiva e as medidas de segurança". Espínola Filho por sua vez, afirma que "o juiz, examinando se estão satisfeitos os requisitos legais, determina a movimentação inicial do processo, sem qualquer deliberação sobre o mérito" e que o recebimento da denúncia é uma decisão interlocutória simples, assim como "as decisões sobre a prisão preventiva, a concessão de fiança, a busca, o sequestro (...) a aplicação provisória de interdições de direitos ou de medidas de segurança" (1945, p. 144).

[34] Pacelli (2014) sustenta que "sempre houve e sempre haverá discussões acerca da natureza do ato de recebimento da denúncia: cuida-se, ou não, de ato decisório? Basta ver a jurisprudência da Suprema Corte nas ações penais originárias, isto é, aquelas promovidas diretamente naquele Tribunal, por força

possível compreender o que o acórdão considera ser um "*beneplácito*". Todos os autores afirmam que nesse momento o juiz não deve realizar uma cognição definitiva ou pronunciar-se longamente. Mas, nenhum deles se pronuncia afirmando a validade de decisões que não apreciam as teses defensivas, nem as que se limitam a afirmar presentes os requisitos legais. Trocando em miúdos, todos entendem que o juiz deve ser sucinto, mas todos discordam da validade da fundamentação sucinta, tal como definida pelo STF.

Da mesma maneira, no Ag no RE 929.795, o Tribunal manteve decisão vaga, sustentando que, no caso de recebimento da denúncia, "*o juízo é de mera delibação e tem por finalidade evitar uma ação penal descabida*". Para defender esse ponto de vista, o acórdão cita trecho de um artigo em que o autor (Cruz, 2008) sustenta ter havido uma mudança radical a partir da Lei 11.373/2008: "o que era, portanto, carestia, agora é abundância" (p. 204). O mesmo trecho, citado na decisão, aponta como o intuito de aumentar a proteção a acusações infundadas e "*até temerárias, que, se não constituírem a regra, podem ocorrer como fruto do açodamento,*

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de prerrogativa de função do acusado, para se concluir que o recebimento da peça acusatória tem conteúdo decisório". Lima (2017) afirma que o juiz "deve ao menos aludir às teses eventualmente apresentadas na resposta à acusação, notadamente para fins de enfrentar questões processuais relevantes e urgentes. Por isso, na hipótese de o magistrado se limitar a afirmar que as teses apresentadas na resposta à acusação são 'defesa de mérito', designando, na sequência, audiência de instrução e julgamento, admite-se o reconhecimento de eventual nulidade relativa" (2017, p.1.322). Lima (2014) afirma que com a reforma de 2008 a previsão de resposta à denúncia, talvez "acabe a prática maléfica do juiz 'delegar a um funcionário do cartório ou a um secretário, o recebimento 'genérico' de iniciais penais. O autor ainda afirma que "o juiz deverá, nem que seja de uma forma não exauriente (evitando, assim, adentrar demasiadamente no mérito) exarar uma fundamentação, enfrentando os argumentos expostos pela defesa, pois, nesta hipótese, já temos um contraditório prévio estabelecido, merecendo um pronunciamento judicial acerca da manutenção do recebimento" (2014, p. 853-855). Gomes Filho, Badaró e Toron (2018), por sua vez, afirmam que "também no caso de rejeição da absolvição sumária será necessário fundamentar a decisão, expondo as respectivas razões de fato e de direito pelas quais a tese defensiva não deve ser acolhida. No entanto, nesse caso, a fundamentação pode e deve ser mais sucinta, até mesmo para evitar prejulgamento, limitando-se a afastar os argumentos levantados pela defesa, em cognição superficial" (p.744)

errônea interpretação dos fatos apurados na investigação preliminar, ou quiçá, de distorcida concepção dos fins do processo penal" (idem).

Como se nota, o Supremo Tribunal Federal ressignifica a aparente divergência entre doutrina e seus julgados se valendo de críticas, mais ou menos diretas, à sua forma de julgar, como apoio para suas teses. Os acórdãos não estabelecem um diálogo nem com seus predecessores, nem com os autores dogmáticos. A notoriedade dos juristas funciona como uma espécie de alegoria, sugerindo apoio a argumentos não enfrentados nem criticados nas citações.

4.2.3. As consequências desse entendimento

Retomando os achados de Uinie Caminha e outros (2021), a amostra indica como o exame sobre a viabilidade da denúncia é feito diversas vezes. Os juízes de primeiro grau são, nessa dinâmica, os magistrados que menos falam a respeito de como chegaram às suas conclusões, muito embora sejam os que tenham mais condições de analisar os autos. As decisões indicam que Tribunais são tolerantes com a ausência de motivação do juiz, mas não deixam de analisar a viabilidade da acusação.

A estrutura dos votos consiste em uma transcrição do que fora decidido pelo STJ, pelos tribunais de origem e pelo juiz, e, dessa forma, o acórdão acaba agregando afirmações que já se situam, no mínimo, no plano dos três outros recebimentos.

Isso significa que, em circunstâncias ordinárias, é possível observar um mesmo caso com 4 ou mais juízos autônomos sobre a denúncia. São situações em que o magistrado decide mediante uma expressão lacônica e a defesa impetra *habeas corpus* aos Tribunais de segundo grau, discutindo a necessidade de fundamentação e a falta de viabilidade da inicial. Daí sucede outro *habeas corpus*, ou recurso em *habeas corpus*, no qual o STJ atua da mesma forma: não exige do Tribunal que aprecie o caso a partir da validade da decisão, nem que examine todos os argumentos defensivos, mas os Ministros também se pronunciam sobre a denúncia. Daí segue uma nova impetração ao STF, em que a prática se reproduz.

Como resultado, em um mesmo acórdão é possível observar diferentes juízos sobre a viabilidade, mas essa pluralidade não significa que a Defesa tenha muitas oportunidades de discutir e rediscutir o tema. Isso

porque as teses são restringidas quanto ao âmbito de cognição e quanto à demonstração de que uma omissão gera algo (no caso, um prejuízo concreto). Além disso, se um Tribunal não se pronunciar sobre uma tese, isso não é normalmente reconhecido como um problema.

Não foi possível checar as premissas factuais das impetrações. No entanto, comparando o relatório e o voto do RHC 138.752, nota-se situação em que o ato de ratificação do recebimento da denúncia afirma que "*não foram arguidas preliminares*" e que não estavam presentes os requisitos autorizadores da absolvição sumária. No entanto, a defesa afirma que a decisão não só omite as teses de atipicidade e falta de justa causa, como afirma que elas sequer foram abordadas pelo Judiciário. Essa circunstância de a Defesa ter chegado ao STF pedindo que suas teses fossem apreciadas foi ignorada. O STF não acolhe ou rejeita esse argumento, afirma a validade da decisão e a impossibilidade de examinar o pleito, ante a superveniência de sentença condenatória.

Na prática, os Tribunais avaliam e reavaliam a viabilidade do processo entendendo que a procedência das teses defensivas é muito excepcional: as decisões mencionam a excepcionalidade do conhecimento e da concessão de *habeas corpus*, a excepcionalidade do reconhecimento da inépcia da denúncia e da falta de justa causa, a limitação cognitiva feita no âmbito de *habeas corpus* ou de recurso extraordinário, a necessidade de provar a existência de prejuízo e a convalidação dos vícios se houver sentença[35].

O julgamento do Ag no HC 162.295 é um ilustrativo dessa forma de julgar. Nele, o voto condutor ressalta que a "*primeira circunstância trazida pela defesa*" era "*a ausência da fundamentação na decisão que recebeu a denúncia*". O relator salienta "*Eu a tenho, inclusive, aqui, à minha frente, é uma decisão manuscrita, e não há dúvida de que ela é monossilábica*". No entanto, rejeita a tese, por conta da "*orientação pacífica*" do STF.

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[35] O fato de a Corte funcionar em colegiado, que poderia assegurar mais homogeneidade e coerência nas decisões, é mitigado no julgamento dos *habeas corpus*, ao notar-se que os acórdãos mais recentes foram proferidos em agravos internos. Como os Ministros têm decidido mais por meio de decisões monocráticas, não é sequer possível à defesa sustentar as razões oralmente na sessão de julgamento, e, assim chamar a atenção para os argumentos que ficaram de fora de mais um dos exames quanto à viabilidade da denúncia.

O que poderia ser uma divergência, vira uma recomendação. Dizendo que "*é preciso evoluir daquele recebimento da denúncia de forma extremamente parcimoniosa*"[36] e, que os Ministros precisam "*realmente exigir uma fundamentação maior nesse ato importante, que é o do recebimento da denúncia, tal como nós fazemos aqui nesta Suprema Corte e nas Cortes Superiores*" e de dizer que "*é preciso uma análise para o recebimento da denúncia*", o voto convergente desconsidera a tese por conta do caso.

O fato de o réu ter ficado foragido e ter trocado de advogados para dilatar algum prazo processual foram os motivos pelos quais se relevou o debate a respeito da tese.

Esse conjunto de circunstâncias (o fator contextual decorrente da apreciação direta da denúncia pelos desembargadores e ministros, somado ao fator excepcional decorrente de juízos sobre o que caracteriza a situação de flagrante ilegalidade e a possibilidade de as cortes escolherem os argumentos que querem rebater) potencialmente transforma o exame sobre a viabilidade de um processo em uma situação casuísta. Os dados sugerem que os juízes podem escolher quais casos e quais teses querem apreciar no âmbito de *habeas corpus*.

5. Conclusões

Este artigo investiga como o Supremo Tribunal Federal reproduz seu entendimento sobre o alcance do art. 93, IX, da Constituição da República, quando examina a validade de decisões proferidas no controle de admissibilidade da ação penal. A partir do exame bibliográfico e de uma análise qualitativa de decisões em que a Corte se pronunciou sobre os termos fundamentação e recebimento da denúncia, observo como diferentes soluções regulatórias nos procedimentos para o juízo de viabilidade da ação penal, aparentemente, não afetaram mudanças significativas no resultado de julgamentos questionando a necessidade de fundamentação. Com esse diagnóstico, indico hipóteses sobre quais

[36] O voto menciona precedentes em que o Min. Ricardo Lewandowski teria suscitado essa mudança de orientação qualificando os votos como carimbos. Eles não estão contidos na amostra, e buscas pelos termos "carimb$ [operador lógico de pesquisa] E denúncia" não retornam resultados.

fatores estão associados à reprodução de um entendimento que sustenta a validade de decisões lacônicas, proferidas no limiar da ação penal.

Apresentei a minha leitura sobre recentes pesquisas a respeito da temática do recebimento da denúncia nos Tribunais Superiores e, a partir dessas considerações, apontei os motivos que justificaram a escolha de um plano de observação de segunda ordem, cujo foco não é a norma, e sim a maneira com a qual o Poder Judiciário interpreta o comando normativo.

A pesquisa indica como a prática processual está longe de um modelo que considera o conhecimento do acusado ou os argumentos da defesa no controle de viabilidade dos processos criminais. A prática judicial criou um modelo de extrema deferência às seleções feitas pelo Ministério Público. Se um juiz quiser rejeitar a denúncia, tem grande ônus argumentativo. Para recebê-la, basta repetir um texto-padrão.

Essa parece ser a forma com que desembargadores e ministros encontraram para decidir os determinados casos e não necessariamente as teses.

É evidente que não se pode olhar para os julgados do STF, no exercício do julgamento de *habeas corpus*, com a mesma lente em que se examina decisões da Suprema Corte norte-americana ou do Tribunal Constitucional alemão. O nosso Tribunal de cúpula precisa decidir milhares de casos, enquanto as demais cortes selecionam alguns. É natural, portanto, que as decisões não sejam proferidas com a mesma profundidade e que sejam mais padronizadas.

Mas, essa padronização chega aos limites de considerar de forma homogênea situações reguladas pela lei de forma distinta. Na relação entre juízes e ministros, teses e casos, a pesquisa revela que o exame jurídico feito sobre a viabilidade da denúncia se dá em uma dinâmica do conselho. O Tribunal parece funcionar não como instância de controle jurídico, mas de uma instância que aconselha como se deve aplicar a lei, ou a aplica diretamente. Não se trata propriamente das consequências da incorreção de uma tese, mas de considerações aos juízes sobre o que o Tribunal entende serem boas práticas. A atividade jurídica aparece não como uma discussão entre o lícito e o ilícito, mas do que é mais ou menos recomendável.

O objetivo deste artigo foi jogar luz a algo que não pode ser naturalizado. Uma pessoa tem o direito de saber os motivos pelos quais o Poder Judiciário entendeu ser viável começar um processo criminal

contra ela. É preciso compreender a participação de juízes para dotar de racionalidade essa tarefa de criminalização secundária, isto é, de seleção sobre quais casos devem seguir como processos criminais e quais pessoas devem se tornar réus[37].

Daí o convite à leitora e ao leitor para aprofundar o exame sobre as decisões do Supremo Tribunal Federal e para criar, junto com os magistrados, uma dogmática a partir do que for, na percepção dessas pessoas, o meio de tornar realidade a etapa intermediária no Brasil.

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Fundamentos de Direito Processual Penal

Fundamentals of Criminal Procedure

Uso del algoritmo COMPAS en el proceso penal y los riesgos a los derechos humanos[1]

Use of the COMPAS algorithm in the criminal process and the risks to human rights

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Resumen: En la actividad policial, administración de justicia y procesos penales, se han empezado a utilizar diversos algoritmos predictivos de riesgo, los cuales aportan celeridad en la toma de decisiones. Han surgido controversias acerca de su aplicación, debido a ciertas variables subjetivas ponderadas, lo que implicaría una posible vulneración para los derechos humanos. En el presente artículo se describen los principales algoritmos predictivos de riesgo, haciendo énfasis en el algoritmo COMPAS y se determinan los impactos a los derechos humanos derivados de su uso. El método utilizado es deductivo-inductivo, partiendo de un análisis documental para describir el funcionamiento de los algoritmos y un proceso inductivo para determinar si se garantizan los derechos humanos con su utilización. Los resultados indican que en efecto sí hay riesgos cuando se utilizan estos sistemas inteligentes predictivos, los cuales son derivados de la falta de transparencia de la arquitectura del algoritmo y de la presencia de sesgos. Lo anterior impediría identificar el proceso por el cual se llega a la calificación de nivel de riesgo, de un lado, y de otro, una aplicación objetiva de la evaluación; lo que pondría en riesgo derechos como el debido proceso, la libertad personal y no discriminación, entre otros.

Palabras clave: Inteligencia artificial; justicia penal; algoritmos; derechos humanos.

Abstract: *Diverse risk assessment algorithms used in policing, justice administration and criminal proceedings have contributed to promptness in decision making. Controversies have emerged regarding their enforcement, due to certain subjective weighted variables that may lead to a possible breach of human rights. This article describes the main risk assessment*

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algorithms, emphasizing the COMPAS algorithm and determining its impact on human rights. The method used is deductive-inductive, on the basis of a documentary analysis that describes the operation of algorithms, and an inductive process used to determine if human rights are guaranteed while it is used. Results indicate that, in fact, risks exist at the time of using intelligent predictive systems, derived from a lack of transparency in the design of the algorithm and bias. The above would not allow the identification of the process used to classify the risk level and the unbiased application of the evaluation, jeopardising rights like due process, freedom and non-discrimination, among others.

Keywords: *Artificial intelligence; criminal justice; algorithms; human rights.*

Introducción

En el desarrollo de la denominada era digital, se ha evidenciado la creciente presencia de herramientas derivadas de la inteligencia artificial (en adelante IA) en el derecho, lo cual se puede ver materializado en la administración de justicia, en la actividad policial y en los procesos penales, en donde se han empezado a utilizar diversos algoritmos predictivos de riesgo, como lo son el PSA, el LSI-R, HART, CAS, y COMPAS. Según Linares son potencialmente aplicables a los procesos de toma de decisiones relacionados con la valoración del riesgo de aquellos individuos que se ven envueltos en el proceso judicial[5], y su función es determinar el grado de riesgo de reincidencia del individuo en diferentes etapas del proceso penal; no obstante algunos algoritmos también son usados en actividades policiales.

A pesar de que los mencionados algoritmos son herramientas que aportan celeridad a la justicia y precisión en la toma de decisiones, han surgido controversias acerca de su aplicación, debido a que ponderan criterios tales como el comportamiento social, nivel educativo, entre otros; lo que implicaría una posible vulneración para los derechos humanos

[5] MIRÓ, Fernando. Inteligencia artificial y justicia penal: más allá de los resultados causados por robot. *Revista de Derecho Penal y Criminología*, n. 20, 2018, p. 107.

como son, los derechos a la igualdad, no discriminación, debido proceso, libertad personal, honra, dignidad, entre otros.

En el mismo orden de ideas, se ha establecido que hay "algoritmos secretos" de predicción de niveles de riesgo, respecto de los cuales no es posible conocer la forma exacta cómo funciona el algoritmo ya que son de propiedad exclusiva de su creador; y ello pondría en riesgo, derechos tales como el de contradicción, de defensa o el derecho a la información.

Así mismo ProPublica[6] realizó un estudio sobre el algoritmo COMPAS en el que advirtió la probabilidad de una discriminación algorítmica hacía los individuos afrodescendientes, lo que conllevaría a un posible riesgo de vulneraciones de los derechos humanos antes señalados.

Se ha determinado que los algoritmos predictivos de riesgo contienen posibles sesgos al ser aplicados. En ese sentido encontramos el caso hito: State Wisconsin vs Loomis en donde fue usado el algoritmo COMPAS y se evidenció inseguridad jurídica, sesgos por razones de raza, discriminación por género, entre otros.[7] Así mismo Rizer & Watney establecieron que los algoritmos no son completamente neutrales, no son herramientas objetivas debido a que contienen una conservación inadecuada de datos.[8] Si bien es cierto que se evidencia una preocupación por el uso de estas herramientas, no existe aún una regulación internacional, o suficientes estudios acerca de los eventuales derechos vulnerados con el uso de estos algoritmos predictivos; es así como en el presente artículo se aportará este nuevo conocimiento, mediante un análisis crítico de los principales algoritmos predictivos y los eventuales impactos para los derechos humanos.

Al observarse la problemática anteriormente mencionada surge la pregunta problema de investigación a resolver en el presente artículo: ¿cuáles son los impactos a los derechos humanos derivados de la utilización

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6 ProPública es una sala de prensa independiente sin fines de lucro que produce periodismo de investigación con fuerza moral, https://www.propublica.org/

7 MIRÓ, Fernando. Inteligencia artificial y justicia penal: más allá de los resultados causados por robot. *Revista de Derecho Penal y Criminología*, n. 20, 2018, p. 10.

8 RIZER, Arthur; WATNEY Caleb. Artificial Intelligence Can Make Our Jail System More Efficient, Equitable and Just. *Texas Review of Law & Politics*, Austin, v. 23, n. 1, 2018, p. 15. (traducción libre).

de algoritmos predictivos de riesgo en la administración de justicia penal, y en especial el algoritmo COMPAS? Por tanto, el objetivo general consiste en establecer los posibles impactos a los derechos humanos por la utilización de algoritmos predictivos de riesgo en la administración de justicia penal.

Para dar cumplimiento a este objetivo se hará uso de una metodología cualitativa de tipo básico jurídico y multidisciplinaria, porque integra sistemas de análisis de las ciencias computacionales, que permitirán un alcance descriptivo donde se identificarán y analizarán los elementos de los algoritmos el PSA, el LSI-R, HART, CAS, NDAS y COMPAS, que son utilizados para la cuantificación del riesgo de actividades delictivas; por lo cual, el método utilizado será de tipo deductivo-inductivo, debido a que primero se realizará el análisis documental de fuentes primarias, secundarias y terciarias, que describen el funcionamiento de los algoritmos, para deducir en ellos los elementos sobre los cuales podrían generarse conflictos frente a los derechos humanos. Para lo anterior será necesario identificar aquellos que se encuentran inmersos en el objeto y fin de la utilización de los algoritmos, aplicando entonces un proceso de inducción que logre contrastar el respeto y garantía del pleno goce y ejercicio de estos derechos humanos, y las garantías procesales en la utilización de los algoritmos.

Por último, los resultados se presentarán de la siguiente forma: primero se describirán los algoritmos predictivos de riesgo y las variables que son usadas en su aplicación, seguidamente se describirá el algoritmo COMPAS en el marco del proceso penal y finalmente, se determinarán cuáles son los impactos de los derechos humanos relacionados con el uso de aquellos algoritmos y en especial del algoritmo COMPAS.

Los resultados apuntan a la hipótesis de que en efecto sí hay riesgos hacia los derechos humanos cuando se utilizan algoritmos predictivos de niveles de riesgo, en el proceso penal.

1. Algoritmos predictivos de riesgo en el marco del proceso penal

La inteligencia artificial y en especial los algoritmos basados en aprendizaje automático se encuentran presentes en diferentes áreas del

conocimiento. Estos algoritmos analizan grandes cantidades de datos y realizan predicciones según el tipo de necesidad requerida, siendo utilizados principalmente en herramientas del sector financiero, en sistemas de georreferenciación, así como en el ámbito de la comunicación, marketing y redes sociales. Sin embargo, la predicción también está siendo utilizada en el ámbito de la administración de justicia en asuntos tan importantes como la criminalidad, a través de los llamados algoritmos predictivos de riesgo; también "en las últimas décadas, gran parte de la comunidad de investigación de AI & Law se ha centrado en desarrollar modelos computacionales integrales de argumentación legal (CMLA)"[9].

Volviendo a los algoritmos predictivos de riesgo, se trata de patrones matemáticos basados en la automatización del proceso de predicción del comportamiento de un individuo a través de un puntaje (score), el cual determina su nivel de riesgo y son utilizados en los procesos de toma de decisiones, por ejemplo, para la aplicación de medidas cautelares, o también tras la condena,[10] en un proceso judicial.

A su vez, los mencionados algoritmos apoyan las actividades policiales a través de información automatizada en tiempo real, por ejemplo, acerca de las áreas en las que deben desplegarse operativos policiales.

En el marco del proceso penal, estan presentes varios algoritmos predictivos de riesgo como lo son el PSA (Public Safety Assessment), el cual es usado para determinar si el procesado puede permanecer en libertad hasta la etapa del juicio, teniendo en cuenta el nivel de riesgo de reincidencia o de no comparecencia a la audiencia de juicio.

Otro algoritmo predictivo de riesgo es el LSI-R (Level of Service Inventory-Revised), el cual se usa en los permisos de salida y la libertad condicional de los procesados; aquí, la ponderación utiliza criterios como los antecedentes penales, lugar de residencia, educación, empleo, ocio, familia, problemas de alcohol o drogas, actitudes emocionales y personales.

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[9] ASHLEY, Kevin. Computational Models of Legal Argument. In Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age, 2017. p. 127. (traducción libre)

[10] MIRÓ, Fernando. Inteligencia artificial y justicia penal: más allá de los resultados causados por robot. *Revista de Derecho Penal y Criminología*, n. 20, 2018, p. 107.

Por otro lado, se encuentra el algoritmo HART (Harm Assessment Risk Tool), su función es predecir el nivel de riesgo de los individuos de cometer delitos en un lapso de dos años, usando criterios como edad, sexo e historial de delitos; este algoritmo ayuda a determinar si el individuo que tiene un riesgo bajo puede ser enviado por los agentes de policía a un programa de rehabilitación denominado Checkpoint.

Además, existe otro algoritmo denominado CAS (Crime Anticipation System), su función es predecir los delitos de alto impacto, por ejemplo, el hurto, que puede llegar a ocurrir en zonas específicas. Las variables que usa CAS están relacionadas con aquellos delitos que se han materializado en dicho lugar con anterioridad, además de tener en cuenta datos "socioeconómicos y demográficos sobre género, etnia [...], edad e ingresos/bienestar, código postal en la ciudad; a la vez usa datos como el historial penal y la distancia de los posibles sospechosos".[11] Claramente se trata de una herramienta que utiliza las ideas de la criminología ambiental, y del defensible space, según las cuales existen lugares y personas predispuestas para el hecho criminal, que pueden ser determinadas analizando las relaciones entorno-individuo.

También se encontró el algoritmo NDAS (National Data Analytics Solution), el cual es utilizado para predecir delitos violentos, el nivel de riesgo del individuo de cometer un delito con arma blanca o con arma de fuego y quién puede ser víctima del delito. Los criterios que usa el algoritmo son registros de individuos detenidos y de los delitos cometidos. Una vez son identificados los posibles sospechosos se les ofrecen servicios sociales o de salud con el fin de evitar la ocurrencia del delito.

Los diversos algoritmos mencionados, ponderan diferentes variables y son utilizados primordialmente con el objetivo de anticipar la decisión criminal o la reincidencia, e inclusive apoyan la toma de decisiones relacionadas con la libertad, rehabilitación o servicios sociales. Inmerso en estos algoritmos, el que ha tenido un mayor análisis en su aplicación es el COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), el cual "es entendido como una herramienta estructurada que valora el riesgo de reincidencia del procesado y las

[11] MUTSAERS, Paul. Changing chronotopes of policing: timespace, race, and juvenile justice in amsterdam, p. 11 (traducción libre).

necesidades criminológicas del sujeto",[12] dicha herramienta será objeto de análisis en el siguiente capítulo.

A pesar de no ser materia puntual del presente escrito, debe mencionarse también la cada vez más estrecha relación entre neurociencia y derecho penal, la cual ha impulsado el desarrollo de herramientas cada vez más sofisticadas, que permitan como lo advierte de Souza, acercarnos más a la verdad, a la historia que se pretende describir en el proceso penal. En ese escenario, herramientas como el examen neurológico llamado P-300, el cual pretende "reunir elementos de conocimiento cognitivo que el imputado tiene sobre el delito [...] a través del análisis de su actividad eléctrica cerebral frente a ciertos estímulos", generan dudas tales como la señalada por de Souza, en torno a si "¿son estos métodos aceptables desde la perspectiva de un proceso equitativo y equitativo, basado inquebrantablemente en la protección de derechos, libertades y garantías?" [13].

2. Algoritmo COMPAS en el marco del proceso penal

El algoritmo COMPAS fue desarrollado por la empresa privada Northpointe que lo describe como "un instrumento de evaluación de riesgo de cuarta generación, el cual permite el monitoreo de los individuos a lo largo del tiempo a partir de la información de factores de riesgo dinámicos, diseñados para ayudar en la intervención correccional con el fin de disminuir la probabilidad de que los infractores reincidan".[14]

En la misma línea, "COMPAS tiene dos modelos principales de riesgo: riesgo de reincidencia general y riesgo de reincidencia violenta, así mismo este algoritmo cuenta con escalas que miden tanto el riesgo

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[12] MARTÍNEZ, Lucía. Peligrosidad, algoritmos y due process: el caso state vs loomis. *Revista de Derecho Penal y Criminología (uned)*, n. 20, 2018, p. 485.

[13] AIRES DE SOUSA. Susana. Neurociências e Direito Penal: em busca da "verdade" perdida (na mente)?, 2017, p. 4-6.

[14] NORTHPOINTE. Practitioner's Guide to COMPAS Core, p. 1, (traducción libre).

dinámico (factores criminógenos) como riesgo estático (factores históricos)".[15]

En efecto, el mencionado algoritmo está siendo utilizado en el proceso penal para valorar el grado de riesgo de reincidencia del sujeto, "sobre la base de un análisis complejo que implica el uso de la información obtenida de una encuesta de 137 preguntas, dividida en varias secciones diferentes, así como de la información correspondiente a los antecedentes penales individuales";[16] además se realiza una entrevista al procesado con el fin de obtener toda la información necesaria para realizar la ponderación y determinar un puntaje del nivel de riesgo de reincidencia.

Ahora bien, después de realizada dicha evaluación y ponderación de factores, se obtiene un puntaje (score) dentro de una escala del 1 al 10, en la que 1 es el riesgo más bajo y 10 es el riesgo más alto.

La Guía del Usuario del COMPAS de 2015 realizada por Northpointe, determinó los tipos de escalas de cada nivel de riesgo:

Tipos y escalas principales del algoritmo Compas	
Escala	Tipo de escala
Riesgo de reincidencia violenta	1
Riesgo de reincidencia general	1
Riesgo de liberación previa al juicio	1
Participación criminal	1
Historial de incumplimiento	1
Historia de violencia	1
Violencia actual	1
Asociados criminales / compañeros	4
Abuso de sustancias	2
Problemas financieros / Pobreza	3
Problemas vocacionales / educativos	3

[15] NORTHPOINTE. Practitioner's Guide to COMPAS Core, p. 1, (traducción libre).

[16] ROMEO, Carlos. Riesgo, procedimientos actuariales basados en inteligencia artificial y medidas de seguridad. *Revista de Derecho, Empresa y Sociedad (REDS),* n. 13, 2018, p. 49.

Tipos y escalas principales del algoritmo Compas	
Escala	Tipo de escala
Pensamiento criminal	3
Criminalidad familiar	3
Problemas del entorno social	3
Ocio y recreación	3
Inestabilidad residencial	3
Problemas de adaptación social	3
Fracaso de socialización	3
Oportunidad criminal	3
Personalidad criminal	3
Aislamiento social	3

Gráfico 1. Elaboración propia, información tomada de NORTHPOINTE, p. 8-9, (traducción libre).

Algunas de las variables utilizadas por el algoritmo para establecer el grado de riesgo de reincidencia están basadas en información privada y posiblemente subjetiva. Por ejemplo, las escalas de ocio o fracaso de socialización, lo cual podría considerarse discriminatorio al tenerse en cuenta criterios ajenos a un riesgo real de reincidencia.

En el mismo orden de ideas en la Guía se mencionó una puntuación para cada tipo de escala, de la siguiente forma:

Puntos para las escalas utilizadas en el algoritmo Compas			
Tipo 1	Bajo (1-4)	Medio (5-7)	Alto (8-10)
Tipo 2	Improbable (1-2)	Probable (3-4)	Muy probable (5-10)
Tipo 3	Improbable (1-5)	Probable (6-7)	Muy probable (8-10)
Tipo 4	Improbable (1-4)	Probable (5-7)	Muy probable (8-10)

Gráfico 2. Elaboración propia, información tomada de NORTHPOINTE, p. 8-9, (traducción libre).

Cada tipo de escala tendrá una puntuación de 1 a 4 y de igual forma un puntaje de 1 a 10; lo que permitiría determinar una puntuación

del nivel de reincidencia del procesado. Northpointe en su guía establece que hay dos tipos de escalas, la de necesidades y la de riesgo, la primera no es predictiva, sino que permite describir de forma sencilla al procesado[17].

En el mismo orden de ideas, en la guía ya mencionada, se clasifican dichas escalas en: reincidencia general, reincidencia violenta y la mala conducta previa al juicio; no obstante, la guía carece de especificidad en cuanto a la descripción del funcionamiento del algoritmo, por lo cual el COMPAS se comporta como un algoritmo de caja negra, lo cual implica que su arquitectura no permite conocer su funcionamiento ni saber cómo influyen verdaderamente esas escalas en la determinación del nivel de riesgo de reincidencia, por ende puede afirmarse que hay opacidad en el algoritmo.

De otro lado, se hará mención de algunas preguntas que integran la encuesta Core las cuales alimentan el algoritmo:

Nombre de la escala	Tipo de pregunta	Tipo de respuesta
No comparecencia	¿Cuántas veces el individuo no se presentó a comparecer ante el tribunal?	___0 ___1 ___2 ___3 ___4 ___5+
Comportamiento cognitivo	¿Cuántos de sus amigos/conocidos consumen drogas con regularidad?	___Ninguno ___Pocos ___La mitad ___La mayoría
Oportunidad criminal	¿Hay mucha delincuencia en su vecindario?	___Sí ___No
Personalidad criminal	Me meto en problemas porque hago las cosas sin pensar	___Muy en desacuerdo ___En desacuerdo ___No estoy seguro ___De acuerdo ___Muy de acuerdo
Pensamiento criminal	Algunas personas deben ser tratadas con rudeza o golpeadas solo para enviarles un mensaje claro	___Muy en desacuerdo ___En desacuerdo ___No estoy seguro ___De acuerdo ___Muy de acuerdo
Delincuencia familiar	¿Fue arrestado alguna vez su padre (o figura paterna que lo crio principalmente)?	___Sí ___No

[17] NORTHPOINTE. Practitioner's Guide to COMPAS Core, p. 8, (traducción libre).

Nombre de la escala	Tipo de pregunta	Tipo de respuesta
Historial de violencia	¿Cuántos arrestos previos por delitos graves de agresión (no asesinato, sexo o violencia doméstica) ha tenido?	___0 ___1 ___2 ___3+
Ocio y recreación	¿Con qué frecuencia sintió que no tenía nada que hacer en su tiempo libre?	___Nunca ___Varias veces al mes ___Varias veces a la semana ___Diariamente
Educación	¿Cuáles fueron sus calificaciones habituales en la escuela secundaria?	___A ___B ___C ___D ___E / F ___No asistió
Historia de enfermedad mental	¿Ha intentado suicidarse alguna vez?	___Sí ___No
Salud mental	¿Alguna vez ha visto cosas u oído voces que no estaban realmente presentes?	___Sí ___No

Gráfico 3. Elaboración propia, información tomada de NORTHPOINTE, p. 5, s.s, (traducción libre).

Dentro de las escalas y preguntas recién mencionadas, se evidencia que algunas pueden ser polémicas, al estar relacionadas con asuntos de salud como trastornos mentales; información que debería ser utilizada para brindar el acompañamiento psico-social adecuado, pero no deberían impactar negativamente la calificación de riesgo de reincidencia. Adicionalmente, cabe la pena preguntarse, si los eventuales sesgos de los algoritmos predictivos de riesgo, podrían incentivar lo que Silva ha llamado la teoría de la inocuización, de acuerdo con la cual "resulta posible individualizar a un número relativamente pequeño de delincuentes (high risk offenders), respecto de los cuales cabe determinar que han sido responsables de la mayor parte de hechos delictivos y predecir, sobre la base de criterios estadísticos, que lo seguirán siendo. De este modo, se entiende que la inocuización de los mismos, esto es, su retención en prisión el máximo tiempo posible conseguiría una radical reducción del número de hechos delictivos y, con ello, importantes beneficios al menor coste"[18].

[18] SILVA, Jesús. La expansión del derecho penal aspectos de la política criminal en las sociedades postindustriales, 1999, p. 144.

La tendencia a esa inocuización, es preocupante, en tanto podría llevar a un círculo vicioso que aliente la segregación de sectores tradicionalmente discriminados, poniendo en riesgo garantías tradicionales de la persecución penal, tales como la presunción de inocencia, o el propio derecho penal de acto, para regresar a ideas fines al derecho penal de autor.

2.1 Caso hito en la aplicación del algoritmo COMPAS: State Wisconsin vs Loomis

Algunos estados y condados de Estados Unidos han implementado el uso del algoritmo COMPAS. El caso de Wisconsin State vs Loomis puede catalogarse como hito, ya que al parecer fue la primera vez que un tribunal se pronunció sobre la admisibilidad del uso de herramientas de IA dentro del proceso penal.

En este caso Loomis fue acusado por cinco delitos, ya que estuvo involucrado en un tiroteo, fue imputado por cargos de posesión de arma de fuego, posesión de un rifle de cañón corto, intento de huida de un agente de tráfico, peligro a la seguridad pública y conducción de un vehículo motorizado ajeno sin el consentimiento del propietario. El procesado no admitió su participación en el tiroteo, pero sí acepto que condujo el vehículo y que intentó huir del oficial de tránsito; finalmente llegó a un acuerdo con la Fiscalía en donde solamente aceptó los cargos de puesta en peligro de la seguridad pública y conducción de un vehículo ajeno sin autorización.

Seguidamente la Fiscalía aportó un informe con el resultado del algoritmo COMPAS, en el que se estableció que el Señor Loomis presentaba un alto grado de riesgo de reincidencia. El juez de primera instancia teniendo en cuenta entre otros, el mencionado informe, impuso una pena de 6 años de prisión además de una pena de 5 años de libertad vigilada.

El apoderado del Señor Loomis apeló la decisión ante la Corte Suprema ya que vulneraba el "derecho al debido proceso por tres razones: (1) viola el derecho del acusado a ser sentenciado con base en información precisa, en parte debido a la naturaleza patentada de COMPAS, lo que impide evaluar su exactitud; (2) viola el derecho del acusado a una

sentencia individualizada; y (3) utiliza indebidamente evaluaciones de género en las sentencias"[19].

Sobre el primer argumento, la defensa de Loomis, decidió utilizar como ejemplo el precedente del caso Gardner vs. Florida, en donde el "Tribunal de Circuito impuso la pena de muerte basándose en parte en la información de un informe de investigación anterior a la sentencia, tal informe no se reveló a los abogados de las partes [...] y se concluyó que se le negó el debido proceso cuando se impuso la pena de muerte, al menos en parte, sobre la base de información que no tuvo oportunidad de negar o explica [...] no obstante, la corte de apelaciones de Wisconsin determinó que fue un ejercicio erróneo por parte de la Corte de circuito el negar categóricamente la divulgación del informe de investigación a un acusado"[20].

Respecto de COMPAS, "al ser un instrumento patentado que cuenta con secreto comercial, no revela cómo se determinan las puntuaciones de riesgo o cómo se ponderan los factores. En ese sentido Loomis afirmó que no tuvo acceso a información que el Tribunal de Circuito consideró al momento de dictar la sentencia"[21].

No obstante, lo anterior, la Corte estableció que la analogía con el caso Gardner and Skaff es imperfecta, ya que Loomis no podría revisar y cuestionar cómo el algoritmo COMPAS calculó el riesgo, al menos podría revisar y cuestionar las puntuaciones de riesgo resultantes establecidas en el informe adjunto; a diferencia del caso Gardner and Skaff, en la que el acusado no tuvo oportunidad de refutar información utilizada por el Tribunal al momento de dictar sentencia[22].

Por otro lado, la Corte precisó que a pesar de que "el programa COMPAS no explica cómo usa la información para calcular los puntajes de riesgo, la Guía para profesionales de COMPAS de 2015 de Northpointe,

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[19] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 13. (traducción libre).

[20] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 20-21. (traducción libre).

[21] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 21. (traducción libre).

[22] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 22. (traducción libre).

explica que las puntuaciones se basan en gran medida en información estática (antecedentes penales), con un uso limitado de algunas variables dinámicas" [23].

El segundo argumento de la defensa estableció que COMPAS vulneraba el derecho a una sentencia individualizada, ya que el software trabaja con base en estadísticas grupales, sobre este punto la Corte recalcó que "las evaluaciones de riesgo son junto otros factores de apoyo útiles para proporcionar la mayor cantidad de información posible para llegar a una sentencia individualizada"; [....] sin embargo las implicaciones del debido proceso, generan la necesidad de advertir a los Tribunales de Circuito que los puntajes de evaluación de riesgos de COMPAS se basan en datos grupales, que pueden identificar grupos de delincuentes de alto riesgo, no un individuo de alto riesgo en particular [24].

Por último, el defensor del Sr. Loomis estableció que el uso del software tomaba en cuenta el género, argumentando que el acusado no puede ser sentenciado basándose en su género; la Corte sostuvo que es necesario considerar el género en una evaluación de riesgo para lograr precisión estadística, además, debido a que los hombres y las mujeres tienen diferentes tasas de reincidencia y diferente potencial de rehabilitación. Una evaluación de riesgo neutral en cuanto al género proporcionaría resultados inexactos tanto para hombres como para mujeres[25].

Adicionalmente la Corte puntualizó que el uso del género por parte de COMPAS promueve la precisión que, en última instancia, redunda en beneficio del sistema de justicia. Finalmente, la Corte concluyó que el acusado no demostró que la sentencia utilizó el género como un factor decisorio en la sentencia [26].

El caso Loomis ha sido paradigmático ya que ha puesto de presente que las garantías del proceso penal y los derechos de los procesados podrían

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[23] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 22. (traducción libre).

[24] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 30-31. (traducción libre).

[25] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 32. (traducción libre).

[26] SUPREME COURT OF WISCONSIN. Appeal from an order of the circuit court, p. 35-36. (traducción libre).

estar amenazados, por la utilización de los informes de nivel de riesgo derivados del algoritmo COMPAS. Lo anterior, por cuanto los acusados no tienen información suficiente para contradecir tales resultados, al no ser posible establecer el peso, la valoración y ponderación exacta que el algoritmo realiza en relación con las diferentes variables. Lo anterior impactaría el derecho al debido proceso, el principio de contradicción e inclusive la presunción de inocencia.

2.2 Problemáticas jurídicas derivadas de la aplicación del algoritmo COMPAS

Una de las problemáticas surgidas con uso del algoritmo COMPAS es la posibilidad de la presencia de sesgos, en ese sentido Joanna Bryson ha establecido que "la IA tiene el potencial de reforzar los sesgos existentes, porque a diferencia de los humanos, los algoritmos pueden no estar equipados para contrarrestar conscientemente los sesgos aprendidos"[27]. La investigadora ha insistido, en que no se trata de que la IA tenga sesgos per se, sino que ella está aprendiendo y replicando los sesgos presentes en los seres humanos[28].

Se ha indicado que, si estos sistemas automatizados son alimentados con información "de justicia sesgada, acabarán reproduciendo y potenciando esos sesgos. Si en un país como Estados Unidos las personas de ascendencia africana tienen muchas más probabilidades de acabar en la prisión sin fianza, y entrenamos a una red neuronal con esos datos, el algoritmo acabará replicando ese tipo de sesgos".[29] Lo anterior quiere decir, que el sesgo de un tipo de datos utilizados por el programador del algoritmo puede verse reflejado en la herramienta de inteligencia artificial lo cual conllevaría a una injusticia algorítmica, al replicarse en esta los mencionados sesgos.

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[27] THE GUARDIAN, AI programs exhibit racial and gender biases, research reveals, párr. 6, (traducción libre).

[28] THE GUARDIAN, AI programs exhibit racial and gender biases, research reveals, párr. 6 (traducción libre).

[29] CASACUBERTA, David. Sesgo en bucle: alimentando la injusticia algorítmica, párr. 3.

Quizás la más importante de las críticas ha sido realizada por ProPublica,[30] a través de un informe en el que argumentó que el COMPAS tiene un sesgo racista, lo cual demostró entre otras en el siguiente gráfico:

	Blancos	Afroamericanos
Etiquetado como de mayor riesgo, pero no reincidió	23.5%	44.9%
Etiquetado como de menor riesgo, pero reincidió	28.0%	47.7%

Gráfico 4. *Elaboración propia, información tomada de Propublica, párr. 62, (traducción libre).*

Este gráfico señala que la calificación de los acusados blancos se inclina hacia el menor riesgo, a diferencia de los acusados afrodescendientes, respecto de los cuales la tendencia se inclina hacia el mayor riesgo. Además se evidenció el denominado falso positivo, entendido como la calificación que da el algoritmo sobre si el procesado va a reincidir cuando en realidad no lo hace, lo cual se vio reflejado con un 44.9% en los procesados afroamericanos a diferencia de los procesados blancos con un 23.5%, así mismo está el denominado falso negativo, que opera de forma contraria, determinando que el procesado no va a reincidir pero efectivamente sí reincide y es así como se reflejó un resultado de un 47.7% en los procesados afroamericanos a diferencia del 28.0% de los procesados blancos, lo que conllevaría a un error discriminatorio en la arquitectura que posee COMPAS.

No obstante, la raza no es el único sesgo que se ha evidenciado en el algoritmo, pues al parecer se presenta un sesgo adicional dirigido hacia grupos minoritarios, ya que "las poblaciones que históricamente han sido perseguidas por las fuerzas del orden público de manera desproporcionada, especialmente las comunidades con ingresos bajos y las minorías; ahora están en riesgo de recibir puntuaciones más altas de reincidencia. Como resultado, el algoritmo podría amplificar y perpetuar

[30] ProPublica es una sala de prensa independiente sin fines de lucro que produce periodismo de investigación con fuerza moral, https://www.propublica.org/

los sesgos ya existentes y generar aún más datos afectados por esos sesgos para alimentar ese ciclo vicioso".[31]

En el mismo orden de ideas el juez Hillman de Estados Unidos, "estableció que varios estados han empezado a experimentar el uso de la IA, como una herramienta para predecir el riesgo de reincidencia de los acusados [...] y para considerar dicha evaluación al momento de dictar la sentencia. Según Hillman, al menos un acusado ha presentado una apelación sobre la puntuación determinada por el algoritmo, sin embargo, dichas apelaciones no han tenido éxito alguno".[32]

De igual forma para Hillman, "estos experimentos pueden presagiar el crecimiento de dicho uso en la toma de decisiones críticas al dictar sentencia y reflejar un nivel de comodidad cada vez mayor con el uso de la IA entre los jueces".[33] Lo anterior podría conllevar a que el juez no use esta herramienta solo como apoyo en la toma de decisión (como elemento de convicción), sino que fundamente su decisión exclusivamente en el puntaje establecido en el algoritmo, con lo que se replicaría en la decisión una injusticia algorítmica, y se perdería el elemento de valoración y raciocinio humano. En ese sentido, el juez ha afirmado que "el uso de tecnología predictiva de inteligencia artificial en la sentencia es un desarrollo preocupante, que los tribunales [...] deben enfrentar con escepticismo y un escrutinio minucioso". [34]

Debe considerarse que "el puntaje de evaluación de riesgo generado por el algoritmo se presenta al tribunal como una presunta determinación fáctica" [35]. Lo que implica que el procesado no cuenta con las garantías procesales suficientes, ya que por un lado dicha tecnología predictiva se incorporaría al proceso como una prueba que no podría

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[31] HAO, Karen. La IA que evalúa a delincuentes perpetúa la injusticia hacia las minorías, párr. 11.

[32] HILLMAN, Judge. The Use of Artificial Intelligence in Gauging the Risk of Recidivism, párr. 1, (traducción libre).

[33] HILLMAN, Judge. The Use of Artificial Intelligence in Gauging the Risk of Recidivism, párr. 1, (traducción libre).

[34] HILLMAN, Judge. The Use of Artificial Intelligence in Gauging the Risk of Recidivism, párr. 1, (traducción libre).

[35] HILLMAN, Judge. The Use of Artificial Intelligence in Gauging the Risk of Recidivism, párr. 6, (traducción libre).

ser controvertida, "sin una oportunidad concomitante de probar [o desvirtuar] los datos, los supuestos e incluso los prejuicios que subyacen a la conclusión", [36] debido a que el procesado no podría acceder a la información que tuvo en cuenta el algoritmo para llegar al informe final, ya que este proceso se encuentra protegido por el denominado secreto de empresa; entonces la pregunta que surge es ¿de qué forma se podrían ejercer los derechos de contracción y de defensa si no se puede conocer cómo funciona el algoritmo?

En consecuencia de lo anterior, puede afirmarse que estos sesgos algorítmicos se materializan en los sistemas de aprendizaje automático, específicamente el algoritmo COMPAS, y al ser incorporados en los procesos judiciales como un supuesto fáctico incontrovertible, se estarían violando derechos humanos como la igualdad, no discriminación, debido proceso, libertad personal, honra y dignidad.

Adicionalmente a lo mencionado, tampoco se materializaría el modelo garantista expuesto por Ferrajoli, de acuerdo con el cual los ordenamientos jurídicos penales, al alinearse con tal modelo deben garantizar los principios de legalidad y presunción de inocencia[37], entre otros.

2.3. Incertidumbre frente a los Derechos Humanos con el uso del algoritmo COMPAS.

Ya hemos mencionado que la creciente utilización de algoritmos predictivos al interior de la administración de justicia, en especial en materia penal, suscita dudas acerca de las eventuales violaciones de derechos humanos que podrían surgir de tal uso. Se ha evidenciado una gran preocupación por parte de varios sectores de la sociedad civil, que han sugerido cuál debería ser el adecuado uso de los algoritmos predictivos de riesgo, en un marco de protección y respeto de los derechos humanos y garantías judiciales. Si bien es cierto que tales algoritmos aportan celeridad en la toma de decisión judicial, también se han visto comprometidos

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[36] HILLMAN, Judge. The Use of Artificial Intelligence in Gauging the Risk of Recidivism, párr. 6, (traducción libre).

[37] FERRAJOLI. Derecho y razón, 1995 p. 33.

algunos derechos humanos; lo anterior se hizo evidente por ejemplo en el caso Loomis anteriormente citado.

De acuerdo con la Declaración Universal de Derechos Humanos (en adelante DUDH) "todos los seres humanos nacen libres e iguales en dignidad y derechos"[38], lo cual se alinea con lo establecido en el Pacto Internacional de Derechos Civiles y Políticos (en adelante PIDCP) que establece en su artículo 14 "[...] todas las personas son iguales ante los tribunales y cortes de justicia [...][39]

En igual sentido los Principios y directrices de las Naciones Unidas sobre el acceso a asistencia jurídica en los sistemas de justicia penal, específicamente en el principio No 6, se ha señalado que "los Estados deben garantizar la prestación de asistencia jurídica a todas las personas, independientemente de su edad, raza, color, sexo, idioma, religión o creencia, opinión política o de otra índole, origen nacional o social, patrimonio, ciudadanía o domicilio, nacimiento, instrucción o condición social, o de cualquier otra condición".[40]

Ahora bien, algunos de los tipos de escalas que son aplicadas en el algoritmo COMPAS que fueron mencionadas en el capítulo anterior, podrían desconocer ese derecho a la igualdad y no discriminación, al valorarse criterios tales como la situación financiera, el desempleo o la pobreza. Lo anterior llevaría a la nefasta conclusión de que, si un procesado cuenta con un nivel económico superior a otro, el primero tendría un puntaje de escala de riesgo de reincidencia más bajo, lo que evidenciaría un tratamiento desigual de los procesados al ponderar sus recursos económicos.

En relación con la discriminación, la Organización de Naciones Unidas (ONU) "ha indicado que se trata de una forma de intolerancia por motivos de raza, color, linaje u origen nacional o étnico y además las víctimas pueden sufrir formas múltiples o agravadas de discriminación por otros motivos conexos, como el sexo, el idioma, la religión, las opiniones

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[38] NACIONES UNIDAS. La Declaración Universal de Derechos Humanos, p. 5.

[39] NACIONES UNIDAS. Pacto Internacional de Derechos Civiles y Políticos, p. 5.

[40] NACIONES UNIDAS. Principios y directrices de las Naciones Unidas sobre el acceso a la asistencia jurídica en los sistemas de justicia penal, p. 10.

políticas o de otra índole, el origen social, la situación económica y el nacimiento [...]" [41]; además la DUDH en su artículo 7 estableció que todas las personas son iguales ante la ley y tienen, sin distinción, derecho a igual protección de la ley [...][42].

Al respecto, ProPublica hizo evidente el sesgo racial del COMPAS, el cual si bien no utiliza la raza como una variable en la encuesta, si se inclina hacia el sesgo racista, en los denominados falsos positivos, esto es, las personas afrodescendientes son etiquetadas equivocadamente como de alto riesgo, con mayor frecuencia que las personas blancas, quienes son con más frecuencia etiquetadas como falsos negativos, con lo que es claro, que la tendencia se inclina de manera negativa hacia las personas afrodescendientes, evidenciando una discriminación por parte del mencionado algoritmo.

En el mismo sentido, Dieterich, Mendoza y Brennan en estudio realizado en 2016, determinaron que la raza sí afecta los puntajes que son obtenidos en el algoritmo COMPAS, "el porcentaje de acierto a la hora de determinar el riesgo de reincidencia, aunque similar, era superior en el caso de personas blancas (un 67%), frente al 63,8% para las personas negras. Sin embargo, lo relevante de este estudio es que las personas negras que COMPAS puntuó con un alto riesgo fueron incorrectamente catalogadas en un 45% de los casos, dado que no reincidieron, mientras que los blancos lo fueron en un 23,5% de los casos. Por el contrario, los blancos que obtuvieron un porcentaje de bajo riesgo de reincidencia posteriormente reincidieron en un 47,7% de los casos, frente a un 28% de las personas negras. Esta estadística demuestra que COMPAS sí parte de un sesgo racial".[43]

Por ende, de acuerdo con el mencionado estudio y el informe Propublica entre otros, se pudo determinar con certeza que el derecho a la no discriminación está siendo vulnerado con la aplicación de la evaluación de riesgo de reincidencia. En el mismo sentido Arnold, Dobbie & Yang,

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[41] NACIONES UNIDAS. Protocolo Facultativo de la Convención contra la Tortura y Otros Tratos o Penas Crueles, p. 11.

[42] NACIONES UNIDAS. La Declaración Universal de Derechos Humanos, p. 16.

[43] DIETERICH, W. et al, como se citó en HERNÁNDEZ, María. Inteligencia artificial y derecho penal. *Revista Actualidad Jurídica Iberoamericana*, n. 10, 2019 p. 825.

intentaron identificar prejuicios raciales en las decisiones de fianza que son tomadas por los jueces, y de acuerdo con los resultados, se encontró que se están cometiendo errores de predicción con sesgo racial, y ello podría llevar a los jueces de fianza a exagerar el peligro relativo de liberar acusados negros versus acusados blancos e igualmente consolidar los estereotipos anti-negros, lo cual exacerba aquellas diferencias entre estos grupos raciales.[44]

En este punto, es interesante un segundo estudio realizado por ProPublica, "donde a través de una solicitud de registros públicos se obtuvieron dos años de puntajes del COMPAS de la Oficina del Sheriff del Condado de Broward en Florida, es así como recibieron datos de las 18,610 personas que fueron calificadas en 2013 y 2014, y construyeron un perfil de los antecedentes penales de cada persona, tanto antes como después de haber sido calificados".[45] Según dicho estudio para determinar la raza, el algoritmo COMPAS "utilizó las clasificaciones raciales de la Oficina del Sheriff del Condado de Broward, que identifica a los acusados como negros, blancos, hispanos, asiáticos y nativos americanos, adicionalmente en un primer momento ProPublica dedujo que a veces los nombres de las personas o las fechas de nacimiento se ingresaron incorrectamente en algunos registros, lo que condujo a coincidencias incorrectas entre la puntuación COMPAS de una persona y sus antecedentes penales".[46]

Seguidamente, se analizó la reincidencia entre los acusados blancos y los acusados afrodescendientes detectando que el sesgo racial influyó porcentualmente en una puntuación de 45% más alta del grado de reincidencia.[47] Se concluyó entonces que los acusados afrodescendientes

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[44] ARNOL, David, DOBBIE Will & YANG Crystal. Racial Bias in Bail Decisions. *The Quarterly Journal of Economics*, v. 133, n. 4, p. 3, (traducción libre).

[45] LARSON, Jeff, MATTU Surya, KIRCHNER, Lauren & ANGWIN, Julia. How We Analyzed the COMPAS Recidivism Algorithm, párr. 12, (traducción libre).

[46] LARSON, Jeff, MATTU Surya, KIRCHNER, Lauren & ANGWIN, Julia. How We Analyzed the COMPAS Recidivism Algorithm, párr. 12, (traducción libre).

[47] LARSON, Jeff, MATTU Surya, KIRCHNER, Lauren & ANGWIN, Julia. How We Analyzed the COMPAS Recidivism Algorithm, párr. 12, (traducción libre).

tienen el doble de probabilidad de ser calificados en riesgo de reincidir en la escala de tipo violenta, lo cual conlleva un sesgo algorítmico al ponderar la raza como un factor determinante.

Continuando con otros derechos en posible riesgo, el derecho al debido proceso es entendido como "un derecho humano, civil y político, que consiste en el conjunto de garantías procesales que protegen al individuo sometido a un procedimiento judicial".[48] Al respecto en el ya señalado caso Wisconsin vs Loomis, uno de los principales argumentos de la defensa, fue precisamente la violación de este derecho, derivada de la imposibilidad de controvertir la operación realizada por el algoritmo, para establecer el nivel de riesgo.

Es claro que el derecho al debido proceso debe verse reflejado en todas las decisiones judiciales, aun en aquellas que son tomadas con la ayuda de algoritmos predictivos, garantizando que el procesado pueda conocer, analizar y contradecir todos los elementos probatorios en los que se base la decisión judicial, en el mismo orden de ideas la ONU ha establecido que este derecho es "[...]el conjunto de requisitos que deben observarse a fin de que las personas puedan defenderse adecuadamente ante cualquier acto del Estado que pueda afectar sus derechos" [...].[49]

Es así como los individuos que se vean involucrados en decisiones tomadas con ayuda de algoritmos predictivos de riesgo, tienen derecho a contradecir la decisión cuando no se encuentren de acuerdo con la misma. Esto implicaría garantizar acceso abierto a la arquitectura del algoritmo, para conocer el proceso a través del cual se llega al resultado del nivel de riesgo.

En el caso en concreto de Loomis, la defensa señaló que este derecho fue vulnerado ya que el procesado en un principio no pudo conocer la forma en que funcionó el algoritmo, lo cual impidió el adecuado ejercicio de la contradicción, y también el derecho a recurrir la sentencia, ya que la opacidad del algoritmo impide refutar la ponderación y valoración previa al resultado arrojado por el COMPAS.

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[48] ANAYA, Alejandro. Glosario de términos básicos sobre derechos humanos, p. 46.

[49] NACIONES UNIDAS, Protocolo facultativo de la convención contra la tortura y otros tratos o penas crueles, inhumanos o degradantes, p. 5.

Hasta el momento y de acuerdo con el precedente del caso Loomis, la protección al derecho de empresa termina por impactar negativamente otros derechos y garantías del procesado, por lo cual, si la toma de decisiones judiciales fuese soportada entre otros, por algoritmos privados que el acusado no puede examinar o controvertir [...] el derecho al debido proceso o de defensa estaría siendo violado, conllevando a la falta de confianza pública en la integridad del sistema judicial,[50] por ello sería interesante determinar cómo debe hacerse la ponderación de estos derechos involucrados.

De otro lado, se evidenció el derecho a la explicación y el derecho al acceso de la información con transparencia, los cuales se encuentran relacionados con el de contradicción, en este sentido la Comisión Europea presentó una propuesta a través del denominado "libro blanco", en el cual se planteó que la IA al ser aplicada debe tener varios criterios en cuenta, tales como: "acción y supervisión humana, solidez técnica y seguridad, gestión de la privacidad y de los datos, transparencia, diversidad, no discriminación y equidad, bienestar social y medioambiental y rendición de cuentas".[51]

Ahora bien, la falta de conocimiento sobre las operaciones que ejecuta internamente una herramienta basada en aprendizaje automático, implica que "la falta de transparencia (opacidad de la IA) hace difícil detectar y demostrar los posibles incumplimientos de la legislación, especialmente las que protegen los derechos fundamentales que imputan responsabilidades y permiten reclamar una indemnización [...]"[52].

El factor de transparencia también se relaciona con la creación de los algoritmos, y lo que se ha calificado como el diseño ético de los mismos; es así como Rizer & Watney determinaron que "los algoritmos no son completamente neutrales ni herramientas objetivas, ya que pueden estar sesgadas debido a la conservación inadecuada de datos y

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[50] RIZER, Arthur & WATNEY, Caleb. Artificial intelligence can make our jail system more efficient, equitable and just. *Texas Review of Law & Politics*, Austin, v. 23, n. 1, 2018, p. 28, (traducción libre).

[51] COMISIÓN EUROPEA. Libro Blanco. Sobre la Inteligencia Artificial - Un Enfoque Europeo Orientado a la Excelencia y la Confianza, p. 11.

[52] RIZER, Arthur & WATNEY, Caleb. Artificial intelligence can make our jail system more efficient, equitable and just. Texas Review of Law & Politics, Austin, v. 23, n. 1, 2018, p. 25, (traducción libre).

la selección de las variables que los algoritmos buscarán optimizar. Si los desarrolladores humanos no tienen cuidado, o son intencionalmente maliciosos en la creación de estos algoritmos, estos sesgos pueden tener efectos sociales nocivos".[53]

En este orden de ideas, los algoritmos predictivos que se comporten como una caja negra y los sesgos que los pueden integrar, pondrían en riesgo derechos y garantías procesales, el cual se vería agravado cuando los tribunales realizan una ponderación a favor del derecho a la propiedad intelectual y el secreto de empresa.

Otro derecho que se ha señalado como vulnerado en el caso Loomis ha sido la garantía a un juez o tribunal imparcial, el cual se encuentra regulado en el artículo 10 en la DUDH donde se establece que "toda persona tiene derecho a ser oída públicamente y con justicia por un tribunal independiente e imparcial [...]".[54]

De la misma forma en el artículo 14 del PIDCP se señala que "[...] toda persona tendrá derecho a ser oída públicamente y con las debidas garantías por un tribunal competente, independiente e imparcial, establecido por la ley, en la substanciación de cualquier acusación de carácter penal [...]",[55] ahora bien, en el caso en concreto el juez fundamentó en gran parte su decisión por el puntaje establecido por el COMPAS; si bien el algoritmo es una herramienta de apoyo para el juez en la toma de la decisión, ya se ha concluido que el resultado arrojado por el algoritmo puede estar viciado con diferentes sesgos, y en ese orden de ideas el juez o tribunal perderían la imparcialidad, como quiera que esta herramienta de convicción puede entregar resultados sesgados por la raza, el nivel económico, la salud mental, entre otros.

Es evidente que la decisión tomada sobre el algoritmo COMPAS impacta el derecho a la libertad personal, respecto del cual el PIDCP señala en su artículo 9, que todo individuo tiene derecho a la libertad y a la seguridad personal, por ende, nadie podrá ser sometido a detención

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[53] RIZER, Arthur & WATNEY, Caleb. Artificial intelligence can make our jail system more efficient, equitable and just. Texas Review of Law & Politics, Austin, v. 23, n. 1, 2018, p. 25, (traducción libre).

[54] NACIONES UNIDAS. La Declaración Universal de Derechos Humanos, p. 22.

[55] NACIONES UNIDAS. Pacto Internacional de Derechos Civiles y Políticos, p. 5.

o prisión arbitraria [56]. En el caso Loomis la herramienta determinó un alto grado de nivel de reincidencia por lo cual el juez decidió privar de la libertad al procesado, teniendo en cuenta el informe arrojado por COMPAS como uno de los criterios para determinar la pena privativa de libertad en la sentencia; por lo tanto es evidente que el derecho a la libertad personal del procesado podría no verse garantizado cuando el algoritmo usa algunos criterios subjetivos tales como el ocio o fracasos de socialización, por ejemplo.

Otro derecho que es conveniente mencionar, es la dignidad humana, reconocido en el artículo 7 de la DUDH: "todos son iguales ante la ley y tienen, sin distinción, derecho a igual protección de la ley [...]" [57], en la misma línea el PIDCP establece en su preámbulo que todos los derechos allí mencionados emanan de la dignidad inherente al ser humano[58].

En el caso Loomis este derecho se vio quebrantado al tenerse en cuenta algunas variables subjetivas que escapan al control del procesado, tales como vivir en un barrio peligroso, o no haber conseguido trabajo por un largo tiempo, además de la raza, la cual, aunque no es tenida en cuenta en las preguntas, presuntamente sí influye en el nivel de riesgo de reincidencia del procesado, lo que conlleva a una discriminación algorítmica que materializa una afectación a la dignidad humana e igualdad ante la ley.

Por otra parte, la DUDH en el artículo 12, precisa que nadie será objeto de ataques contra su honra o reputación, y que la ley protegerá a las personas que puedan llegar a verse afectadas con tales actos[59]. Si bien el derecho a la honra no fue mencionado por la defensa de Loomis, este puede verse afectado con la utilización del COMPAS, ya que la calificación de riesgo establece una etiqueta algorítmica. Esa categorización del individuo trae consigo las denominadas ceremonias de degradación a las que se refería Garfinkel, señalando que aquella consiste en una degradación del status, que implica una transformación de la identidad que pasa a

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[56] NACIONES UNIDAS. Pacto Internacional de Derechos Civiles y Políticos, p. 4.

[57] NACIONES UNIDAS. La Declaración Universal de Derechos Humanos, p. 3.

[58] NACIONES UNIDAS. Pacto Internacional de Derechos Civiles y Políticos, p. 1.

[59] NACIONES UNIDAS. La Declaración Universal de Derechos Humanos, p. 26.

ser percibida como inferior.[60] Así pues, el resultado de la evaluación de riesgo crea un perfil del procesado que lo etiqueta como peligroso sin que se haya materializado el posible delito, con lo que se estaría violando el derecho a la honra y reputación.

Se puede concluir que los derechos humanos están enfrentándose a vulneraciones inminentes con los algoritmos predictivos de riesgo, por razones que ya fueron descritas; sin embargo, estas herramientas son innovadoras y aportan grandes utilidades al sistema penal, por ello, es importante hacer una reflexión sobre la forma adecuada en la que deben construirse y utilizarse, con el fin de garantizar el respeto a las garantías procesales y los derechos que puedan llegar a verse afectados.

3. Regulación y estudios existentes acerca de los algoritmos predictivos de riesgo

Una de las consecuencias derivadas de las controversias jurídicas anteriormente planteadas, ha sido la iniciativa de una regulación del uso de los algoritmos predictivos de riesgo al interior de la administración de justicia.

La principal regulación actual se encuentra en el Reglamento General de Protección de Datos para ciudadanos de la Unión Europea (en adelante UE), en relación con el adecuado tratamiento de protección de datos personales y la libre circulación de estos, tanto de las organizaciones europeas como de aquellas externas que recogen datos de los residentes de la UE [61].

El mencionado reglamento estableció que, para la elaboración de perfiles basados en datos se deben evitar efectos discriminatorios por razón de raza, opiniones políticas, religión o creencias, afiliación sindical, condición genética, estado de salud u orientación sexual, por lo cual el interesado podrá ejercer el derecho de oposición respecto del proceso de creación de perfiles cuando considere que se estén violando derechos o libertades fundamentales.

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[60] GARFINKEL, Harold, como se citó en GARCÍA, German. Criminología. Construcciones sociales e innovaciones teóricas, 2011, p. 327.

[61] COMISIÓN EUROPEA. El Reglamento general de protección de datos, p. 1.

Por otro lado, en la legislatura del Estado de Idaho de Estados Unidos, existe una normativa sobre transparencia que exige la explicación acerca del cómo las herramientas llegaron a un resultado específico.[62]

Hasta el momento, no existe una regulación legal amplia sobre los algoritmos predictivos de riesgo, pero sí se ha evidenciado un interés de parte de la ciudadanía para que sean regulados; en ese sentido, un ciudadano presentó un proyecto de ley en el Estado de New York, en el que se solicita la creación de un grupo de trabajo, que proporcione recomendaciones sobre cómo la información de los sistemas de decisión automatizada, se podría compartir con el público y cómo se analizarían aquellos casos, en donde las personas puedan llegar a verse afectadas por dichas decisiones tomadas por los algoritmos.[63]

Se presentó otro proyecto de ley en el Estado de Massachusetts, en el cual se requiere la creación de una comisión para la toma de decisiones automatizadas de la agencia estatal con el fin de que no se sigan produciendo vulneraciones de los derechos humanos.[64]

De igual forma Amnesty International y Access Now se han pronunciado sobre la IA, a través de la Declaración de Toronto donde se estableció que se deben proteger los derechos a la igualdad y a la no discriminación en los sistemas de aprendizaje automático.[65]

En el mismo orden de ideas, existen organizaciones cuyo propósito es luchar en contra de las injusticias algorítmicas, y generar una cultura de diseño ético de algoritmos. Por ejemplo, el instituto AI now, el cual se dedica a comprender las implicaciones sociales de la IA, y en ese ejercicio, ha señalado la necesidad de analizar sus impactos respecto de derechos y libertades, a la vez que los sesgos y problemas de inclusión derivados de la falta de equidad respecto de poblaciones diversas. [66] En el mismo sentido, la activista Joy Buolamwini ha creado

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[62] Legislatura de Idaho-Criminal Procedure, (traducción libre).

[63] A Local Law In Relation to Automated Decision Systems Used by Agencies, (traducción libre).

[64] An Act Establishing a Commission on Automated Decision-Making, Artificial Intelligence, Transparency, Fairness, and Individual Rights, (traducción libre).

[65] Toronto´s Declaration on Machine Learning, (traducción libre).

[66] AI NOW.

la Liga de la Justicia algorítmica, y ha señalado que en el mundo actual la IA gobierna el acceso a la información, las oportunidades y la libertad, puntualizando que los sistemas inteligentes pueden perpetuar el racismo, la discapacidad, y en general muchas formas de discriminación.[67] Por ello propone la denominada "codificación inclusiva"[68], para moderar los efectos de la subrepresentación de mujeres y personas de color en el sector de la tecnología[69].

Conclusiones

Los algoritmos predictivos han irrumpido en diferentes áreas del conocimiento y el escenario jurídico no ha sido ajeno a tal realidad, lo cual se evidencia con las herramientas PSA, LSI-R, HART, CAS, NDAS, que están siendo aplicados en actividades policiales y también en el proceso penal, aportando celeridad y precisión en la toma de decisiones.

El COMPAS como otros sistemas inteligentes predictivos, ha sido objeto de críticas, ya que, en el proceso de determinación de riesgo de reincidencia, se ponderan algunos criterios subjetivos tales como la pobreza, la enfermedad mental, el ocio, el rendimiento escolar, la actividad criminal de amigos y familiares. Lo anterior evidencia una discriminación algorítmica derivada del etiquetamiento que implica un riesgo para los derechos humanos como la no discriminación, libertad personal, debido proceso, acceso a la información transparente, entre otros.

Así mismo, se logró determinar que existen impactos negativos para los derechos humanos inmersos en un proceso judicial por el uso de algoritmos predictivos de riesgo. La opacidad de este deriva de un funcionamiento cuyos datos de entrada y salida se conocen, pero no el proceso de ponderación de las variables, lo que implica que el algoritmo

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67 BUOLAMWINI, Joy. IBM Leads, More Should Follow: Racial Justice Requires Algorithmic Justice, párr. 1, (traducción libre).

68 Para más información al respecto se puede consultar https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms?language=es#t-381312

69 BUOLAMWINI, Joy. Artificial Intelligence Has a Problem with Gender and Racial Bias. Here's How To Solve It, párr. 1, (traducción libre).

se comporta como una caja negra que unido al secreto de empresa impide que el afectado acceda y controvierta estas operaciones; lo anterior impacta el adecuado ejercicio de los derechos a la explicación, a la información, a la contradicción, a un juez imparcial y derechos correlacionados.

Ahora bien, en el diseño, programación y entrenamiento de los algoritmos, los sesgos en los datos utilizados para alimentar la herramienta pueden reflejar prejuicios del diseñador del algoritmo y/o replicar los estereotipos presentes en la sociedad. Lo anterior genera una discriminación o afectación de derechos de minorías, derivados de la raza, género o estrato económico.

La escasa regulación en torno al diseño y utilización de la IA en ámbitos de la administración de justicia ha conllevado vulneraciones de los derechos humanos; principalmente porque los funcionarios judiciales no cuentan con las directrices, protocolos o normas vinculantes que señalen la adecuada aplicación de la IA en la toma de decisión. Como consecuencia de lo anterior, desde la sociedad civil, operadores de justicia, y en general los diversos actores del sistema judicial, se demanda la necesidad de una regulación precisa y completa. Actualmente existen muy pocas legislaciones que aborden el asunto, algunos documentos y exhortaciones no vinculantes como el Libro Blanco, entre otros, los cuales propenden por la defensa de los derechos que puedan llegar a verse afectados con ocasión de la aplicación de la IA.

Por último, es importante mencionar que el uso adecuado de los algoritmos predictivos de riesgo requiere un diseño ético de los mismos, de tal forma que se eviten los sesgos en los datos que lo alimentan tanto en su diseño, como en las fases de entrenamiento, validación y pruebas. Además, debe garantizarse la transparencia algorítmica, entendida como eliminación o moderación de la opacidad del algoritmo, a efectos de que sea posible conocer la forma exacta cómo funcionan las operaciones al interior de este. Las anteriores medidas permitirían aprovechar las utilidades de la IA en la administración de justicia, materializando plenamente las garantías y derechos procesales.

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Persecução penal: investigação, juízo oral e etapa recursal

Criminal prosecution: investigation, public oral trial and appeal

La corrección de condenas erróneas en el ámbito comparado: análisis de algunos ejemplos para alimentar el debate en Chile

Correcting wrongful conviction in the comparative field: analysis of a few examples to feed the debate in Chile

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Resumen: En un contexto en el que existe creciente evidencia que las condenas erróneas son un fenómeno habitual en el funcionamiento de los sistemas de justicia penal contemporáneos y que el mecanismo principal de corrección en Chile (recurso de revisión) no prestaría cobertura adecuada, el presente trabajo da cuenta de una investigación para conocer fórmulas diversas de encarar el problema de la corrección de condenas erróneas en el ámbito comparado. Debido a la enormidad de arreglos institucionales existentes, el trabajo se focalizará en dos. En primer lugar, analizará un caso en el cual la regulación de la revisión ha sido objeto de evolución y cambios legislativos significativos que la han alejado del modelo histórico, especialmente al ampliar sus hipótesis de procedencia (España). El segundo grupo de mecanismos que será objeto de estudio será el de las "Comisiones revisoras de casos", órganos estatales independientes cuyo propósito es investigar y evaluar solicitudes de personas que reclaman haber sido erróneamente condenadas y cuyo foco estará en la *Criminal Case Review Commission* de Inglaterra, Gales e Irlanda del Norte.

Palabras-clave: Condenas erróneas; recurso de revisión; comisiones revisoras de casos.

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Abstract: *In a context in which there is growing evidence that erroneous convictions are a common phenomenon in the functioning of contemporary criminal justice systems and that the main correction mechanism in Chile (post-conviction review) would not provide adequate coverage, this paper gives account of an investigation to know diverse formulas to face the problem of the correction of erroneous convictions in the comparative field. Due to the enormity of existing institutional arrangements, work will focus on two. In the first place, it will analyze a case in which the post-conviction review regulation has undergone evolution and significant legislative changes that have distanced it from the historical model, especially when expanding its hypotheses of origin (Spain). The second group of mechanisms that will be studied will be the "Case Review Commissions", independent state bodies whose purpose is to investigate and evaluate applications from people who claim to have been wrongly convicted and whose focus will be on the Criminal Case Review Commission of England, Wales and Northern Ireland.*

Keywords: *Wrongful convictions; post-conviction review; criminal case review commissions.*

Contenido: Introducción; 1. La ampliación jurisprudencial y legal del recurso de revisión tradicional: el caso de España; 1.1. La ampliación de las causales de procedencia; 1.1.1. La evolución de la causal de revisión basada en hechos nuevos; 1.1.2. La evolución de la causal de revisión basada en evidencia producto de la comisión de un ilícito; 1.1.3. La causal de revisión basada en decisiones del Tribunal Europeo de Derechos Humanos; 1.2. Algunas cualificaciones; 2. Las Comisiones Investigadoras: el caso de la *Criminal Case Review Commission* de Inglaterra, Gales e Irlanda del Norte; 2.1. Conformación y misión básica de la CCRC; 2.2. El procesamiento de los casos y los estándares para su reapertura y exoneración; 2.3. Alguna evidencia sobre los resultados y funcionamiento de la CCRC; 2.4. Breves reflexiones sobre el impacto de la CCRC; Consideraciones finales; Bibliografía.

Introducción

En las últimas décadas ha existido una creciente preocupación en el ámbito comparado al ponerse en evidencia la posibilidad real que

tienen los sistemas de justicia penal de producir condenas erróneas.[2] Así, se ha generado un intenso trabajo por parte de distintas organizaciones cuyo propósito es el obtener la exoneración de las personas afectadas[3] y, por otra parte, al desarrollo e implementación de diversas reformas para mejorar los mecanismos disponibles para corregir esos errores.

En Chile, la evidencia disponible muestra la existencia de una cantidad no despreciable de casos de condenas erróneas.[4] Investigaciones

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[2] La expresión ¨condenas erróneas¨ corresponde a un género que abarca varias situaciones que incluyen la condena de inocentes, pero también casos en que la sentencia se ha fundado en un proceso con graves violaciones de garantías o procesales, incorrecta aplicación de la ley penal o una variada gama de defectos significativos de otra naturaleza, véase: HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, p. 23. Tanto en el derecho comparado como en Chile es posible identificar que los recursos de revisión o sus equivalentes funcionales incluyan hipótesis en las que no necesariamente existe un problema de inocencia del condenado y, por lo mismo, prefiero utilizar este término por su mayor amplitud que el de condena de inocentes. Un ejemplo en donde se hace esta distinción analizando las causales de revisión de Chile puede verse en MAÑALICH, Juan Pablo. Justicia, procedimiento y acción de revisión. El principio de culpabilidad frente a la cosa juzgada, pp. 40-41.

[3] El trabajo más conocido es el realizado por el *Innocence Project*. Se trata de una institución creada en los Estados Unidos el año 1992 dedicada a exonerar a personas condenadas erróneamente a través de la demostración de su inocencia utilizando principalmente evidencia de ADN. Mayores antecedentes pueden verse en: www.innocenceproject.org. (última visita el 3 de enero 2022). Existen otras organizaciones como, por ejemplo, el *Innocence Network*, que constituye una afiliación de instituciones dedicadas a prestar servicios investigativos y de asistencia legal gratuitos para exonerar a personas condenadas erróneamente. Además de afiliados de los Estados Unidos cuenta con integrantes de Australia, Canadá, Francia, Holanda, Italia, Irlanda, Nueva Zelanda, Reino Unido y Sudáfrica. Véase: http://www.innocencenetwork.org/members (última visita el 3 de enero de 2022).

[4] DUCE, Mauricio. Los recursos de revisión y la condena de inocentes en Chile: una aproximación empírica en el período 2007-2016, p. 22. En un análisis más reciente de la base de datos de la Corte Suprema en materia de recurso de revisión pude identificar que entre el año 2007 y el mes de octubre de 2020 la Corte acogió 59 recursos tratándose de casos generados en el sistema acusatorio, en 57 de ellos se determinó la inocencia del condenado dictándose sentencia absolutoria de reemplazo y en dos se detectó se configuraba una causal de revisión sin que ella acreditare la inocencia del condenado y se procedió sólo a la anulación de la sentencia.

recientes, por su parte, identifican prácticas muy similares a las descritas por la literatura comparada como aquéllas que tienen más incidencia en generarlas.[5] Por lo mismo, todo indica que existiría un problema de mayor magnitud que el que históricamente se ha considerado. A pesar de lo anterior, el debate sobre la materia es muy incipiente y, en particular, respecto al principal mecanismo de corrección disponible: el recurso o acción de revisión. Éste se encuentra consagrado en los artículos 473 a 480 del Código Procesal Penal (en adelante CPP) del año 2.000. Se trata de una institución que ha mantenido la misma estructura y lógica desde su diseño contenido el Código de Procedimiento Penal de 1906 (en adelante CPP 1906) de corte inquisitivo, con excepción de la introducción de una causal nueva y cambios relativamente menores de redacción.[6] Este diseño fue tomado, a su vez, de la Ley de Enjuiciamiento Criminal Española,[7] la que, por su parte, siguió de cerca

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[5] Por ejemplo, en materia de uso de reconocimientos oculares, véase: DUCE, Mauricio. Los reconocimientos oculares: una aproximación empírica a su funcionamiento y algunas recomendaciones para su mejora, pp. 291-379; CASTILLO, Ignacio. Enjuiciando al Proceso Penal Chileno desde el Inocentrismo (algunos apuntes sobre la necesidad de tomarse en serio a los inocentes), pp. 249-313; CATALÁN, Mario. *Aproximación empírica sobre la realización y valoración de la prueba de reconocimiento ocular en Chile*. Santiago: Ediciones Jurídicas de Santiago, 2019, *passim*. Sobre el uso de la prueba pericial, véase: DUCE, Mauricio. Una aproximación empírica al uso y prácticas de la prueba pericial en el proceso penal chileno a la luz de su impacto en los errores del sistema, pp. 42-103; GONZÁLEZ, Leonardo. *Prueba pericial, litigación con peritos y medicina legal*. Santiago: Thomson Reuters, 2018, *passim*; DIRECCIÓN DE ESTUDIOS DE LA CORTE SUPREMA. *Peritajes en Chile*. Santiago: Corte Suprema, 2017, *passim*. En cuanto a la obtención de reconocimientos de hecho o responsabilidad en procedimientos abreviados y simplificados, véase: DUCE, Mauricio. Los procedimientos abreviados y simplificados y el riesgo de condenas erróneas en Chile, *passim*; ZAGMUTT, Valentina. *Procedimiento abreviado y simplificado en la práctica de audiencias chilenas*. Santiago: Ediciones Jurídicas de Santiago, 2019, *passim*.

[6] PAILLÁS, Enrique. *La revisión en materia penal*. Santiago: LexisNexis, 2001, p. 16; CHAHUÁN, Sabas. *Manual del nuevo procedimiento penal*. Santiago: LexisNexis, 2007, p. 365.

[7] CAROCCA, Alex. *Manual del nuevo sistema procesal penal chileno*. Santiago: Thomson Reuters, 2009, p. 195.

a la regulación contenida en el Código de Instrucción Penal Francés Napoleónico de 1808.[8]

La regulación del recurso de revisión no fue objeto de una discusión muy profunda en la etapa de elaboración del CPP y ni en su debate legislativo.[9] Por lo que la legislación vigente en Chile sigue bastante de cerca una concepción del recurso que se asentó en el derecho comparado hace un poco más de dos siglos como mínimo. A su vez, la mayor parte de la doctrina escrita en el contexto del CPP acusatorio vigente en Chile no ha hecho un análisis profundo de la materia. Se ha privilegiado una exposición general de las principales normas del CPP lo que ha enfatizado la poca evolución de este mecanismo.[10] Sólo en forma reciente se ha

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[8] La doctrina española identifica en esta fuente el origen de su propia legislación. MUÑOZ, Tomás. Estudio sobre la revisión penal, p. 54 y 70, quien agrega que no sólo se siguió la regulación originaria francesa en España sino también su posterior evolución. También sobre el origen francés, véase: GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 89; VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 28-30 y VILLAMARÍN, Luisa. La revisión penal contra reum, p. 476 (quien traza los orígenes de la regla francesa de 1808 en los desarrollos experimentados en dicho país a partir del siglo XIV). La influencia del Código francés de 1808 en esta materia en otros países de Europa fue amplia. Por ejemplo, fue la base de la regulación italiana en el siglo XIX. GIURIATI, Doménico. *Errores judiciales*: diagnosis y remedios. Santiago: Ediciones Olejnik, 2018, p. 108.

[9] Por ejemplo, se trató de una materia que no tienen ninguna mención en el Mensaje del CPP. Por otra parte, la historia de la ley da cuenta fue analizada de manera relativamente escueta. Una presentación resumida en esta materia puede ver en LONDOÑO, Fernando; MOIS, Martin; PRAETORIUS, Daniel; RAMÍREZ, José Manuel. *Reforma procesal penal*. Orígenes, Historia Sistematizada y concordancias. Tomo III. Santiago: Editorial Jurídica de Chile, 2003, pp. 439-461.

[10] CAROCCA, Alex. Manual del nuevo sistema procesal penal chileno. Santiago: Thomson Reuters, 2009, pp. 195-197; CASTRO, Javier. Introducción al derecho procesal penal chileno. Santiago: Legal Publishing, 2008, pp. 569-585; CERDA, Rodrigo. Manual del nuevo sistema de justicia criminal. Santiago: Librotecnia, 2019, pp. 612-620; CHAHUÁN, Sabas. Manual del nuevo procedimiento penal. Santiago: LexisNexis, 2007, pp. 364-367; CORREA, Jorge. Curso de derecho procesal penal. Santiago: Ediciones Jurídicas Santiago, 2003, pp. 266-269; NÚÑEZ, Juan Cristóbal. Tratado del proceso penal y del juicio oral. Santiago: Editorial Jurídica de Chile, t. II, 2002, pp. 362-381; PAILLÁS, Enrique. La revisión en materia penal. Santiago: LexisNexis, 2001, pp.

comenzado a criticar su configuración desde distintos puntos de vista.[11] Así, se ha concluido por algunos que el recurso de revisión en Chile no sería un mecanismo adecuado para la protección de personas condenadas erróneamente. Esto obedecería tanto a razones de diseño normativo como a una interpretación y práctica jurisprudencial restrictiva. [12]

En este escenario, el presente trabajo da cuenta de una investigación que pretende dar a conocer fórmulas diversas de encarar el problema de la corrección de condenas erróneas en el ámbito comparado que podrían

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13-27; SILVA, Rodrigo. Manual de procedimiento penal. Santiago: Editorial Jurídica de Chile, 2011, pp. 168-172.

[11] FERNÁNDEZ, José Manuel; OLAVARRÍA, Malva. Teoría y Práctica de la Acción de Revisión en el Nuevo Código Procesal Penal, Causal letra d) del artículo 473, pp. 215-255; DUCE, Mauricio. La condena de inocentes en Chile: Una aproximación empírica a partir de los resultados de los recursos de revisión acogidos por la Corte Suprema, pp. 159-191; DUCE, Mauricio. Los recursos de revisión y la condena de inocentes en Chile: una aproximación empírica en el período 2007-2016. *Revista Doctrina y Jurisprudencia Penal*. Santiago, n. 30, pp. 3-44, 2017; MAÑALICH, Juan Pablo. Justicia, procedimiento y acción de revisión. El principio de culpabilidad frente a la cosa juzgada, pp. 28-56; CARBONELL, Flavia; VALENZUELA, Jonatan. La prueba de la inocencia y las defensas probatorias: el caso de la revisión, pp. 55-80.

[12] CASTILLO, Ignacio. Enjuiciando al Proceso Penal Chileno desde el Inocentrismo (algunos apuntes sobre la necesidad de tomarse en serio a los inocentes), pp. 249-313; DUCE, Mauricio. Los recursos de revisión y la condena de inocentes en Chile: una aproximación empírica en el período 2007-2016, pp. 3-44; MARDONES, Fernando. El recurso de revisión, una mezquina protección al inocente, pp. 45-47; SALAZAR, Valentina; VASQUEZ, Juan Ignacio. *Recurso de revisión en Chile*: neutralización de la justicia en perjuicio de los inocentes erróneamente condenados. Santiago, 2015, *passim*. Como parte de la investigación de este proyecto he también escrito otro trabajo que se encuentra en proceso de publicación en el que realizo un análisis crítico detallado de la actual configuración del recurso de revisión enfatizando la existencia de problemas de diseño normativo, de prácticas y existencia de obstáculos y barreras sistemáticas que hacen que este mecanismo sólo pueda operar en casos muy excepcionales y tratándose de errores extremadamente graves. A nivel normativo, por ejemplo, se identifica una regulación muy restrictiva de las hipótesis en que procede la revisión y limitaciones a los medios de prueba que pueden usarse para acreditar esas hipótesis. A nivel de prácticas, una tendencia formalista de la Corte Suprema que lleva a que un porcentaje muy mayoritario de los casos (sobre el 85%) los recursos sean rechazados de plano sin pronunciamiento de fondo y una tendencia a interpretar en forma muy estricta a las ya restrictivas causales de revisión, según tendré oportunidad de mostrar en algunos ejemplos un poco más adelante.

entregar una mejor cobertura que las disponibles en Chile. Se trata de un análisis de legislación comparada seleccionada más que un estudio sofisticado en la materia. Con ello, se pretende entregar antecedentes preliminares que pueden ser útiles para iniciar un debate de reforma de la legislación vigente en la materia. Estos antecedentes podrían también ser útiles para animar debates similares en otros países de la región.

Debido a la enormidad de arreglos institucionales existentes en esta materia, el trabajo se focalizará en el análisis de dos casos que han sido seleccionados debido a que aportan elementos novedosos a considerar desde distintas perspectivas. En primer lugar, analizaré un caso en el cual la regulación de la revisión ha sido objeto de evolución y cambios legislativos significativos que la han alejado del modelo histórico, especialmente al ampliar sus hipótesis de procedencia. Para estos efectos, analizaré la regulación de España ya que se trata de una de las fuentes originarias de donde proviene el diseño actual chileno y de otros países de la región, pero que ha sido objeto de una importante evolución jurisprudencial y de modificaciones recientes destinadas a ampliar su cobertura. Esa evolución también parece ser representativa de lo ocurrido en otros países de Europa continental en la materia que serán citados secundariamente.

El segundo grupo de mecanismos que será objeto de estudio será el de las "Comisiones revisoras de casos". Se trata de una estrategia que se ha venido implementando desde la década de los noventa del siglo pasado en cada vez más países y su interés está en que presenta un camino diferente al de la revisión para enfrentar el problema de las condenas erróneas. Se trata de órganos estatales independientes cuyo propósito es investigar y evaluar solicitudes de personas que reclaman haber sido erróneamente condenadas y, eventualmente, referirlos a las cortes penales con el propósito que se realice un nuevo examen del caso, en el que se podría finalmente exonerarlo. El foco de la investigación estará en la *Criminal Case Review Commission* (en adelante CCRC) de Inglaterra, Gales e Irlanda del Norte que fue la primera en implementarse en el ámbito comparado.

El trabajo concluirá con una breve reflexión que permita extraer algunas conclusiones generales relevantes para el debate en Chile y que estimo, además, podrían ser de interés para varios otros países de América Latina.

1. La ampliación jurisprudencial y legal del recurso de revisión tradicional: el caso de España

España resulta un caso interesante de analizar ya que, como se señaló, fue considerado una de las fuentes básicas de la legislación procesal penal inquisitiva en América Latina y claramente en el caso chileno (CPP de 1906), que luego fue mantenida en lo sustancial en la regulación del CPP acusatorio que entró en vigor el año 2.000. De hecho, si se comparan las causales de procedencia del recurso contenidas en el artículo 473 del CPP se notarán enormes similitudes con las previstas en la versión vigente hasta hace muy poco en el artículo 954 de la Ley de Enjuiciamiento Criminal (en adelante LECRIM). En la actualidad el recurso en España está regulado en los artículos 954 a 961 de la LECRIM.

A diferencia del caso chileno, el recurso de revisión ha tenido una importante evolución en España, tanto a través del desarrollo jurisprudencial[13] y, en forma más reciente, por la que es considerada por la doctrina de dicho país como la reforma legal más significativa realizada al mismo en su historia a través de la Ley 41/2015 de 5 de octubre de 2015.[14] Un desarrollo similar ha sido compartido por otros

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[13] Dando cuenta de esta tendencia, en un Acuerdo del Tribunal Supremo (ATS) de 29 de abril de 2004 el tribunal señalaba que ¨...este carácter excepcional del procedimiento de revisión no ha impedido a esta Sala ampliar por vía de interpretación la literalidad de los supuestos contenidos en el artículo 954, en una línea jurisprudencial más flexible que atiende especialmente a la entidad de los derechos afectados desde la perspectiva de la justicia como valor superior del ordenamiento jurídico...¨ (Considerando séptimo) Citado por MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, p. 532. La doctrina también ha reconocido este proceso, por ejemplo, DE URBANO, Eduardo. El recurso de revisión penal según la última jurisprudencia, p. 43; GIMENO, Vicente. *Manual de Derecho Procesal Penal*, 2da edición. Madrid: Ediciones Jurídicas Castillo de Luna, 2018, p. 682; MORENO, Víctor; CORTÉS, Valentín. *Derecho Procesal Penal*. Valencia: Tirant Lo Blanch, 2019, p. 662.

[14] GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 89; GARCIANDÍA, Pedro. Motivos de revisión penal: análisis de la nueva configuración del art. 954 de la Ley de Enjuiciamiento Criminal tras la reforma de 2015 y al amparo de la jurisprudencia del Tribunal Supremo, p. 5; OUBIÑA, Sabela. Ayer y hoy en la revisión penal de las sentencias firmes. *In:* VV.AA. *Justicia con ojos de mujer*. Valencia: Tirant Lo Blanch, Valencia, 2018, p. 955. El recurso de revisión en dicho país

países europeos en las últimas décadas que citaré a modo ejemplar. La evolución del recurso de revisión en el caso español sería consecuencia de una creciente apertura jurisprudencial y, por lo mismo, no obedecería a un hito específico que haya motivado el cambio.

A continuación, me detendré en el análisis de dos cuestiones fundamentales en esta evolución: la ampliación de las causales de procedencia más relevantes y la identificación de algunas cualificaciones para evaluar este desarrollo.

1.1. La ampliación de las causales de procedencia

En esta sección me detengo en el estudio de algunas de las causales de procedencia del recurso de revisión en la LECRIM para mostrar cómo se ha producido una apertura muy significativa en la procedencia de este mecanismo. En su configuración actual, la LECRIM contiene tres numerales en su artículo 954 que desarrollan las causales o motivos de procedencia del recurso de revisión. En el numeral 1 se incluye lo que podríamos identificar como las ¨causales históricas¨, reguladas en literales de la a) a la letra e)[15], las que serían las equivalentes al artículo 473 del CPP de Chile. Los numerales 2 y 3, en cambio, han agregado nuevos motivos. El centro de mi análisis estará en las letras a) y d) del numeral 1 y en la causal prevista en el artículo 954.3. Se trata de las situaciones de mayor relevancia y habitualidad en el sistema y me parece contienen el núcleo central que permite comprender la evolución experimentada por el sistema español.[16]

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fue objeto también de reformas los años 1899 y 1933, pero en su magnitud no se acercan a los cambios introducidos el 2015 en forma y contenidos. Una breve revisión de estas reformas en VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 31-34.

[15] Antes de la reforma del año 2015 estas causales eran las únicas reguladas en el artículo 954 de la LECRIM. Un análisis completo y detallado de todas ellas con anterioridad a la reforma del 2015 puede verse en VICENTE, Tomás. *El proceso de revisión penal*. Barcelona: Bosch, 2013, pp. 121-245.

[16] Una revisión sistemática de todas las causales actualizada luego de la reforma de 2015 puede verse en los libros de GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, pp. 87-157; SÁNCHEZ, Julio. *El recurso de revisión penal*. Madrid: Marcial

1.1.1. La evolución de la causal de revisión basada en hechos nuevos

Inicio el análisis por la causal del artículo 954.1 letra d) que es la equivalente al artículo 473 letra d) del CPP de Chile y que, al igual que él, es la que da lugar a la mayor cantidad de recursos de revisión.[17] Esta causal establece que puede solicitarse la revisión ¨*Cuando después de la sentencia sobrevenga el conocimiento de hechos o elementos de prueba, que, de haber sido aportados, hubieran determinado la absolución o una condena menos grave*.¨

Esta redacción permite apreciar una apertura significativa de la causal respecto a su texto anterior a la reforma del año 2015[18] y también con la regla vigente en Chile.[19] Más allá de la reforma legal, existe un acuerdo en la doctrina que el legislador de 2015 actualizó en esta materia, al menos en partes relevantes, un desarrollo jurisprudencial que efectivamente fue ampliando en el tiempo la interpretación de la redacción anterior[20], sin

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Pons, 2017; pp. 127- 188; MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, pp. 500-521 y VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 79-206.

17 GIMENO, Vicente. *Manual de Derecho Procesal Penal*, 2da edición. Madrid: Ediciones Jurídicas Castillo de Luna, 2018, p. 686; DE URBANO, Eduardo. El recurso de revisión penal según la última jurisprudencia, 2011, p. 38; VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, p. 116. Sánchez cuantifica esta apreciación señalando que de 641 resoluciones revisadas en el período 1930 a 2016 que han sido objeto de su estudio, el 90% correspondería a esta causal, véase: SÁNCHEZ, Julio. *El recurso de revisión penal*. Madrid: Marcial Pons, 2017, p. 149.

18 Esta señalaba en el artículo 954.4 de la LECRIM que podía solicitarse la revisión ¨Cuando después de la sentencia sobrevenga el conocimiento de nuevos hechos o de nuevos elementos de prueba, de tal naturaleza que evidencien la inocencia del condenado.¨ A simple vista se puede apreciar la enorme similitud con nuestra regla vigente.

19 El artículo 473 letra d) del CPP de Chile regula que procede la revisión: "... *cuando con posterioridad a la sentencia condenatoria se descubriere algún hecho o apareciere algún documento desconocido durante el proceso que fuere de tal naturaleza que bastare para establecer la inocencia del condenado*."

20 GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 106. El propio legislador planteó esto como un objetivo explícito de la reforma. OUBIÑA, Sabela. Ayer y hoy en la revisión penal de las sentencias firmes. *In:* VV.AA. *Justicia con ojos de mujer*. Valencia: Tirant Lo Blanch, Valencia, 2018, p. 958.

perjuicio de lo cual se reconoce la importancia que esto se haya plasmado normativamente y de varios perfeccionamientos técnicos que introdujo.[21]

Tres son las cuestiones que me interesa mostrar que dan cuenta de la mayor capacidad que tendría la actual redacción de cubrir casos de condenas erróneas que en Chile hoy día no admiten corrección. Lo primero, es que la regla en estudio, a diferencia de la anterior, no exige que se trate de un hecho o prueba ¨nueva¨ sino que basta con que sobrevenga con posterioridad a la sentencia. Esto actualiza la regla al desarrollo jurisprudencial del Tribunal Supremo que ya había consolidado la idea que por hechos o prueba ¨nueva¨ no sólo se admitía cuestiones novedosas en sentido estricto (producidas o generadas con posterioridad a la sentencia), sino también elementos existentes con anterioridad e incluso conocidos por la defensa, en la medida que no hubieran sido alegados o producidos ante el tribunal sentenciador.[22] En la contracara, quedarían fuera de

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[21] OUBIÑA, Sabela. Ayer y hoy en la revisión penal de las sentencias firmes. *In:* VV.AA. *Justicia con ojos de mujer*. Valencia: Tirant Lo Blanch, Valencia, 2018, passim.

[22] GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 109; GARCIANDÍA, Pedro. Motivos de revisión penal: análisis de la nueva configuración del art. 954 de la Ley de Enjuiciamiento Criminal tras la reforma de 2015 y al amparo de la jurisprudencia del Tribunal Supremo, pp. 10-14; IGARTÚA, Juan. ¿Es preciso probar la inocencia en la revisión penal?, p. 3; MARCHENA, Manuel; GONZÁLEZ-CUELLAR, Nicolás. *La reforma a la Ley de Enjuiciamiento Criminal en 2015*. Madrid: Ediciones Jurídicas Castillo de Luna, 2015, p. 562; MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, p. 504; SERRANO, Ignacio. El recurso de revisión por cambio de doctrina jurisprudencial. La Ley N° 23.016, 2001, p. 6. Se trata de una apertura que es posible apreciar también en la interpretación de causales equivalentes en otros países europeos. Por ejemplo, el artículo 630 letra c) del Código de Procedimiento Penal Italiano. LUPARIA, Luca; PITTIRUTI, Marco. Post-conviction remedies in the Italian criminal justice system, pp. 66-67. En el caso alemán, Roxin reporta que la causal del artículo 364 de la OPP permite considerar como prueba nueva antecedentes cuando incluso fueron conocidos por el tribunal y éste los pasó por alto o mal interpretó en el primer juicio, véase: ROXIN, Claus. *Derecho procesal penal*. Traducción de Mario Amoretti y Darío Rolón. 29ª Edición. Buenos Aires: Editorial Didot, 2019, p. 693. También MAÑALICH, Juan Pablo. Justicia, procedimiento y acción de revisión. El principio de culpabilidad frente a la cosa juzgada, p. 43. Si se compara con la interpretación dominante que ha tenido la Corte Suprema de la regla vigente en Chile se podrá apreciar la enorme diferencia. La Corte

consideración hechos o pruebas que fueron invocados en juicio y a los cuáles no se les dio valor.[23]

Un segundo cambio significativo es que la norma actual no exige que ese hecho o prueba sean de una entidad tal que acrediten la inocencia del condenado, sino que basta simplemente que a partir de ellos se hubiere podido absolverlo.[24] No se trata de un cambio

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ha entendido que la causal sólo puede abarcar documentos o peritajes que existían durante el juicio pero que fueron desconocidos en ese momento, excluyendo, por lo tanto, toda solicitud en la que el documento sea posterior al juicio. Por otra parte, la Corte también ha entendido que la exigencia de desconocimiento no se refiere sólo al tribunal que dictó la sentencia condenatoria que se discute, sino que también debe haberlo sido por el recurrente. De esta forma, el sólo hecho que haya sido conocido por la recurrente, aun cuando no haya sido presentado y considerado en juicio, bastarían para excluir la posibilidad de conceder el recurso por esta causal. FERNÁNDEZ, José Manuel; OLAVARRÍA, Malva. Examinando de nuevo la acción de revisión, pp. 1219-1243.

[23] Otro caso en donde ha existido debate, pero la jurisprudencia y doctrina han tendido a uniformarse en forma negativa es frente al problema de los cambios de doctrina jurisprudencial como un hecho nuevo que habilite la revisión, véase: GIMENO, Vicente. *Manual de Derecho Procesal Penal*, 2da edición. Madrid: Ediciones Jurídicas Castillo de Luna, 2018, p. 686; MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, pp. 510 y siguientes (quienes precisan que esto no se aplicaría a las sentencias del Tribunal Constitucional que sí podrían considerarse un hecho nuevo), SERRANO, Ignacio. El recurso de revisión por cambio de doctrina jurisprudencial. La Ley N° 23.016, 2001, *passim*; VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 156-189 (quien también precisa que las sentencias del Tribunal Constitucional si deben considerarse hecho nuevo). Una síntesis de la evolución jurisprudencial en la materia hasta el año 2011 pude verse en RAGUÉS, 2011, pp. 1047-1052.

[24] Nuevamente se trata de una tendencia más generalizada en la evolución de esta causal en el contexto Europeo. El caso italiano es un buen ejemplo de un desarrollo similar ya que la causal del artículo 630 letra c) admite que la prueba nueva acredite la inocencia del condenado, pero también que genere una duda razonable sobre su culpabilidad. LUPARIA, Luca; PITTIRUTI, Marco. Post-conviction remedies in the Italian criminal justice system, pp. 65-66. En la misma dirección también ha sido la interpretación de la regla equivalente en el caso alemán, véase: ROXIN, Claus. *Derecho procesal penal*. Traducción de Mario Amoretti y Darío Rolón. 29ª Edición. Buenos Aires: Editorial Didot, 2019, p. 696. En Portugal la causal se admite en el caso que la evidencia nueva genere serias dudas sobre la validez de la condena original, véase: NAN, Joost; LESTRADE, Sjarai. Toward an European right to claim innocence?, p.

menor.[25] Una prueba o hecho que determine la absolución puede ser de una ¨entidad¨ mucho menor que aquél que sea capaz de probar la inocencia. Para lo primero basta que ese hecho o prueba haya socavado a una evidencia considerada para la condena o genere dudas razonables sobre la misma.[26] Acreditar inocencia, en cambio, impone una exigencia probatoria mucho mayor y normalmente muy difícil de establecer. Sobre este punto, el desarrollo jurisprudencial del Tribunal Supremo había sido algo más ambiguo. Así, existía en esta materia jurisprudencia en diversas direcciones, aun cuando se había avanzado en los años anteriores a la reforma de 2015 en entender que podía darse lugar a la revisión sin que se acreditara en forma definitiva la inocencia, sino bastando que el hecho o la prueba nueva tendieran a evidenciarla a posteriori en un potencial nuevo juicio.[27] En esta línea, el cambio de redacción terminó por zanjar de manera clara este punto.

Finalmente, una tercera cuestión relevante que da cuenta de la mayor apertura de esta nueva redacción de la causal, está en permitir que la revisión proceda no sólo en situaciones en que el hecho o prueba sobreviniente generen absolución, sino también en casos en que ellos permitirían dictar una condena menos grave, por ejemplo, situaciones en que se hubiere aplicado una agravante cuando ésta no hubiere concurrido en realidad. En consecuencia, es posible admitir revisiones con propósitos de justicia que van más allá del eje inocencia o absolución que ha inspirado

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1332. El contraste con la interpretación que se ha entregado a la regla de Chile también muestra diferencias significativas. La Corte Suprema de Chile ha descartado en forma explícita que esta causal admita la posibilidad de acoger el recurso sin que se establezca de manera fehaciente la inocencia del condenado (Caso de 24 de septiembre de 2014, rol N° 19.373-2014, considerandos 6° y 7°).

25 Parte de la doctrina había sido muy crítica de la redacción anterior de esta misma causal sosteniendo su incompatibilidad con la presunción de inocencia. IGARTÚA, Juan. ¿Es preciso probar la inocencia en la revisión penal?, p.9.

26 IGARTÚA, Juan. ¿Es preciso probar la inocencia en la revisión penal?, p. 9.

27 GARCIANDIA, Pedro. *El proceso de revisión de las sentencias penales*. Pamplona: Aranzadi Thomson Reuters, 2016, pp. 114-119; OUBIÑA, Sabela. Ayer y hoy en la revisión penal de las sentencias firmes. *In:* VV.AA. *Justicia con ojos de mujer*. Valencia: Tirant Lo Blanch, Valencia, 2018, pp. 965-966. Una revisión de esta evolución en VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 118-124.

tradicionalmente a esta causal.[28] Al igual que en casos anteriores, el legislador en este punto plasmó lo que ya había venido desarrollándose como jurisprudencia constante por parte del Tribunal Supremo en los últimos años previo a la reforma de 2015.[29]

Como se podrá observar, los cambios experimentados por la jurisprudencia y luego reforzados y complementados por el legislador de 2015 se han traducido en una apertura muy interesante de esta causal en comparación con su redacción antigua que, valga la pena recordar nuevamente, es muy similar a la vigente en Chile. Con todo, la diferencia en Chile es que la Corte Suprema ha ido en una dirección diversa haciendo una interpretación restrictiva que incluso va un poco más allá del tenor literal de las reglas.[30]

1.1.2. La evolución de la causal de revisión basada en evidencia producto de la comisión de un ilícito

Una segunda causal de interés en analizar es la prevista en el artículo 954.1 letra a) de la LECRIM que establece el que la condena se haya basado en pruebas obtenidas mediante la comisión de un ilícito[31]

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[28] En el caso italiano también se entiende es admisible una solicitud de revisión parcial con el propósito de obtener una condena por un delito de menor entidad o incluso para efectos de obtener la aplicación de una circunstancia de mitigación de la responsabilidad del condenado. Se trataría de una aplicación que históricamente fue permitida en el artículo 553 del Código de 1930. LUPARIA, Luca; PITTIRUTI, Marco. Post-conviction remedies in the Italian criminal justice system, 2020, p. 66.

[29] GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 119.

[30] FERNÁNDEZ, José Manuel; OLAVARRÍA, Malva. Examinando de nuevo la acción de revisión, p. 1213.

[31] El tenor literal señala que la revisión procederá ¨Cuando haya sido condenada una persona en sentencia penal firme que haya valorado como prueba un documento o testimonio declarados después falsos, la confesión del encausado arrancada por violencia o coacción o cualquier otro hecho punible ejecutado por un tercero, siempre que tales extremos resulten declarados por sentencia firme en procedimiento penal seguido al efecto. No será exigible la sentencia condenatoria cuando el proceso penal iniciado a tal fin sea archivado por prescripción, rebeldía, fallecimiento del encausado u otra causa que no suponga una valoración de fondo.¨

y corresponde a una de las más comunes de interposición del recurso.[32] Esta tendría su equivalente a la letra c) del artículo 473 del CPP de Chile y, en fallos de la Corte Suprema en los últimos años, se han admitido dos recursos de revisión invocándola.[33] Con todo, la simple comparación de ambas reglas da cuenta que la norma española es mucho más abierta, cuestión que fue además reforzada por la reforma del año 2015. Esta mayor apertura estaría en el tipo de pruebas obtenidas a través de un acto delictivo como también en las exigencias del tipo de resolución en la que se requiere constatar esa infracción para que proceda el recurso. Analizaré esto en lo que sigue.

En su redacción actual la causal opera sobre la base de dos exigencias centrales. La primera es que se haya utilizado en el proceso para condenar una prueba en contra del imputado que haya sido obtenida a través de un hecho delictivo. La norma identifica cuatro tipos de pruebas: un documento o un testimonio que han sido luego declarados falsos (en esto el paralelismo con la regla chilena es importante), una confesión del condenado que haya sido obtenida por medio de la coacción o la violencia y, finalmente, una obtenida por cualquier otro hecho punible cometido por un tercero. En estas dos últimas reglas la norma amplía la causal regulada en el ordenamiento jurídico chileno.

La doctrina y jurisprudencia precisan que para que se pueda satisfacer la exigencia de esta causal, cualquiera sea la prueba obtenida por medio de actos ilícitos, debe tratarse de una evidencia de cierta relevancia, es decir, que tiene que haber sido determinante o debe habérsele asignado un valor significativo para fundar la condena que se intenta revertir por vía del recurso de revisión.[34] El tenor literal de la regla actual pareciera

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[32] VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, p. 83. Se trata de una causal con amplia acogida también en el contexto europeo, véase: NAN, Joost; LESTRADE, Sjarai. Toward an European right to claim innocence?, pp. 1332-1334.

[33] Dicha regla establece que es procedente la revisión ¨Cuando alguno estuviere sufriendo condena en virtud de sentencia fundada en un documento o en el testimonio de una o más personas, siempre que dicho documento o dicho testimonio hubiere sido declarado falso por sentencia firme en causa criminal¨

[34] MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, p. 501; GIMENO, Vicente. *Manual de Derecho Procesal Penal*, 2da edición. Madrid: Ediciones Jurídicas Castillo

ser amplio al exigir simplemente que dicha prueba haya sido ¨valorada¨. Con todo, la doctrina ha cualificado su interpretación. Así, Garciandía, por ejemplo, justifica esto en atención al carácter excepcional de este recurso proponiendo como criterio que ¨...para que prospere la revisión por esta causal legal no es necesario que la prueba ilícitamente obtenida haya sido la única prueba practicada en el proceso, pero sí que, en el caso que concurra con otras, haya sido suficiente por si misma para declarar probados los hechos relacionados en forma directa con la condena.¨[35]

La segunda exigencia de esta causal es que, en principio, el acto ilícito (la falsedad del documento o declaración, la obtención coaccionada de la confesión o cualquier otro hecho delictivo de terceros) debe sustentarse en la existencia de una sentencia firme penal que lo declare. En esto no habría una diferencia significativa respecto a la regulación de Chile. Con todo, la reforma de 2015 introdujo una importante excepción a esta exigencia, la que permite utilizar la causal sin necesidad de sentencia firme condenatoria por la ilicitud en caso en que se haya iniciado un proceso penal por ese motivo y éste haya concluido por la prescripción, la rebeldía, el fallecimiento del imputado o cualquier otro motivo que no suponga una valoración sobre el fondo del caso. Con esto se estima se evita poner límites formales al uso del recurso de revisión.[36] En todo caso, pareciera ser necesario que del proceso concluido por estas otras vías debiera quedar en claro la comisión del hecho delictivo.[37]

Con esta excepción, según reporta Garciandía, el legislador se hizo cargo de un reclamo que por años sostuvo parte de la doctrina que identificaba que en los casos sin condena se ponía una barrera insalvable

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de Luna, 2018, p. 683; MARCHENA, Manuel; GONZÁLEZ-CUELLAR, Nicolás. *La reforma a la Ley de Enjuiciamiento Criminal en 2015*. Madrid: Ediciones Jurídicas Castillo de Luna, 2015, p. 559; VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, p. 85.

35 GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 96.

36 MORENO, Víctor; CORTÉS, Valentín. *Derecho Procesal Penal*. Valencia: Tirant Lo Blanch, 2019, p. 665; MARCHENA, Manuel; GONZÁLEZ-CUELLAR, Nicolás. *La reforma a la Ley de Enjuiciamiento Criminal en 2015*. Madrid: Ediciones Jurídicas Castillo de Luna, 2015, p. 559

37 MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, p. 500.

para ocupar el recurso de revisión en la redacción anterior. Con todo, la nueva fórmula abre algunos problemas técnicos relevantes en estos casos como, por ejemplo, lo que podría ocurrir habiéndose acogido una revisión en una situación en que la forma de término no haya sido definitiva (por ejemplo, la rebeldía) y al retomarse el caso no prospera y concluye con una absolución con pronunciamiento sobre el fondo de la materia.[38]

Más allá de los detalles técnicos de la regulación en análisis, me interesa destacar la mayor apertura en la redacción de esta causal que tratándose de su equivalente en Chile. Interesante es que esa apertura se genere por las dos vías posibles en el diseño de esta regla, el motivo o evidencia que funda la sentencia, y la causal de término del proceso en que se discute la legalidad de ese motivo o evidencia.

1.1.3. La causal de revisión basada en decisiones del Tribunal Europeo de Derechos Humanos

La última causal que analizo brevemente es la prevista en el artículo 954.3 de la LECRIM. Se trata de una incorporación de la reforma del año 2015, aun cuando la jurisprudencia la había recogido como parte integrante de la causal de hechos o prueba sobreviniente hoy contemplada en el artículo 954.1 letra d).[39] La nueva causal básicamente regula como motivo de revisión la existencia de una decisión del Tribunal Europeo de Derechos Humanos (en adelante TEDH) constatando que en el proceso que se generó la condena se haya declarado una violación a los derechos del Convenio Europeo.[40] La causal se ha hecho cargo de un problema que

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[38] GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 97. Otros problemas destacados por SÁNCHEZ, Julio. *El recurso de revisión penal*. Madrid: Marcial Pons, 2017, p. 184.

[39] VICENTE, Tomás. *El proceso de revisión penal*. Barcelona: Bosch, 2013, pp. 195-206.

[40] La causal señala que ¨Se podrá solicitar la revisión de una resolución judicial firme cuando el Tribunal Europeo de Derechos Humanos haya declarado que dicha resolución fue dictada en violación de alguno de los derechos reconocidos en el Convenio Europeo para la Protección de los Derechos Humanos y Libertades Fundamentales y sus Protocolos, siempre que la violación, por

se presenta con alguna habitualidad en el contexto europeo[41], pero que también ha generado un debate en Chile que terminó zanjando la Corte Suprema en el conocido como ¨Caso Loncos¨,[42] por lo que me parece interesante dedicarle unos breves párrafos.[43]

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su naturaleza y gravedad, entrañe efectos que persistan y no puedan cesar de ningún otro modo que no sea mediante esta revisión.

En este supuesto, la revisión sólo podrá ser solicitada por quien, estando legitimado para interponer este recurso, hubiera sido demandante ante el Tribunal Europeo de Derechos Humanos. La solicitud deberá formularse en el plazo de un año desde que adquiera firmeza la sentencia del referido Tribunal.¨

41 Existe una recomendación del Consejo de Ministros de Europa del año 2.000 en la dirección de permitir nuevo examen de casos en estas hipótesis, véase: NAN, Joost; LESTRADE, Sjarai. Toward an European right to claim innocence?, p. 1331. En este contexto, se trata de una causal que ha sido ampliamente acogida jurisprudencial y legalmente en distintos países. A nivel jurisprudencial, por ejemplo, en Italia a través de decisiones de la Corte Constitucional de dicho país, véase: LUPARIA, Luca; PITTIRUTI, Marco. Post-conviction remedies in the Italian criminal justice system, 2020, p. 65. Sobre Italia también puede verse VASCONCELLOS, Vinicius; CAPPARELLI, Bruna. A revisão criminal como instrumento de execução das sentenças dos tribunais internacionais de direitos humanos: o cenário brasileiro em comparação com a discussão italiana no caso Drassich, pp. 34-41. A nivel legal, por ejemplo, en países como Alemania en el parágrafo 359.6 de su OPP, véase: ROXIN, Claus. *Derecho procesal penal*. Traducción de Mario Amoretti y Darío Rolón. 29ª Edición. Buenos Aires: Editorial Didot, 2019, p.693. Rusia en el artículo 413 de su CPP, véase: PEÑARANDA, Antonio. *Proceso penal comparado*. Granada: Editorial Comares, 2015, p. 128; Noruega en el artículo 391.2 de su Código Procesal Penal, Bélgica en su artículo 442 bis (introducido el 1 de abril de 2007), Francia en el artículo 662 incorporado el año 2014 y Países Bajos en el artículo 457 (incorporado el año 2003), véase: NAN, Joost; LESTRADE, Sjarai. Toward an European right to claim innocence?, p. 1333.

42 En el año 2014 la Corte Interamericana de Derechos Humanos condenó al Estado de Chile por violación de un conjunto de garantías que fueron vulneradas en los procesos penales llevados en contra de diversos loncos mapuches que concluyeron con condenas en su contra. Finalmente, el 26 de abril de 2019 la Corte Suprema se pronunció por el mecanismo jurídico que utilizaría para dar cumplimiento a la sentencia del sistema interamericano, optando por considerar que los fallos originarios habían perdido sus efectos. Se llegó a ello a través de una construcción doctrinaria que no estuvo exenta de críticas debido a la carencia de regulación sobre la materia. Véase decisión del Pleno de la Corte Suprema rol nº 1.386-2014 de 16 de mayo de 2019.

43 No puedo hacer un examen exhaustivo de todos los aspectos técnicos de la causal. Sobre trabajos específicos en esta materia recomiendo ver OUBIÑA, Sabela. Las últimas reformas a la LeCrim. en apelación y revisión penal de

El objetivo central de haber incorporado esta causal era dar una respuesta explícita al problema que se genera para la ejecución de sentencias que dicta el TEDH.[44] Luego de una larga evolución jurisprudencial en la que hubo marchas y contramarchas en decisiones del Tribunal Supremo y el Tribunal Constitucional, la situación previa a la introducción de esta nueva causal el año 2015 era la de comprender que una sentencia del TEDH podía entenderse como un hecho nuevo de acuerdo a lo regulaba la antigua versión del artículo 954.1 d) de la LECRIM.[45] El aumento de sentencias del TEDH contra España y la aplicación polémica que se hizo a un caso concreto facilitó la idea de regular en forma explícita esta nueva causal estableciéndose algunos

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las sentencias firmes a la luz de la STEDH de 8 de marzo de 2016, Porcel Terribas y otros c. España. *In*: VV.AA. *Estudios sobre Jurisprudencia Europea*. Madrid: European Law Institute, 2018, pp. 11-27 y MONTESINOS, Carmen. El recurso de revisión como cauce de ejecución de las sentencias del Tribunal de Estrasburgo: pasado, presente y futuro, pp. 98-113. Trabajos generales sobre revisión que incluyen el análisis de esta materia pueden verse en GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, *passim*; GARCIANDÍA, Pedro. Motivos de revisión penal: análisis de la nueva configuración del art. 954 de la Ley de Enjuiciamiento Criminal tras la reforma de 2015 y al amparo de la jurisprudencia del Tribunal Supremo, *passim*; VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017.

44 GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 138 (quien además cita el preámbulo de la ley apuntando en esta misma dirección); MARCHENA, Manuel; GONZÁLEZ-CUELLAR, Nicolás. *La reforma a la Ley de Enjuiciamiento Criminal en 2015*. Madrid: Ediciones Jurídicas Castillo de Luna, 2015, pp. 567-568.

45 Sobre esta evolución MARCHENA, Manuel; GONZÁLEZ-CUELLAR, Nicolás. *La reforma a la Ley de Enjuiciamiento Criminal en 2015*. Madrid: Ediciones Jurídicas Castillo de Luna, 2015, pp. 568-580, MARTÍNEZ, Andrés; ENCINAR, Miguel Ángel. *El recurso de casación y revisión penal*. Valencia, Tirant lo Blanch, 2016, pp. 528-529; MONTESINOS, Carmen. El recurso de revisión como cauce de ejecución de las sentencias del Tribunal de Estrasburgo: pasado, presente y futuro, pp. 98-113; OUBIÑA, Sabela. Las últimas reformas a la LeCrim. en apelación y revisión penal de las sentencias firmes a la luz de la STEDH de 8 de marzo de 2016, Porcel Terribas y otros c. España. *In*: VV.AA. *Estudios sobre Jurisprudencia Europea*. Madrid: European Law Institute, 2018, pp. 18-20; VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 199-203.

límites para su uso que no surgían de manera clara de la causal que se utilizaba. [46]

En primer lugar, la regla impone una restricción de legitimación activa sólo a quienes han recurrido el TEDH y obtuvieron una sentencia favorable. Es decir, si hay condenados que fueron objeto de las mismas violaciones constatadas por la sentencia del TEDH, pero no recurren o se hacen parte de ese proceso, no pueden luego invocar el recurso de revisión en su favor por este motivo.[47] Lo segundo, es que se regula una restricción temporal para el uso de esta causal de un año desde que la sentencia del TEDH se encuentre firme. Siendo la única causal del artículo 954 de la LECRIM que establece algún tipo de limitación temporal para el uso del recurso de revisión. Finalmente, se agregan exigencias sustantivas en relación con la violación declarada por el TEDH. En este ámbito, la idea del legislador ha sido limitar esta causal a casos de una cierta entidad que se caracterizan por tres elementos: que se trate de una violación grave de derechos fundamentales, que los efectos de dicha violación se mantengan o sean actuales y que la revisión sea la única vía para lograr que dichos efectos cesen.[48]

La regulación de estas limitaciones ha generado varias polémicas que no abordaré. Me interesa si destacar que esta causal, aún con sus limitaciones, representa un claro ejemplo de cómo comienza en España a abandonarse una comprensión del recurso de revisión entendido

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[46] GIMENO, Vicente. *Manual de Derecho Procesal Penal*, 2da edición. Madrid: Ediciones Jurídicas Castillo de Luna, 2018, p. 689; MARCHENA, Manuel; GONZÁLEZ-CUELLAR, Nicolás. *La reforma a la Ley de Enjuiciamiento Criminal en 2015*. Madrid: Ediciones Jurídicas Castillo de Luna, 2015, p. 578.

[47] Analizando un caso ejemplar en donde ocurrió esto (Porcel Terribas y otros c. España de 8 de marzo de 2016), OUBIÑA, Sabela. Las últimas reformas a la LeCrim. en apelación y revisión penal de las sentencias firmes a la luz de la STEDH de 8 de marzo de 2016, Porcel Terribas y otros c. España. *In*: VV.AA. *Estudios sobre Jurisprudencia Europea*. Madrid: European Law Institute, 2018, pp. 11-27.

[48] GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, pp. 141-144; GIMENO, Vicente. *Manual de Derecho Procesal Penal*, 2da edición. Madrid: Ediciones Jurídicas Castillo de Luna, 2018, p. 688; OUBIÑA, Sabela. Ayer y hoy en la revisión penal de las sentencias firmes. *In:* VV.AA. *Justicia con ojos de mujer*. Valencia: Tirant Lo Blanch, Valencia, 2018, pp. 22-23.

sólo como un mecanismo destinado a solucionar el problema de la condena de inocentes y muta hacia un sistema de corrección de errores graves del sistema.[49]

Sumando los cambios de esta causal con los dos de las ¨clásicas¨ examinadas, parece claro que el sistema español, como un buen ejemplo de evolución en el contexto europeo continental, muestra un camino interesante de cómo abrir al recurso de revisión y transformarlo en una herramienta que preste una cobertura mayor que la actual regulación chilena.

1.2. Algunas cualificaciones

Esta sucinta revisión no pretende obviar que detrás de cada una de las causales examinadas se han generado polémicas y debates en la doctrina y jurisprudencia española. Por lo mismo, desde un punto de vista técnico, es probable que todas ellas pudieran ser objeto de perfeccionamientos diversos si uno quisiera adoptarlas para Chile. Sin embargo, como señalé, más que el detalle técnico específico de cada causal, lo que me interesa en este texto es mostrar la evolución y lógica de la actual regulación española que da cuenta de una concepción mucho más amplia de las causales de procedencia.

Sin perjuicio de lo anterior, si creo importante hacerme cargo de una materia que no fue objeto de reformas en la ley del año 2015 y que, producto de esta, ha generado algunas dificultades en la implementación de las nuevas causales. Un problema importante de la reforma del año 2015 que ha sido fuertemente criticado por la doctrina es que más allá del artículo 954 de la LECRIM no se introdujeron reformas ni a las reglas de procedimiento ni a las que regulan los efectos del recurso de revisión, esto es, las consecuencias jurídicas de su aprobación. Esto, ha generado

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[49] En esta dirección GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, pp. 145-147. A una conclusión similar llegan Nan y Lestrade haciendo una observación general de la regulación europea en la materia sosteniendo se trataría de lo que ellos llaman una aproximación amplia de la revisión, NAN, Joost; LESTRADE, Sjarai. Toward an European right to claim innocence?, p. 1334.

un conjunto de incertidumbres y problemas de orden práctico[50] que deberán ser resueltos por la jurisprudencia.[51] Esto es relevante de tener presente, ya que una reforma significativa a las causales de procedencia del recurso también debiera ir acompañada en Chile de una restructuración de las normas procedimentales (por ejemplos de reglas como aquellas que regulan el tipo de prueba que se puede utilizar en la tramitación de estos recursos) y aquellas que establecen los efectos o consecuencias en caso que se acoja (por ejemplo sólo anulación de la condena original con posibilidad de realizarse un nuevo juicio o anulación acompañada de absolución definitiva en el caso).

Un segundo punto que quiero abordar es que en la investigación no he encontrado evidencia empírica sobre el cambio que en la práctica ha producido en la cantidad de solicitudes presentadas de revisión ni en sus tasas de acogimiento o rechazo. Hay que tener presente que la reforma del año 2015 sólo entró en vigor a partir del 6 de diciembre de ese año por lo que se trata de un cambio que podría tardar algo en reflejarse en las estadísticas. Por otra parte, como ya señalé, una porción no despreciable de los cambios que se introdujeron el 2015 ya habían sido incorporados por la jurisprudencia. Aun así, sería indispensable contar con mayor evidencia para poder apreciar el impacto concreto del cambio. Los trabajos consultados, aún los más recientes, no abordan con claridad esta dimensión de la reforma de 2015. En materia de derecho suele existir una distancia enorme entre programa normativo y práctica y en algunos casos puede ser un error quedarse sólo con las cuestiones normativas que

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[50] GARCIANDÍA, Pedro. Motivos de revisión penal: análisis de la nueva configuración del art. 954 de la Ley de Enjuiciamiento Criminal tras la reforma de 2015 y al amparo de la jurisprudencia del Tribunal Supremo, p. 28 (quien pone énfasis en materia de efectos); OUBIÑA, Sabela. Ayer y hoy en la revisión penal de las sentencias firmes. *In:* VV.AA. *Justicia con ojos de mujer*. Valencia: Tirant Lo Blanch, Valencia, 2018, pp. 953-954, VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, p. 34 y 209 (quien pone énfasis respecto de los procedimientos). Un análisis detallado en materia de efectos GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, pp. 187-217 y en el tema procedimientos VERNEGO, Nancy. *Revisión de la sentencia firme en el proceso penal*. Lisboa: Juruá Editorial, 2017, pp. 207-225.

[51] GARCIANDÍA, Pedro. *El proceso de revisión en las sentencias penales*. Pamplona: Thomson Reuters Aranzadi, 2016, p. 211.

no necesariamente reflejan la práctica cotidiana. Desafortunadamente las cifras que publica el Consejo General del Poder Judicial y el Tribunal Supremo no desagregan este tipo de recursos.[52]

2. Las Comisiones Investigadoras: el caso de la *Criminal Case Review Commission* de Inglaterra, Gales e Irlanda del Norte

En el mundo anglosajón no existe un modelo único de cómo abordar la corrección de condenas erróneas, tanto a nivel de mecanismos y procedimientos, como respecto a los criterios sustantivos que habiliten a tal decisión.[53] Históricamente han existido distintas formas de aproximarse al problema, por ejemplo, entregándole la función de corrección de condenas al poder ejecutivo o al judicial, y el desarrollo estándares diferentes para permitir dicha revisión.

En la actualidad es posible identificar un importante debate y experimentación de nuevos mecanismos para lidiar con el viejo problema de las condenas erróneas. Por ejemplo, una de las experiencias más recientes ha sido el desarrollo de las ¨*conviction integrity units*¨ o unidades de integridad de las condenas. Se trata de una alternativa surgida en Estados Unidos en los últimos 15 a 20 años y que representa la respuesta que desde las fiscalías se ha entregado al problema de las condenas erróneas, sugiriendo un camino complementario a los otros dos. A grandes rasgos, consisten en la instauración de unidades internas en las propias fiscalías destinadas a investigar de oficio o a solicitud de un condenado casos en los que exista sospecha que puedo haberse afectado a un inocente.[54] El análisis detallado de los elementos centrales de su diseño y el impacto que tendrían en revertir condenas erróneas no puede ser abordado en

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52 Véase: www.poderjudicial.es (última visita el 3 de enero de 2022).

53 ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 961-962; CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 268.

54 HOLLWAY, John. *Conviction integrity units*: a national perspective. United States of America: University of Pennsylvania Law School, 2016, *passim*. Véase también: SCHECK, Barry. Conviction integrity units revisited, pp. 705-753.

este texto, pero si menciono que se trata de un tipo de estrategia que comienza a ser objeto de creciente atención más allá de las fronteras de Estados Unidos.[55]

Otro ejemplo, más consolidado en términos de análisis de legislación comparada, ha sido la creación de comisiones de inocencia. Ellas han sido establecidas con muy distintos propósitos, [56] pero en este trabajo analizaré aquellas cuya función central es la investigación de casos potenciales de condenas erróneas para luego permitir su reexamen y revisión.[57] Lo interesante es que se trata de una estrategia que comienza a tener impacto en países fuera del ámbito anglosajón. El surgimiento de las comisiones puede identificarse a partir de la década de los ´90 del siglo pasado en contextos similares: el descubrimiento de casos de alto perfil público de inocentes condenados que generan cuestionamiento de la institucionalidad vigente y debate sobre la necesidad de contar con mecanismos más eficaces para lidiar con ese problema.[58]

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[55] Por ejemplo, recientemente ha sido propuesta como una innovación interesante de introducir en Italia por la doctrina en dicho país. LUPARIA, Luca; GRECO, Chiara. Unveiling wrongful convictions between the U.S. and Italy: Cross-learning from each other's mistakes, 2020, pp. 118-121.

[56] Por ejemplo, para el caso de los Estados Unidos, Cooper identifica comisiones con tres objetivos diversos: (1) corregir errores; (2) proponer reformas sistémicas; y, (3) a cargo de desarrollar programas de integridade. COOPER, Sarah. Innocence commissions in America: ten years after. *In*: COOPER, Sarah (ed.). *Controversies in innocence cases in America*. England: Routledge, 2014, pp.198-200. Una revisión sintética de varios modelos puede verse en CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, pp. 281-286.

[57] ROACH, Kent. Wrongful Convictions: Adversarial and Inquisitorial Themes, p. 91.

[58] Para los casos de Inglaterra, Gales, Irlanda del Norte, Escocia, Carolina del Norte y Noruega véase CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, pp. 268-286. Sin Noruega, pero incluyendo a Canadá y Australia, véase: ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 961-990. En el caso de Inglaterra, Gales e Irlanda del Norte, véase: HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, p. 280.

Las primeras en crearse fueron las de Inglaterra, Gales e Irlanda del Norte el año 1997,[59] Escocia en 1999 (SCCRC)[60] y Noruega el año 2004 (NCCRC).[61] Con posterioridad se incorpora la primera comisión de este tipo en los Estados Unidos en el estado de Carolina del Norte, denominada *North Carolina Innocence Inquiry Commission* (NCIIC) el año 2006[62] y, más recientemente, la de Nueva Zelandia (NZCCRC) que inició de sus funciones fue el 1 de julio de 2020.[63] En la actualidad existen también propuestas avanzadas para la implementación de comisiones similares en Australia[64] y Canadá.[65]

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[59] Véase: https://ccrc.gov.uk/ (última visita el 3 de enero de 2022); BELLONI, Rank; HODGSON, Jacqueline. *Criminal injustice*: an evaluation of the criminal justice process in Britain. Great Britain: Palgrave, 2000, pp. 185-195; ELKS, Laurie. *Righting miscarriages of justice?* ten years of criminal case review commission. London: Justice, 2008, *passim*; NAUGHTON, Michael. *The Innocent and the Criminal Justice System*. A Sociological Analysis of Miscarriages of Justice. United Kingdom: Palgrave Macmillan, 2013, pp. 162-190; HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, *passim*; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 9-10.

[60] Véase: http://www.sccrc.co.uk/ (última visita el 3 de enero de 2022); CHALMERS, James; LEVERICK, Fiona. The Scottish Criminal Case Review Commission and its referrals to the appeal court: the first 10 years, *passim*.

[61] ROACH, Kent. Wrongful Convictions: Adversarial and Inquisitorial Themes; CORMACK, Tracey. The criminal case review commission, *passim*; STRIDBECK, Ulf; MAGNUSSEN, Philos Svein. Prevention of wrongful convictions: Norwegian criminal safeguards and the criminal case review commission, p. 268.

[62] Véase: http://innocencecommission-nc.gov/ (última visita el 3 de enero de 2022).; COOPER, Sarah. Innocence commissions in America: ten years after. *In*: COOPER, Sarah (ed.). *Controversies in innocence cases in America*. England: Routledge, 2014, pp. 197-217; MUMMA, Christine. The North Carolina innocence inquiry commission: catching cases that falls through the cracks. *In*: ZALMAN, Marvin; CARRANO, Julia (eds.). *Wrongful convictions and criminal justice reform*. New York: Routledge, 2014, pp. 249-265.

[63] Véase: https://www.ccrc.nz/ (última visita el 3 de enero de 2022).

[64] En este país existen propuestas legislativas por introducir una comisión desde el año 2013 y un creciente debate en esa dirección. Detalles en KIRBY, Michael. A new right of appeal as a response of wrongful convictions: it is enough?, pp. 299-305.

[65] Desde hace algún tiempo el Ministerio de Justicia de Canadá comprometió la creación de una Comisión para la cual ha encargado diversas consultas

Con algunas diferencias, se podría resumir la configuración y trabajo de estas comisiones de la siguiente forma: se trata de órganos independientes cuya función principal es el recibir reclamos de personas condenadas por el equivalente funcional a nuestras sentencias firmes, investigarlos y luego, en caso de darse los supuestos de la respectiva legislación, ser reenviados a tribunales para su reapertura y eventual exoneración. En consecuencia, el foco de las comisiones no ha sido reemplazar al sistema judicial en la revisión de los casos, sino más bien crear una institucionalidad que pueda asegurar independencia y que disponga de poderes de investigación para revisar y preparar casos potenciales de condenas erróneas, entregando una opinión respecto de ellos, pero dejando el poder final de decisión en manos de los tribunales. Su ámbito de actuación suele cubrir no sólo las condenas de inocentes sino también todo tipo de condenas erróneas generadas por causas diversas.[66]

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y opiniones técnica. Una de las más recientes fue una opinión de expertos, que entregó su reporte en diciembre del año 2021, identificando la necesidad de crear una comisión que fuera proactiva, tuviera una visión sistemática de casos y destinada a corregir no sólo las condenas de inocentes sino casos de extravíos de la justicia de manera genérica. Detalles en https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/p1.html (última visita el 3 de enero de 2022).

[66] El modelo disonante en varias de estas materias es la comisión de Carolina del Norte, la que, por ejemplo, sólo acoge situaciones de condenas de personas fácticamente inocentes y, en el evento que decide reenviar un caso a un tribunal, se lo hace a un panel especial integrado por tres jueces que funciona con reglas distintas a las apelaciones ordinarias, véase: ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 976-977. Si bien el modelo de la CCRC fue considerado en Carolina del Norte al momento de crearse, diversos temores respecto a su impacto llevaron a introducir un diseño con más restricciones, véase: MUMMA, Christine. The North Carolina innocence inquiry commission: catching cases that falls through the cracks. *In*: ZALMAN, Marvin; CARRANO, Julia (eds.). *Wrongful convictions and criminal justice reform*. New York: Routledge, 2014. Su regulación más restrictiva se refleja en los resultados básicos obtenidos a la fecha comparados con los de sus pares. Así, desde su creación al 1 de julio de 2021, la NCIIC recibió 3.064 solicitudes habiendo decretado la exoneración en 15 casos, es decir, una tasa de exoneración de 0,49%. https://innocencecommission-nc.gov/about/ (última visita el 3 de enero de 2022). Veamos resultados en otras jurisdicciones. En Escocia desde 1999 al 31 de julio de 2021 la

Como señalaba, esta modalidad de trabajo representa un cambio significativo respecto a la forma en que en dichas jurisdicciones se enfrentaba la corrección de condenas erróneas en forma previa. Por ejemplo, Noruega operaba antes acudiendo directamente a órgano jurisdiccional responsable de la decisión (similar a los sistemas imperantes en otros países de Europa continental), lo mismo Carolina del Norte, pero en Nueva Zelandia se cambia un sistema que descansaba en el órgano administrativo al solicitarle al Gobernador General hacer uso de una prerrogativa real de clemencia.[67] En Inglaterra, en cambio, se trataba de un sistema mixto ya que era el *Home Secretary* quien tomaba la decisión de referir un caso a la división criminal de la Corte de Apelaciones para su revisión en la medida que hubiera sido un caso resuelto por una *Crown Court*.[68] Algo similar ocurría en Escocia ya que se debía recurrir primero al Secretario de Estado.[69]

Los objetivos perseguidos al instalar estas comisiones son los de generar mayor independencia del órgano que analiza el caso, elevar los estándares de transparencia en sus procedimientos y decisiones,

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SCCRC recibió 2.883 solicitudes, habiendo referido 149 casos a la *High Court* (una tasa de 5,16%), de los cuáles 88 habrían sido acogidos (3% del total de las solicitudes y 59% de los casos referidos), estando 15 pendientes de resolución a esa fecha. https://www.sccrc.co.uk/case-statistics (última visita el 3 de enero de 2022). En el caso de Noruega desde 2004 a 2019 se presentaron 2.602 solicitudes (2.412 concluidas) y se ordenó la reapertura de 314 casos, es decir, un 13% de los casos concluidos (la NCCRC reporta se trataría de un 15%, seguramente descontando del universo algunos casos pendientes de resolución, cuestión que no queda completamente clara de la lectura de los datos). THE NORWEGIAN CRIMINAL CASE REVIEW COMMISSION. Annual Report 2019, 2020, p. 14.

67 CORMACK, Tracey. The criminal case review commission, p. 93.

68 NOBLES, Richard; SCHIFF, David. After ten years: an investment in justice. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission:* hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, p. 151; ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p. 963; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 18.

69 CHALMERS, James; LEVERICK, Fiona. The Scottish Criminal Case Review Commission and its referrals to the appeal court: the first 10 years, p. 609.

contribuir a una mayor legitimidad pública de las mismas e ir generando cuerpos más profesionales y especializados que mejoren la calidad de las investigaciones en estos casos aumentando la probabilidad de revertir condenas erróneas. Se espera con esta institucionalidad también aliviar a las víctimas de estas condenas de la enorme carga que representaba para ellos en los modelos anteriores acudir ante los respectivos órganos y tener que probar su inocencia o el carácter erróneo de la condena. Desde esta perspectiva, las comisiones han sido una estrategia que claramente intenta asegurar acceso a la revisión de condenadas erróneas como un elemento central.[70]

Hay algunas diferencias en las reglas de integración de las comisiones, sus recursos disponibles, los procedimientos de trabajo, sus facultades legales y los estándares a satisfacer para activar el proceso de exoneración ante las cortes, pero en su gran mayoría se trata de orientaciones bastante similares, salvo, como ya he mencionado, el modelo de Carolina del Norte, ya que todo el resto siguió más de cerca el modelo de la CCRC como base.[71] La CCRC de Inglaterra, Gales e Irlanda del Norte no sólo es la comisión más antigua, sino también es considerada como un ¨*gold*¨ estándar o el modelo ideal a seguir en la literatura especializada a nivel comparado.[72] Además, como ya señalaba, ha sido la inspiración en la generación de las otras y a esta altura cuenta con datos y evaluaciones de su trabajo por cerca de 25 años. Me detengo entonces en análisis de algunos elementos básicos para la comprensión de su funcionamiento y el impacto concreto que ha tenido, permitiendo así evaluar su utilidad como mecanismo de corrección.

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[70] Sobre estos objetivos para el caso de la CCRC puede verse NOBLES, Richard; SCHIFF, David. After ten years: an investment in justice. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission:* hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, pp. 151-152; HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, pp. 1-4.

[71] NAUGHTON, Michael. *The Innocent and the Criminal Justice System*. A Sociological Analysis of Miscarriages of Justice. United Kingdom: Palgrave Macmillan, 2013, pp. 163-164.

[72] ROACH, Kent. Wrongful Convictions: Adversarial and Inquisitorial Themes, p. 92.

2.1. Conformación y misión básica de la CCRC

La CCRC de Inglaterra, Gales e Irlanda del Norte se define, como ya se señalaba, como una comisión completamente independiente creada con el propósito de investigar *miscarriages of justice*.[73] Su independencia está orientada a garantizar una investigación imparcial de los casos que recibe, es decir, sin compromiso con otros actores institucionales cuyo comportamiento puede haber generado el problema. Define su misión como ¨investigamos e identificamos potenciales extravíos de la justicia y, en esa labor, promovemos la confianza pública en el sistema de justicia penal¨.[74]

En cuanto a su integración, la CCRC está compuesta por 12 comisionados nombrados por la Reina previo consejo del Primer Ministro, siendo designados por períodos de tres años.[75] Para efectos de su designación, se deben seguir las reglas de conducta desarrolladas por la Oficina del Comisionado para Nombramientos Públicos.[76] Un tercio de los comisionados deben ser abogados con al menos 10 años de experiencia y los otros dos tercios personas con conocimiento o experiencia en el sistema de justicia penal que provengan de otras profesiones. La idea de esta integración fue la de confirmar un cuerpo multidisciplinar que pudiera tener una mirada más amplia y compleja de los casos que conocen, reconociendo que los problemas de condenas erróneas presentan aristas

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[73] Existen diferentes formas de traducir esta expresión, por ejemplo, se le menciona como errores judiciales en algunos textos o más literalmente como un aborto involuntario de la justicia. En lo sucesivo ocuparé la expresión de extravíos de la justicia y lo haré equivalente a la noción de condenas erróneas entendido en un sentido amplio, es decir, no sólo producto de condenas a personas fácticamente inocentes.

[74] Véase: https://ccrc.gov.uk/about-us/who-we-are/ (última visita el 3 de enero de 2022).

[75] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 22; CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 273.

[76] Más antecedentes sobre el trabajo de la oficina y los principios y reglas que regulan su comportamiento en: https://publicappointmentscommissioner.independent.gov.uk/regulating-appointments/ (última visita el 3 de enero de 2022).

que exceden a las cuestiones puramente normativas o de estándares de regulación legal.

El sistema de designación ha sido objeto de críticas por considerarse demasiado político para un órgano independiente y, a la vez, poco transparente.[77] Por otra parte, se ha criticado también que la mayoría de sus comisionados trabajan sólo en forma parcial para la CCRC en jornadas que han disminuido con los años (el 2014 equivalían a 8,8 jornadas completas y el 2019 eso bajó a sólo 2,5), con una remuneración limitada, la que también ha disminuido en el tiempo, todo lo que constituye un riesgo para su independencia, especialmente a nivel operacional. [78]

Además de los comisionados, la CCRC está integrada por un equipo de trabajo de 90 personas (40 de ellos en calidad de investigadores de casos).[79] Su presupuesto ejecutado en el período 2019-2020 fue de 6,7 millones de libras[80] y el ejecutado para el período 2020-2021 de 7,5 millones.[81] Todas estas cifras dan cuenta de un incremento importante respecto a los recursos que disponía el sistema anterior que trabajaba al alero de la *Home Office* en una oficina específica (Oficina C3) que estaba integrada por 21 miembros y cuyo financiamiento era nueve veces menos que el presupuesto de la CCRC en dinero equivalente al del período 2005-2006.[82] No obstante esta evidente mejora, se critica

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[77] CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 273; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 26

[78] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 23-26.

[79] Véase: https://ccrc.gov.uk/who-we-are/ (última visita el 3 de enero de 2022).

[80] Véase: https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6i-q1l/uploads/2020/07/CCRC-2329571-v1-CCRC_Annual_Report_and_Accounts_2019-20_Final_for_web.pdf (última visita el 3 de enero de 2022).

[81] Véase: https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1d-nrmkg14/uploads/sites/5/2021/07/Annual-review-plain-english-V9-FINAL-pdf.pdf (última visita el 3 de enero de 2022).

[82] NOBLES, Richard; SCHIFF, David. After ten years: an investment in justice. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission:* hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, p. 151. En el informe de la Westminster Commission se habla que la integración de la

el progresivo desfinanciamiento que ha tenido la CCRC (lo que habría ocurrido claramente en la mitad de la década pasada) y el hecho que su equipo no sea suficiente para la carga de trabajo que debe enfrentar, traduciéndose esto en lentitud para abordar las solicitudes que recibe.[83]

2.2. El procesamiento de los casos y los estándares para su reapertura y exoneración

Como ya se señalaba, la CCRC investiga casos de condenas presentados por el público en los que se han agotado apelaciones, incluyendo condenas por delitos de menor entidad.[84] Las solicitudes se presentan por escrito llenado un formulario que está disponible en la página web de la CCRC y que si se observa resulta muy amigable y simple de llenar.[85] Para la presentación de una solicitud, no se requiere

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oficina C3 era de sólo 13 servidores públicos, véase: THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 16.

83 CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 271; HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, pp. 18-21; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 27-31.

84 Pueden ser objeto de esta revisión las condenas dictadas no sólo por las *Crown Courts* sino también por las *Magistrates´ Courts*. THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE (2021) In the interests of justice, 88 pp, p. 13. Las *Magistrates´ Courts* tienen competencia para conocer de infracciones penales sancionables con multas o penas privativas de libertad de hasta seis meses. Una explicación sobre la competencia y funcionamiento de estas cortes puede verse en el sitio oficial: https://www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/ (última visita el 3 de enero de 2022).

85 El formulario puede ser revisado en: https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2019/08/2019-app-form.pdf (última visita el 3 de enero de 2022). Una reciente evaluación del nivel de impacto de este formulario da cuenta de un éxito importante. Su formato actual proviene de abril de 2012 y desde ese entonces se incrementó su uso de un 49% a un 88% el año 2014 del total de las solicitudes. VOGLER, et. al.

de representación legal, aun cuando diversos estudios disponibles dan cuenta que en los casos que cuentan con ella aumenta significativamente su probabilidad de éxito, tanto en las etapas iniciales de revisión ante la CCRC como luego en la decisión de enviarlos a la Corte de Apelaciones.[86] En este contexto, el sistema inglés provee de distintas vías para obtener financiamiento de servicios de defensas para las solicitudes ante la CCRC y luego ante la Corte.[87] Con todo, la evidencia muestra que ese financiamiento ha disminuido en forma drástica en años recientes, lo que ha tenido un

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The Criminal Case Review Commission: Legal Aid and Legal Representatives (Final report). United Kingdom: Economic and Research Council University of Sussex, 2021, pp. 10-11.

86 Por ejemplo, un estudio del año 2010 indica que 2/3 de los casos que efectivamente fueron referidos a la Corte de Apelaciones por la CCRC contaban con representación legal, véase: ROACH, Kent. Wrongful Convictions: Adversarial and Inquisitorial Themes, p. 97. En la misma dirección, otro estudio del año 2009 elaborado por Hodgson y Horne mostró que, a esa fecha, un 8% de los casos acumulados que contaban con representación legal había sido referidos por la CCRC a la Corte de Apelaciones y sólo un 2,1% de los que no contaban con ella (citado por THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 30) y que un 51% de las solicitudes sin representación fueron rechazadas en las primeras etapas versus un 18,4% de las que contaban con representación (citado por HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, p. 318). Hoyle y Sato han llegado a conclusiones similares, véase: HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, pp. 109-112. La investigación empírica más reciente disponible en la materia también constata el mismo hallazgo. VOGLER, et. al. *The Criminal Case Review Commission*: Legal Aid and Legal Representatives (Final report). United Kingdom: Economic and Research Council University of Sussex, 2021, pp. 23-24.

87 En todo caso existe la posibilidad que un abogado que represente a un solicitante obtengan fondos de asistencia legal para financiar la prestación de servicios. Véase: https://ccrc.gov.uk/making-application/how-to-apply/ (última visita el 3 de enero de 2022). Por otra parte, existe un servicio de apoyo a potenciales víctimas de condenas erróneas cuando sus casos son referidos a las cortes de apelaciones denominado *The Miscarriages of Justice Support Service* (MJSS) que puede prestar asesoría y consejo en distintas materias. Véase: https://ccrc.gov.uk/making-application/how-it-works/ (última visita el 3 de enero de 2022).

impacto directo en la disminución de las solicitudes que cuentan con esa representación legal.[88]

Recibida la solicitud se hace una evaluación inicial de ella para determinar si puede ser procesada o es desechada. Esta última hipótesis puede ocurrir en casos como, por ejemplo, en los que no se agotaron las apelaciones previas o se considere que la solicitud no contiene ningún elemento novedoso que permita referir el caso ante la corte de apelaciones. La evidencia muestra que cerca del 50% de los casos es desechado como consecuencia de esta primera revisión.[89] En todo caso, la decisión debe ser justificada y comunicada al solicitante, quien tiene posibilidad de requerir su revisión o en el futuro volver a presentar una solicitud cuando se cumplan con las exigencias básicas para presentar un caso ante la CCRC.

En la hipótesis que la solicitud pase el primer filtro, ella será asignada a *un Case Review Manager* (CRM) quien completará la investigación requerida por el caso para tomar una decisión. Concluida esta, si estima que el caso no cumple con los estándares para ser referido a la corte de apelaciones, someterá la solicitud a un comisionado que podrá efectivamente ratificar este criterio o estimar que el caso tiene una probabilidad de ser referido. En esta última hipótesis, lo enviará a un comité compuesto por tres comisionados. Si el CRM estima que el caso merece ser referido, lo enviará directamente a comité de tres comisionados para su decisión. El cualquier evento en que se decida no referir el caso, ello deberá ser consignado en una decisión provisional fundada que será comunicada al solicitante, quien tendrá la posibilidad de acompañar nuevos elementos para la decisión final.[90] En todo caso, el

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[88] La disminución habría sido de un tercio de los casos el año 2008 a un 10% en la actualidad. THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 30. En la misma dirección aún cuando cuestionando algunos datos, véase: VOGLER, et. al. *The Criminal Case Review Commission*: Legal Aid and Legal Representatives (Final report). United Kingdom: Economic and Research Council University of Sussex, 2021, pp. 15-16.

[89] HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, pp. 288-289.

[90] En una investigación empírica que consideró una muestra de casos entre los años 2004 y 2015 se determinó que en sólo el 0,7% dentro de los que la CCRC

rechazo de una solicitud no impide a futuro una nueva presentación en la medida que concurran nuevos elementos o antecedentes que permitan cumplir con el estándar para referir un caso antes la corte.[91]

Un aspecto central para llevar adelante la investigación de los casos es la existencia de un conjunto de facultades o poderes legales que se le confieren a la CCRC para poder hacerlo. Esos poderes incluyen la posibilidad de ordenar la realización de nuevos peritajes, designar oficiales investigadores con el propósito de obtener nueva evidencia y, además, solicitar todo tipo de documentos a instituciones públicas (por ejemplo, las policías, el servicio de persecución penal o al sistema de salud pública) y privadas. En este último caso se trata de una reforma introducida el año 2016 que permite a la CCRC, a través de los tribunales, obtener documentación relevante (por ejemplo, empresas que proveen servicios periciales).[92] Como se puede apreciar, se trata de poderes bastante relevantes que le permiten acceder a una cantidad importante de información en los casos que llevan adelante. Además, la CCRC está habilitada para llevar adelante la investigación con bastante libertad, sin que necesariamente deba estar sujeta a los temas que fueron planteados en la solicitud, sino pueden incluir en su investigación todo aquello que

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decidió no enviar el asunto a la corte de apelaciones se pudo revertir tal situación, a pesar de que en cerca de la mitad de dichos casos los solicitantes presentaron peticiones adicionales a la original, véase: HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, p. 290.

[91] El proceso completo esta descrito con detalle en documento de la CCRC sobre Decision-Making Process: Casework Policy que se encuentra publicado en su página web: https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2019/01/DECISION-MAKING-PROCESS.pdf (última visita el 3 de enero de 2022). Una revisión más sustantiva de estos procesos con resultados de una investigación empírica puede verse en HOYLE, Carolyn; SATO, Mai. Reasons to doubt: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, pp. 50-59 y pp. 85-103.

[92] HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, p. 288; ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 963-964.

al CRM pueda parecer relevante para determinar si el caso debe o no ser enviado a la corte de apelaciones para su revisión. Este conjunto de poderes investigativos ha llevado a caracterizar a la CCRC como una institución de naturaleza inquisitiva inserta en un modelo adversarial de justicia criminal.[93]

El trabajo investigativo de la CCRC también ha sido objeto de diversas críticas. La primera, es que se ha identificado una tendencia a un tipo de trabajo investigativo muy pasivo o de escritorio, es decir, orientado a la revisión de documentación disponible y, en cambio, con poca actividad proactiva orientada a identificar evidencia nueva que no haya sido descubierta previamente. A eso se suman problemas de sesgos cognitivos identificados en los CRM que limita la posibilidad de avanzar con más fuerza en algunas tipologías de casos en donde se producen esos sesgos. Por otra parte, también se menciona el problema de las investigaciones de casos en donde la condena errónea ha surgido como consecuencia del mal comportamiento policial, ya que las diligencias se deben encargar a las mismas policías lo que genera tensiones para su desarrollo. Se suma la reducción de recursos a que ya he hecho referencia, la que impacta en la posibilidad de ordenar ciertas diligencias de importancia (por ejemplo, evidencia forense) y, finalmente, el problema surgido a partir de la falta de herramientas legales para compeler a los organismos públicos a entregar en forma oportuna los antecedentes que se les solicitan (cuestión que en cambio no ocurriría tratándose de privados gracias a una regulación más precisa en la materia).[94] A pesar de estas críticas se reconoce que

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[93] CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 272; HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, pp. 280-311.

[94] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 44-52, CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 272. En detalle explicando la designación de investigadores policiales, véase: HOYLE, Carolyn; SATO, Mai. *Reasons to doubt*: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, pp. 233-245. Una crítica desde la perspectiva del impacto que tiene una investigación no centrada en acreditar la inocencia del condenado derivado del estándar legal que la CCRC debe acreditar en NAUGHTON, Michael. The importance

la CCRC ha representado un enorme avance en la investigación de condenas erróneas.[95]

Un aspecto central del trabajo de la CCRC es la determinación de si un caso que ha investigado o revisado puede ser enviado a la Corte de Apelaciones con el propósito que se determine o no la exoneración del erróneamente condenado.[96] Para estos efectos, la legislación inglesa establece un criterio bajo el cual la CCRC debe adoptar esta decisión. Así, el estándar bajo el cual se acepta una solicitud para referir un caso a la corte de apelaciones está regido por la sección 13 de la *Criminal Appeal Act* de 1995 y es conocido como el "test de la posibilidad real". Éste básicamente significa que la CCRC, para referir un caso, debe considerar que existe una posibilidad real que la corte de apelaciones revocará el veredicto del juicio por ser legalmente "inseguro" debido a nuevos argumentos o evidencia no considerados previamente.[97] Este estándar requeriría acreditar, como la señalado la jurisprudencia, ¨más que una posibilidad remota o una mera posibilidad¨ pero menos que una ¨probabilidad o certeza incipiente¨.[98]

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of the innocence for the criminal justice system. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, p. 36.

95 THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 48.

96 HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, pp. 301-302.

97 Una explicación con distintos niveles de detalle de este estándar puede encontrarse en diversos textos, entre ellos, HOYLE, Carolyn. Compensating injustice: the perils of the innocence discourse. *In*: HUNTER, Jill, ROBERTS, Paul, YOUNG, Simon, DIXON, David (eds.) The integrity of criminal process: from theory into practice. Londres: Hart Publishing, 2016, p. 374; HOYLE, Carolyn; SATO, Mai. *Reasons to doubt*: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, pp. 14-17; KERRIGAN, Kevin. Real possibility or fat chance?. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, pp. 167-170; HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, pp. 301-311; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 33-36.

98 ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER,

La corte de apelaciones, por su parte, usa el estándar de "inseguro" en dos sentidos: (1) cuando una persona factualmente inocente ha sido condenada erróneamente y (2) cuando en alguna etapa del procedimiento éste ha sido llevado de manera irregular o en forma no equitativa, con independencia de si se trata de una persona factualmente inocente.[99] Como se puede apreciar, especialmente este segundo significado, se amplía de manera importante la posibilidad de revertir condenas ya que el eje no está en acreditar inocencia sino en el carácter inseguro de la decisión.[100] Si esto se compara con la causal de la letra d) del artículo 473 del CPP de Chile citada, que opera, como lo ha señalado la Corte Suprema, en la acreditación de inocencia factual de parte del recurrente, se puede apreciar la enorme diferencia. Esta apertura de los casos revisables a situaciones que van más allá de la inocencia factual parece ser una constante en los estándares que regulan el trabajo de otras comisiones construidas sobre la base de la CCRC.[101]

Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p. 967; KERRIGAN, Kevin. Real possibility or fat chance?. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, p. 168.

[99] HOYLE, Carolyn. Compensating injustice: the perils of the innocence discourse. *In*: HUNTER, Jill, ROBERTS, Paul, YOUNG, Simon, DIXON, David (eds.) The integrity of criminal process: from theory into practice. Londres: Hart Publishing, 2016, p. 376; NAUGHTON, Michael. *The Innocent and the Criminal Justice System*. A Sociological Analysis of Miscarriages of Justice. United Kingdom: Palgrave Macmillan, 2013, pp. 151-157; THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 40-43.

[100] Una visión crítica a esta apertura en NAUGHTON, Michael. The importance of the innocence for the criminal justice system. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, pp. 17-38.

[101] Por ejemplo, el caso escocés el estándar bajo el cual la SCCRC puede referir un caso a la corte requiere que estime que: (a) se ha producido un extravío a la justicia (*miscarriage of justice*); y (b) es en el interés de la justicia el envío del caso a la Corte. CHALMERS, James; LEVERICK, Fiona. The Scottish Criminal Case Review Commission and its referrals to the appeal court: the first 10 years, p. 609. En el caso de la NZCCRC el estándar es aún más abierto al permitir el reenvío cuando se considere que existe un interés en la justicia para hacerlo, véase: THE WESTMINSTER COMMISSION ON

El uso del ¨test de la posibilidad real¨ por parte de la CCRC y la interpretación que la corte de apelaciones hace de lo que constituye una ¨condena insegura¨ son objeto de importantes críticas y debates. No puedo entrar en un trabajo de esta naturaleza al detalle de los aspectos técnicos de este debate, pero si me interesa poner foco en las principales cuestiones problemáticas que se mencionan en relación con el trabajo de la CCRC. Una primera línea de problemas que se discuten dice relación con la vaguedad y enorme apertura que tiene el estándar que lo hacen difícil de aplicación y, por lo mismo, muy subjetivo.[102] Por otra parte, el test descansa en un ejercicio predictivo que debe hacer la CCRC acerca de cómo la corte de apelaciones aplicará la ley al caso, lo que habría generado un comportamiento demasiado deferente de la comisión, perdiendo en parte su independencia de juicio al tomar decisiones.[103] Este elemento predictivo transformaría la decisión de la CCRC en una suposición de lo que la corte resolverá, generando una suerte de subordinación de lo que supuestamente debiera ser un órgano independiente.[104] Estos aspectos críticos se habrían traducido en un comportamiento muy tímido de la CCRC en la remisión de casos a la corte de apelaciones[105] y explicarían las bajas tasas que revisaré en la próxima sección, lo que redunda finalmente

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MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 34.

[102] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 33; CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, p. 272; KERRIGAN, Kevin. Real possibility or fat chance?. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, p. 169.

[103] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 33; CAMPBELL, Kathryn. *Miscarriages of justice in Canada*. Toronto: University of Toronto Press, 2018, pp. 271-272; HOYLE, Carolyn; SATO, Mai. *Reasons to doubt*: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, p. 14.

[104] KERRIGAN, Kevin. Real possibility or fat chance?. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, p. 169; NAUGTHON, 2012, pp. 35-36)

[105] HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, p. 303.

en la desprotección en que quedarían casos de condenas erróneas que resultan difíciles de enmarcar en el estándar legal en análisis. A partir de estas críticas, recientemente se ha sugerido la necesidad cambiar el test por uno que permita una decisión con mayores niveles de independencia por parte de la CCRC y que favorezca a las víctimas de condenas erróneas.[106]

2.3. Alguna evidencia sobre los resultados y funcionamiento de la CCRC

La puesta en marcha de la CCRC en 1997 produjo un amplio impacto en el incremento de solicitudes de revisión de condenas erróneas y en casos enviados a la corte de apelaciones en relación con los que se tramitaban en el sistema previo. La oficina encargada de esta materia recibía entre 700 y 800 solicitudes en promedio anualmente y entre los años 1981 y 1992 envió 64 casos a la corte de apelaciones para su examen, es decir, un promedio de alrededor de cinco casos al año.[107] En los cuatro últimos años (entre 2017-2021), la CCRC ha recibido en promedio más de 1.300 casos anuales, habiendo referido a la corte de apelaciones 131, es decir, un promedio anual de casi 33 casos.[108] Esto mostraría un incremento significativo en la tasa de casos referidos a la corte en relación con el sistema previo.

Si se considera las cifras totales, desde puesta en marcha en abril de 1997, la CCRC reporta que a noviembre de 2021 había referido a las

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[106] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, pp. 36-37.

[107] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 16; HODGSON, Jacqueline. *The metamorphosis of criminal justice*: a comparative account. Oxford: Oxford University Press, 2020, p. 280, p. 284.

[108] Datos obtenidos de la revisión de los reportes anuales de la CCRC de su página web. La desagregación es la siguiente: año 2017-2018: 1.439 solicitudes y 19 casos referidos; 2018-2019: 1.371 solicitudes y 13 casos referidos; 2019-2020: 1.334 solicitudes y 29 casos referidos; y, 2020-2021: 1.109 solicitudes y 70 casos referidos. Los reportes anuales pueden ser obtenidos en: https://ccrc.gov.uk/corporate-information-and-publications/ (última visita el 4 de enero de 2022).

cortes de apelaciones 772 casos (31,5 casos anuales en promedio). De ellos, 763 habían sido resueltos, con 534 admitidos, 216 rechazados y 13 pendientes. La tasa de aceptación de la corte de apelaciones de los casos referidos sería 71,2%, es decir, casi tres de cada cuatro casos enviados por la CCRC a la corte tendrían éxito. El total de solicitudes recibidas desde inicios de su funcionamiento a noviembre de 2021 fue de 28.181 (promedio de 1.141 anuales), de las cuales 27.426 habían completado su tramitación (promedio de 1.119 anuales). De esta forma el 2,78% del total de solicitudes completadas habría sido referida a las cortes de apelaciones.[109]

Dos observaciones en relación con esta tasa de envío a la corte de apelaciones. La primera es que se trata de una cifra inferior a la de otras comisiones que han seguido un modelo cercano de trabajo a la CCRC. Tal como ya tuve oportunidad de examinar en forma precedente, la tasa de la SCCRC era superior el 5% y la de la NCCRC de entre 13 a 15%. Un segundo aspecto para tener presente es que esta tasa no ha sido estable en el tiempo y más bien se detecta una baja paulatina en los años más recientes. Por ejemplo, el promedio de la tasa entre los años 1997 y el período 2015-2016 fue de 3,43%.[110] Esta baja en la tasa se habría producido, entre otras cuestiones, por las disminuciones de presupuestos de la CCRC y la consiguiente sobrecarga de su trabajo, por los recortes de los fondos destinados a financiar asesoría legal a los solicitantes y por la interpretación restrictiva realizada del estándar de ¨posibilidad real¨ según hemos visto.

En cuanto a la extensión de los procesos ante la CCRC, desde abril de 1997 a agosto de 2021, el 85% de las solicitudes completó su tramitación dentro de los 12 meses, distinguiéndose entre un 88,7% de solicitantes en prisión y un 77% en libertad. En la contracara, existe un 5,5% del total de solicitudes que se encontrarían en la categoría de casos de larga duración, es decir, que han estado bajo revisión por más de 24 meses. Por su parte, el proceso de revisión inicial de las solicitudes tuvo

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[109] Datos obtenidos y calculados a partir de los contenidos en la página de la CCRC: https://ccrc.gov.uk/facts-figures/ (última visita el 4 de enero de 2022).

[110] THE WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE. *In the interests of justice*: an inquiry into the Criminal Case Review Commission. United Kingdom, 2021, p. 12.

un promedio de duración de 28,6 semanas tratándose de solicitantes privados de libertad y de 33 semanas de aquellos en libertad. [111] Estos plazos han sido criticados como demasiado lentos por varios analistas.[112]

2.4. Breves reflexiones sobre el impacto de la CCRC

A pesar de importantes críticas que se han formulado al trabajo de la CCRC y de que existen diversas áreas en donde es necesario avanzar en perfeccionamientos, incluso entre quienes las plantean, es posible identificar que ella es reconocida como una mejora sustantiva para lidiar con las condenas erróneas con respecto a la situación previa.[113] Así, como hemos visto, su creación produjo un aumento significativo de solicitudes de revisión de casos, de envío de los mismos a la corte de apelaciones para su examen y de exoneraciones.[114] Visto desde otro ángulo, aun cuando probablemente menos de lo que se esperaba, la CCRC mejoró el acceso a la justicia de personas que se consideran víctimas de condenas erróneas y aumentó las posibilidades de corrección de ellas. [115] Hay que

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[111] Véase: https://ccrc.gov.uk/facts-figures/ (última visita el 4 de enero de 2022).

[112] HOYLE, Carolyn; SATO, Mai. *Reasons to doubt*: Wrongful convictions and the criminal case review commission. Oxford: Oxford University Press, 2019, p. 19).

[113] Un ejemplo claro de esto se puede observar en el muy crítico informe de la Westminster Commission que he citado en varias oportunidades.

[114] Roach destaca el impacto que ha tenido la CCRC en incrementar el acceso al mecanismo, pero a su vez identificando lo restrictivo que ha sido en la decisión de enviar casos a la Corte de Apelaciones, véase: ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p. 988.

[115] Con el propósito de tener una imagen comparativa realicé un ejercicio utilizando el indicador de número de solicitudes de revisión por cien mil de habitantes entre el total de casos de la CCRC en el período 1997 (abril)-2021 (noviembre) y los datos de los recursos de revisión recibidos por la Corte Suprema de Chile en el lapso entre los años 2007-2020 (octubre). La CCRC tuvo un promedio anual de 190 solicitudes por cien mil habitantes y en el caso chileno se trató de 45 solicitudes. Los cálculos se hicieron considerando población de 2016 de Inglaterra, Gales e Irlanda del Norte (60,2 millones) y de Chile en el mismo año (18,2 millones de acuerdo con las proyecciones realizadas por el Instituto Nacional de Estadísticas de Chile para ese año). Los

considerar, además, que los resultados de la CCRC debieran presentar algunas diferencias en otros países que cuentan con comisiones y que vimos tenían tasas de reenvío a tribunales muy superiores.

El trabajo de la CCRC también ha generado un importante nivel de información empírica sobre el funcionamiento del sistema de justicia criminal, acerca de las condenas erróneas y de los factores que las explican.[116] Esto, a su vez, ha facilitado el desarrollo de muchas investigaciones sobre la materia que han generado un conocimiento más preciso acerca del problema.[117] Seguramente su trabajo también ha contribuido a sensibilizar al público en general sobre el problema al permitir tener una visión en conjunto de este y no aislada en sólo algunos casos que generan interés mediático.[118]

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datos de la cantidad de recursos de revisión presentados y acogidos en Chile en el período 2007-2020 (octubre) fueron obtenidos de la base de datos que tengo en mi poder proporcionada por la Dirección de Estudios de la Corte Suprema. En el período se habrían presentado 1.173 solicitudes de revisión y se habrían acogido 88, considerando tanto condenas producidas en del sistema inquisitivo como el acusatorio.

[116] Destacando este aspecto del trabajo de las comisiones, pero identificando que no han abordado el trabajo por reformas sistémicas para lidiar con los problemas de condenas erróneas, véase: ROACH, Kent. Exceptional procedures to correct miscarriages of justice in Common Law systems. *In*: BROWN, Darryl; TURNER, Jenia; WEISSER, Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, pp. 989-990.

[117] Algunas investigaciones que he citado menos en este trabajo ya que son un poco más antiguas pueden verse en BELLONI, Rank; HODGSON, Jacqueline. *Criminal injustice*: an evaluation of the criminal justice process in Britain. Great Britain: Palgrave, 2000, *passim*; ELKS, Laurie. *Righting miscarriages of justice?* ten years of criminal case review commission. London: Justice, 2008, *passim*.

[118] Un estudio que realizó un análisis de prensa entre los años 1996 y 2006, en todo caso, detectó que la principal cobertura de la prensa inglesa sobre el trabajo de la CCRC tendía a focalizarse en los casos de alto impacto público o notorios. MASON, Paul. Press and release: UK news coverage of the CCRC since 1996. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. UK: Palgrave Macmillan, 2012, pp.178-190. Una visión crítica sobre el impacto en la cobertura de los medios en materia de inocentes condenados como producto del trabajo de la CCRC en NAUGHTON, Michael. The importance of the innocence for the criminal justice system. *In*: NAUGTHON, Michel (ed.). *The Criminal Case Review Commission*: hope for the innocents?. United Kingdom: Palgrave Macmillan, 2012, pp. 28-29.

Desde el punto de vista de un observador externo que conoce la experiencia de la CCRC a través de la literatura disponible, me parece que esta institucionalidad ha favorecido un debate robusto sobre el problema de las condenas erróneas que ha ayudado a identificar muchos puntos ciegos, dificultades y problemas que presenta la labor de corregirlas y que resultan más difíciles de visualizar en un sistema basado en reclamos individuales presentados en sede jurisdiccional como es el chileno.

Consideraciones finales

La creciente evidencia disponible en distintos países acerca de la existencia de un problema más extendido de condenas erróneas que el que históricamente habíamos estimado, ha llevado a una revisión profunda de los mecanismos tradicionales diseñados para corregir dichos errores. En este trabajo he puesto foco en el análisis de dos ejemplos: los cambios experimentados en la legislación y práctica de España respecto al uso del tradicional recurso o acción de revisión y la implementación de las comisiones investigadoras de delitos mostrando el desarrollo experimentado por Inglaterra, Gales e Irlanda del Norte. Ambos son representativos de experiencias similares que han sido desarrolladas en varios países en paralelo y, por lo mismo, dan cuenta de un fenómeno extendido en el ámbito comparado.

Hay tres temas que me interesa destacar surgen del análisis que he realizado en este trabajo. Lo primero que me parece claro los sistemas comparados han avanzado en abandonar la inocencia fáctica como causal principal que permite la revisión de condenas firmes y, en cambio, se mueven en la dirección de entender que los errores a corregir deben ser comprendidos en forma mucho más amplia.[119] En segundo término, que la posibilidad de tener un sistema efectivo de revisión de condenas firmes pasa por resolver no sólo el tema de las hipótesis que la habilitan, sino también los serios problemas de acceso de las víctimas de esos errores a

[119] En esta misma dirección para el caso de las regulaciones de Europa, véase: NAN, Joost; LESTRADE, Sjarai. Toward an European right to claim innocence?, p. 1334.

los mecanismos.[120] Finalmente, es posible observar que, más allá de los avances experimentados en las últimas décadas en esta materia, la revisión de una condena firme sigue siendo algo complejo y dificultoso y un área en donde se enfrentan reticencias de diverso tipo en las legislaciones y prácticas nacionales.

La situación en Chile llama la atención no sólo debido a que el diseño de su mecanismo de corrección se ha mantenido casi igual a las reglas desarrolladas en Europa hace más de dos siglos a pesar de haberse instalado un nuevo sistema acusatorio el año 2.000, sino porque incluso se podría identificar una suerte involución o retroceso por vía de una interpretación jurisprudencial muy estricta de parte de la Corte Suprema de Chile de las reglas vigentes, según tuve oportunidad de mostrar en algunos ejemplos. Allí donde en Europa las reglas crecientemente han ido abriendo las causales del recurso, en Chile primero el legislador y luego la Corte Suprema parecen haber ido en dirección contraria.

En mi opinión, el escenario actual y el conocimiento disponible sobre las condenas erróneas obliga a dar una nueva mirada al problema que permita contar en Chile con un mecanismo que ofrezca mayor y mejor cobertura. Lo anterior supone la búsqueda de un nuevo equilibrio entre la vieja tensión entre seguridad jurídica (finalidad de las decisiones judiciales/cosa juzgada) y justicia (verdad), que históricamente ha estado detrás del diseño del recurso de revisión. El punto de equilibrio vigente no es adecuado a las circunstancias actuales y debiera moverse en la dirección de entregarle un poco más peso al valor de la justicia. Con todo, hasta dónde pueda moverse dependerá de una discusión que debiéramos tener considerando, entre otras variables, algunos de los aspectos identificados en este trabajo que han sido objeto de desarrollo en experiencias comparadas. Estimo que esta experiencia podría ser muy útil para entregarnos algunas pistas en esta búsqueda de un nuevo equilibrio. Ojalá este trabajo contribuya entonces a aportar elementos que permitan iniciar esa conversación algo postergada en Chile y potencialmente en otros países de la región.

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[120] Por ejemplo, a través de diseños institucionales como las comisiones que permiten generar capacidades de investigación que los particulares no cuentan o de otros mecanismos destinados a alivianar los costos que tiene un proceso de revisión como lo es asesoría jurídica gratuita.

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A Critical Analysis of Drug Courts in Chile[1]

Análisis crítico de los Tribunales de Drogas en Chile

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Abstract: This paper is a critical study of the Drug Courts in Chile. To this end, it analyses the regulatory context in which they were created within the criminal legislation regarding illicit drug trafficking. Without questioning the merits of drug treatment, the idea that drug courts are a valid alternative to incarceration is here challenged. Rather, they widen the punitive net that complements the extreme punitiveness of criminal drug legislation. Furthermore, the eligibility requirements established in Chile's drug courts prevent many people who might need it from the possibility of accessing treatment, given that as they are presently structured, drug courts combine and confuse public health criteria with notions of dangerousness. In the conclusion, maintaining and even increasing the budget of drug treatment is recommended.

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Nevertheless, the separation of criminal law assessments or charges from public health criteria is proposed. Likewise, as a public policy in criminal matters on drugs, it is recommended the decriminalisation of behaviours and the reduction of penalties in order to build a real path that is decriminalising and respectful of human dignity.

Keywords: Drug Courts; drug treatment; voluntariness; War on Drugs; special positive prevention.

Resumen: *Este trabajo es un estudio crítico sobre los Tribunales de Drogas (TTD) en Chile. Para esto, se analiza el contexto normativo en el que nacen dentro de la legislación penal en materia de tráfico ilícito de estupefacientes. Sin perjuicio de valorar la existencia de tratamientos contra las drogas, cuestionamos que los TTD sean una alternativa al encarcelamiento. Más bien, se trata de un aumento de la red punitiva que sirve de complemento al punitivismo extremo en la legislación penal sobre drogas. Asimismo, por los requisitos de elegibilidad establecidos en los TTD chilenos, se impide la posibilidad de un tratamiento para muchas personas que podrían requerirlo, toda vez que en la forma actual los TTD combinan y confunden criterios de salud pública con nociones de peligrosidad. En las conclusiones recomendamos la mantención y el aumento presupuestario de los tratamientos contra las drogas. No obstante, sugerimos la separación de las valoraciones o imputaciones jurídico-penales de los criterios de salud pública. Asimismo, como política pública en materia penal sobre drogas, recomendamos la despenalización de conductas y la disminución de sanciones para construir un camino real descarcelatorio y respetuoso de la dignidad humana.*

Palabras claves: *Tribunales de drogas; tratamiento contra las drogas; voluntariedad; Guerra contra las Drogas; prevención especial positiva.*

1. INTRODUCTION

The goal of this study is to critically analyse the Drug Courts (Tribunales de Drogas – TTD), especially in Chile. Drug courts, far from being an institution with a long national tradition, have emerged as one more element in the imposition of hegemonic regimes that, within the framework of criminal drug control legislation, reproduce US criminal

policies. These exact same policies, and specifically the War on Drugs, are the main cause of mass imprisonment of people on low-income and the increase in female incarceration.[4]

Without undermining the critical analysis arising from a well-founded distrust of US intervention in Latin American criminal policies, after having spoken with various participants in the TTD (judges, prosecutors, public defenders, psychosocial teams and, especially, users), this paper intends supporting the idea of treatment itself and analysing its potential to soften the penal response. However, the extremely slim chance of defendants being able to access these treatments in Chile, as they have to comply with the requirements of the conditional suspension of proceedings (SCP),[5] means that preference is given to those candidates that generally do not present a high-risk level of criminal involvement, which more often than not goes hand in hand with less problematic drug use. To a certain extent, the filters of the TTD may be extremely useful in order to see the varying results compared to the ones of those who failed to meet the requirements. The issue in this approach, as usual, is that mixing public health with criminal justice leads to a kind of treatment not based on a medical perspective, which everyone is entitled to, but rather founded on neo-positivist considerations on the grounds of criteria of dangerousness.

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[4] ALEXANDER, Michelle. *El color de la justicia. La nueva segregación racial en Estados Unidos*, traducción de Carmen Valle y Ethel Odriozola. Salamanca: Capitán Swing Libros, 2012, p. 12. En el mismo sentido ANTONY, Carmen. *Reflexiones sobre los procesos de criminalidad y criminalización de las mujeres de América Latina implicadas en delitos relacionados con drogas*, EN: FACIO, Alda y FRIES, Lorena (eds.). *Género y Derecho*. Santiago de Chile: LOM. 2002, pp. 511-516.

[5] In Chile, the Conditional Suspension of Proceedings is an alternative solution that is regulated in articles 237 to 240 and 245 and 246 of the Code of Criminal Procedure. It implies the interruption of the punitive claim of the State during the trial, causing the suspension of the trial, in exchange for the voluntary acceptance by the accused of certain conditions that entail the affectation of some of their rights for a period of time. The formal requirements for the SCP (art. 237, second paragraph) are: a) That the sentence that may be imposed on the accused in the event of conviction does not exceed three years' imprisonment; and b) That the accused has not previously been convicted of a crime or simple offence.

It should be made now clear that TTDs in Chile do not exists neither legally nor constitutionally. TTDs, as we will see further down, were created in 2004 as a "pilot project" in the city of Valparaiso, and currently are working as a "programme" within the ordinary justice. They do not constitute a criminal sanction as such and, being limited to the SCP, are intended as an alternative to criminal proceedings.[6] Without any judgment to this, in this article we refer generally to the "TTD" in Chile with the understanding that this functions rather as a "programme".

Despite the criticisms highlighted throughout this paper, in the conclusions, we recommend the maintenance, and even the budgetary and case-specific increase, of drug treatment (with or without a form of TTD). Nevertheless, far from retaining the current restrictions on admission, we suggest extending treatment to those in need due to their addiction, even to convicted offenders. regardless of a possible high level of criminal involvement. We also recommend the separation of criminal law assessments or charges from public health criteria. Thus, although problematic drug use may be considered, when exercising criminal justice, as an element that has an impact on lower reprehensibility, we believe that combining public health with criminal justice criteria to be inappropriate.

On the other hand, it seems pertinent to inquire into the real functions that TTDs and, in general, the creation of new legal institutions may conceal. In this context, as well as TTDs, will we also have criminal courts for feminicides? other criminal courts for the environment? others for economic crimes? Were each of these courts not to have enough work, like any bureaucracy, they would invent it, because no bureaucracy commits suicide. On the other hand, these courts that require a "special status", according to those who thrive on inventing

[6] In fact, the conditional suspension of proceedings, as the usual way of agreeing drug treatment under Article 238(c) of the Code of Criminal Procedure, is a self-compositive form of conflict resolution which, in addition to requiring the consent of the accused and the Public Prosecutor's Office, in no case involves a criminal sanction since it does not constitute a penalty based on the criterion of guilt, nor a security measure based on the criterion of dangerousness. It is, therefore, an agreement between certain participants in the criminal proceedings, the merit of which lies in the fulfilment of certain conditions that put an early end to the criminal proceedings.

such "special statuses", can only function in big and not in small cities. Furthermore, as we go higher up the courts, there is less specialisation, that is to say, "specialisation" is required in the lower courts and not in the higher that review what has been decided. And so on, all the way up to the Supreme Court, where the very few are supposed to know everything.

2. TREATMENT AND PUNISHMENT

The idea of punishment-treatment is linked to special prevention, a theory that represents an anthropological shift in punitive law. This theory has its roots in Lombrosian penal positivism and underlies the notion of clinical treatment, whereby the convicted person is seen as a human being with a deficiency, a subject to be treated, both of deficiencies as well behaviour.

Treatment requires *per se* individualisation of the offender, thereby necessarily creating a link to actor based criminal law, which is related to a totalitarian conception of society. This individualisation will be used with the aim of modifying the behaviour and values of the convicted individual, allowing people to be punished for who they are and not what they do, allowing judgements to be made on the basis of personal prejudices and stereotypes of a racial, socio-economic, lifestyle, ideological and/or political nature.

Criminal law focuses, for special prevention, on the idea of dangerousness of which crime is none other than a manifestation or symptom and its penalty the means, or better, a remedy, of social defence. Punishment-treatment is applied to the individual, which will aim at transforming the defiant subject in someone who no longer poses a danger for society. Therefore, dangerousness will be the criterion for determining the nature and length of the sentence. In other words, special prevention implies indeterminacy of punishment.

Within these doctrines, terms such as re-education, re-socialisation, re-adaptation, reincorporation, or social integration, are often used, "perhaps the most fashionable in contemporary penitentiary practice [which] with its sophisticated appearance of altruism and philanthropy,

constitutes the most fearsome and refined danger to human freedom and dignity in the penal sphere of our times".[7]

These goals most of the time constitute mere declarations which have nothing to do with reality, since believing that prison can be rehabilitative only shows ignorance of what goes on inside its walls. Furthermore, seemingly inappropriate is the use of the prefix "re" (rehabilitation, re-education, reintegration, etc.), since, on the one hand, there are people with a sound education who commit crimes (in politics and the business world for example) and, on the other hand, the majority of those sentenced to prison are individuals who grew up on the edge of society lacking real alternatives to education or social facilitation; therefore it is paradoxical that they can be "re" educated or "re" habilitated. Rather, these concepts refer to a type of intervention that aims to adapt these people to a certain "way of being", respectful of the prevailing social/legal order. This is even more contradictory, given that to this end people are subject to a "prison order" that is far from such an ideal social/legal order, as it is characterised by "widespread disregard for the law".[8] Another issue that is hardly considered by supporters of these theories is the cost and means required to actually implement rehabilitative penalties. In practice, prison, despite its extremely high costs, not only fails to provide the necessary tools to achieve this supposed rehabilitation, but also increases the criminal factors of those incarcerated. Therefore, it would be appropriate to ask the same society that expects to rehabilitate its convicts, whether each society has the criminals it deserves, that is to say, those it is capable of producing, and whether it is not that society that should

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7 RIVACOBA, Manuel. *Violencia y justicia.* Valparaíso: Universidad de Valparaíso, 2012, p. 44.

8 In this respect, BOVINO points out that it is often said that prison is a „lawless" space and that this can mean at least two things, either that it is an area not regulated by law or that it is an area of generalised non-compliance with the law. The author is inclined towards the latter. BOVINO, Alberto. Control judicial de la privación de libertad y derechos humanos. *Revista Jurídica*, Guayaquil, n. 17, pp. 1-23, 2004. Available at: https://www.revistajuridicaonline.com/2004/01/el-control-judicial-de-la-privacion-de-libertad-y-derechos-humanos/ Consulted on: 11th May 2021.

be resocialised and with what qualifications and aptitude it can then expect to resocialise individuals.[9]

Without any judgment to the criticism previously raised, it is not less true that the resocialising thought has the merit of denouncing the stigmatising and criminal effects of certain punishments – such as life imprisonment -, the uselessness of short-term deprivation of liberty and, above all, of having provided a legal-philosophical basis for a criminal policy that should be oriented towards the individual and his or her fundamental rights. Equally, any attempt of resocialisation – if the aim is for this to be successful – must have all the necessary agreement of the offended, which mitigates the possible dehumanising effects that the idea of punishment-treatment may have.[10]

With the emergence of field work from the 1940s onwards,[11] special positive prevention, being no longer able to be totally disconnected

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[9] RIVACOBA, Manuel. *Violencia y justicia*. Valparaíso: Universidad de Valparaíso, 2012. p. 44 y ss. The same idea is also developed in: RIVACOBA, Manuel. *Función y aplicación de la pena*. Buenos Aires: Depalma, 1993; y RIVACOBA, Manuel. *Hacia una nueva concepción de la pena*. Lima: Grijley, 1995.

[10] Though the literature on theories of the end of punishment is not exhaustive in this article, for a critical analysis on the matter, it is useful to see: VON HIRSCH, Andrew y MAHER, Lisa. Should penal rehabilitationism be revived? *Criminal Justice Ethics*, vol.11, n. 1, pp. 25-30, 1992, y BARATTA, Alessandro. Resocialización o control social: por un concepto crítico de "reintegración social" del condenado. En: BARATTA, Alessandro (ed.) *Criminología y sistema penal: compilación in memoriam*. Montevideo-Buenos Aires: BdeF, 2004, pp. 376 ss. Among the Chilean doctrine, together with the already mentioned texts by Rivacoba, the following can be consulted:: CURY URZÚA, Enrique. *La prevención especial como límite de la pena,* EN: ADPCP, XLI, fasc. 3, pp. 685-702, 1998. Highlighting novel aspects of rehabilitation: ROTMAN, Edgardo. *Beyond Punishment: A New View on the Rehabilitation of Criminal Offenders (Contributions in Criminology and Penology)*. New York: Greenwood Press, 1990. For a modern análisis that seek to reconcile theorical and empirical aspects of posivite prevention, see: ROBINSON, Paul. *Principios distributivos del Derecho penal*, traducción e introducción de Manuel Cancio e Iñigo Ortiz de Urbina. Marcial Pons, Madrid-Barcelona-Buenos Aires: Marcial Pons, 2012, y ROBINSON, Paul H. y CAHILL, Michael T. *Law without justice: why criminal law doesn't give people what they deserve*. Oxford: Oxford University Press, 2006.

[11] The pioneering analysis belong to CLEMMER and his conception of imprisonment, CLEMMER, Donald. The prison community. New York: Rinehart & Winston, 1958. Subsequently, the work of Goffman stands out: GOFFMAN,

with reality, changed its original perspective and abandoned a vision purely focused on the need for clinically treating the offender, to place more emphasis on the social deficiencies motivating or explaining criminal behaviour.

These new rehabilitative concepts were at the forefront of the American penal system until the 1970s[12], as they could offer many advantages in contrast with retribution, which was not intended to serve any social end. However, the weakening of the social state meant a transformation of the penal system, leaving behind the rehabilitative ideal. This change was accompanied by the adoption of neo liberal systems, where social deregulation, the increase of wage precarity and job instability went hand in hand with the rise of the punitive or authoritarian state, which is far removed from rehabilitative goals.[13]

Beckett y Western argue that the social expenditure and expenditure in the penal system are inversely related, as they are ways of managing the excluded sectors of the labour market, and that this relationship is empirically demonstrated from 1995 onwards in the USA.[14] The neoliberal system which professes economic deregulation, generates

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Erving. Internados. Ensayos sobre la situación social de los enfermos mentales, translated by María Oyuela, Buenos Aires: Talleres Gráficos Color Efe, 1992; GOFFMAN, Erving. Asylums. Le istituzioni totali: i meccanismi dell'esclusione e della violenza. Torino: Edizioni di Comunità, 1968. Then those of GOZZANO, Mario. Compendio di psichiatria clinica e criminológica. Turin: Rosenberg & Sellier, 1971; and more recently those of GONIN, Daniel. La santé incarcérée. Médicine et conditions de vie en détention. Paris: l'Archipel, 2000 and LIEBLING, Alison and MARUNA, Shadd. (eds.). The effects of imprisonment. Devon: Willan Publishing, 2005.

12 GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, traducción Máximo Sozzo. Barcelona: Gedisa, 2005, pp. 27-32.

13 WACQUANT, Loïc. *Las cárceles de la miseria*, traducción de Horacio Pons. Buenos Aires: Manantial, 2000, pp. 94-98., y WACQUANT, Loïc. *Parola D'onore: Tolleranza Zero. La trasformazione dello stato penale nella società neoliberale*, traducción de Massimiliano Guareschi, Milano: Feltrinelli, 2000, pp. 38 y ss.

14 LARRAURI, Elena. La economía política del castigo. *Revista Electrónica de Ciencia Penal y Criminología*, España, v. 11, n. 06, pp. 1-22, 2009, p. 8. Available at: http://criminet.ugr.es/recpc/11/recpc11-06.pdf Consultated on:10th May 2021.

penal over-regulation. The consequences produced by the dismantling of the social state, chiefly material insecurity among the lower classes, lead to an over-investment in prisons as an instrument of oppression and social control.

According to Garland[15], the penal system characteristic of the welfare state (*penal welfare complex*), does not see crime as an amorality of the perpetrator, but as a manifestation of a social problem resulting from an industrial, class-based and unequal society.[16] This system of welfarist punishments seeks, rather than reproaching the individual behaviour of the perpetrator of a crime, to correct the offender, providing him with tools to reintegrate him socially. The very idea of resocialisation encompasses that of treatment, which, as the 20th century progressed, became more and more scientific and contributed to the development of a penal language. "This is the case of *reformatories*, correctional institutes and associations, therapies, therapists and prison guards".[17] The rehabilitative ideal as well as its necessary consequence of indeterminate sentences, were widespread and strong in the United States, but not in continental Europe.[18]

Welfarism was characterised by an enormous trust in the operators of the penal system who were considered to be specialists in policies aimed at the rehabilitation of convicts. Thus, such operators had extensive powers to determine the type of sentence, classify the convicts, evaluate the possibility of an early release, assess the need for more or less intense supervision, and so on. The opinion of expert operators in the penal system became more of a deciding factor than that of the judicial authority. The type of sentencing and benefits of the convicts lay in the

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[15] (1999 y 2005) GARLAND, David. *Castigo y sociedad moderna*, traducción Berta Ruiz de la Concha. México: Siglo XXI editores, 1999, pp. 19-20, and GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translated by Máximo Sozzo. Barcelona: Gedisa, 2005, pp. 75-80.

[16] GARLAND, David. *Castigo y sociedad moderna*, traducción Berta Ruiz de la Concha. México: Siglo XXI editores, 1999.

[17] ZYSMAN, Diego. *Sociología del castigo. Genealogía de la determinación de la pena*. Buenos Aires: Ediciones Didot, 2012, p. 231.

[18] ZYSMAN, Diego. *Castigo y determinación de la pena en los Estados Unidos. Un estudio sobre las United States Sentencing Guidelines*. Madrid: Marcial Pons, 2013, p. 285

hands of probation officers[19], social workers, psychologists, psychiatrists, educators and social reformers, etc. [20]

With the welfarism context, the liberal view that punishment was of less use than treatment, that imprisonment was counterproductive and that the death penalty was irrational prevailed over the conservative view of the deterrent power of harsh sentences and the need for longer custodial sentences and the death penalty.[21] This welfare state and claims to rehabilitate offenders were based on a discourse that was aware of social inequalities and understood that the real causes of crime were to be found within the social context, especially in the deprivation suffered by the most vulnerable sectors.

With the crumbling of the welfare state and the loss of job security, a new poverty emerges as a consequence of mass unemployment and of broad sectors oscillating between labour instability and illegal work (often constituting a criminal offence). With the loss of stability, insecurity rises, and "risk" takes centre stage. This will no longer be eradicable and, therefore, mechanisms will have to be sought to minimise or distribute its effects.[22] Within the criminal field, the idea of social co-responsibility in the origin of crime is left aside in order to focus primarily on the culpability of the individual. From this moment prevention (whether real or ideal) will no longer seek the transformation of the offender but will focus on making the offence less "profitable" for the perpetrator, who is assumed to be capable of making a rational choice.

Obviously, this dismantling of the ideal of rehabilitation did not come out of the blue. Penal policies aiming at rehabilitation or resocialisation have always had their detractors. The most conservative and reactionary sectors have constantly argued that prison should have a

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[19] For us parole. Occurs when a convicted person is allowed to serve his or her sentence on release under certain conditions.

[20] GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translation Máximo Sozzo. Barcelona: Gedisa, 2005, pp. 83-84.

[21] GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translation Máximo Sozzo. Barcelona: Gedisa, 2005, p. 86.

[22] BRANDARIZ, José Ángel. *El gobierno de la penalidad. La complejidad de la política criminal contemporánea*. Madrid: Dykinson, 2014.

punitive and not a rehabilitative function, since, if in our society honest and innocent people exist on the one side and bad and dishonest on the other, prison should serve to protect the former from the latter, locking the criminal inside four walls for as long as possible.[23] With the arrival in power of Margaret Thatcher[24] in Great Britan (1979) and Ronald Reagan (1981) in the United States a decisive shift took place, away from interventionist state and welfarist policies towards tougher criminal legislation far removed from correctionalist ideas. These conservative groups (right wing realism), critical of the ideal of rehabilitation, identify themselves with the idea of "law and order" and with the "criminology of the other".[25]

From the 1960s onwards, criticism also emerged from more progressive sectors. These are based on the ineffectiveness of the treatments that were intended to reintegrate convicts and that ended up giving legitimacy to prison, which, as a total institution - they argue - produces harmful effects on those who experience it. Furthermore, they understood that indeterminate sentences mask a system of total injustice that inflicts harshest punishments on the most vulnerable sectors of society, especially the poor and blacks. This criticism was aiming at limiting arbitrariness and denouncing the hypocrisy that was surrounding the "correctional" paradigm. Thus, reprobation of the "rehabilitation ideal" quickly began to spread in American academic circles, essentially because the very rationale of rehabilitation evidenced an insurmountable contradiction, since rehabilitative responses would inevitably fail to get to the root causes, because they intervene after the damage has been done. In other words, they respond to the consequences rather than the cause.[26]

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[23] WILSON, James. *Thinkinng About Crime*, 2ª ed. Nueva York: Basis Books, Nueva York, 1983.

[24] Margaret Thatcher, after being elected, started a campaign to reintroduce the death penalty and tougher criminal penalties.

[25] ZYSMAN, Diego. *Sociología del castigo. Genealogía de la determinación de la pena*. Buenos Aires: Ediciones Didot, 2012, p. 260.

[26] GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translated by Máximo Sozzo. Barcelona: Gedisa, 2005, p. 89. Literature and cinema also warned us of the dangers of special prevention and punishment-treatment with "A Clockwork Orange", a novel by Anthony Burgess made into a film by Stanley Kubrick, showing how cruel and

This does not mean, as we will see below, that we are against the existence of treatment in general and drug treatment in particular. Quite the opposite, in fact. We believe that such treatments are extremely necessary and that the advantages that they can bring are priceless. However, we believe that the mixing of the criminal justice and health system has complex consequences. Among these, the efficiency of these treatments is usually appraised more in terms of non-recidivism and lower costs compared to imprisonment, rather than in relation to the improvement of physical and mental health indicators of the people who access them.[27] To summarise, it appears to be extremely hazardous to unite or confuse criminal-legal criteria, which should not disregard culpability as reproachability, with those of a clinical nature, which must be based on the individual need for treatment. In the same light, lucid are the words of Morris, for whom: "[i]njustice and inefficiency invariably flow from any mixture of the criminal law and the mental health powers of the state. Each is sufficient by itself to strike a fair balance between liberty and authority; each has its own interest in potential constituents; when mixed together, they only add up to the possibility of injustice".[28]

3. ACCEPTANCE OF RESPONSIBILITY AND NEED FOR TREATMENT

We previously examined how rehabilitative theories and the treatments they advocate, regardless of the intentions of those who support them, seek to modify lifestyles, habits and customs. However

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dehumanising resocialising treatment could be. We analyse this film from a legal-criminal perspective in "Stanley Kubrick y las doctrinas preventivistas" in CUNEO, Silvio. Cine y Derecho penal, Valencia: Editorial Tirant lo Blanch, 2019, pp. 77-80.

27 See: FUNDACIÓN PAZ CIUDADANA. Evaluación de impacto y costo-beneficio de los tribunales de tratamiento de drogas en Chile. 2018. Available at: https://pazciudadana.cl/biblioteca/reinsercion/evaluacion-de-impacto-y-costo-beneficio-de-los-tribunales-de-tratamiento-de-drogas-en-chile/ Consulted on: 14th May 2021.

28 Cite on: MONAHAN, John. El futuro de la gestión del riesgo de violencia. EN: TONRY, Michaels (ed.) El futuro del encarcelamiento. Nueva York: Oxford University Press, 2003, p. 237.

altruistic they may appear to be, this change in behaviour is not freely chosen by the defendant, as it is not possible to speak of freedom when the alternative to treatment consists of a penal response.

Treatments against drug addiction are often not entirely voluntary, as those in treatment have often been heavily pressured into entering treatment. However, it is extremely different when the acceptance of treatment is the result of pressure from parents, partners, other family members or friends,[29] than when such pressure is exerted by the state, where acceptance of treatment is out of fear of criminal prosecution and, eventually, imprisonment.

We are aware that prison is a highly risky as far as personal safety is concerned. Studies on intra-prison violence confirm Elías Neumann's opinion that in Latin American prisons "one does not go To serve a punishment, but to be punished daily and continuously".[30] Under

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[29] LÓPEZ describes what may be a differentiating aspect between the two types of pressure. When the person is under pressure from family members, this does not close the dimension of choice on the part of the subject, as long as the therapeutic space offers the possibility of addressing this tension. The process of accompaniment involves allowing the patient to take responsibility for their subjective position in relation to their substance use, which requires a time of decanting and dialogue within the system. Thus, the subject will be able to choose any of the alternatives presented to him/her, including the rejection of the demand coming from significant third parties. See: LÓPEZ, Cristián. La decisión de entrar a un tratamiento de adicciones: motivación propia e influencia de terceros. Terapia Psicológica, Santiago, v. 27, n. 1, pp. 119-127, 2009. http://dx.doi.org/10.4067/S0718-48082009000100012

[30] NEUMAN, Elías. El abuso de poder en las cárceles latinoamericanas. p. 54. Available at: http://www.ehu.eus/documents/1736829/2029681/08+-+Abuso+poder+carceles.pdf Accessed on: 10 May 2021. In the Chilean case, a recent United Nations report states that Chile is the country with the highest rate of deaths in the intra-prison context in Latin America. UNODC. Global study on homicide 2019. Available at: https://www.unodc.org/unodc/en/data-and-analysis/global-study-on-homicide.html Accessed on: 10 May 2021. On a comparative level, a prison survey (2013) in six Latin American countries showed that Chile is the country where most people report being beaten inside their prisons, with around 26% of them reporting that they were beaten. Of these, 66% say that prison staff are responsible for the beatings. SÁNCHEZ, Mauricio and PIÑOL, Diego. Condiciones de vida en los centros de privación de libertad en Chile. Santiago de Chile: Instituto de Asuntos Públicos, Universidad de Chile, 2015, p. 33. Available at: https://www.

criminal threat, it is at least questionable to speak of voluntariness in the acceptance of treatment.[31]

On the other hand, the lack of access to treatment for problematic drug use is particularly acute in the US. According to a study conducted in 2016, there are almost seven and a half million people affected by illegal drug dependency and only 28% of those receive treatment,[32] which generates a perverse result, since the simplest and cheapest way to access treatment is precisely via the drug court,[33] which would encourage accepting criminal responsibility, that is, giving up basic rights - such as the presumption of innocence - in order to treat an addiction.[34]

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cesc.uchile.cl/docs/CESC_condiciones_centros_privacion.pdf Accessed on: 10th May 2021.

31 There is strong evidence pointing to the importance of intrinsic motivation (doing something because it is valued in itself and not because of external motivations or pressures) in relation to this type of treatment, as it is associated with improved participation in behaviour change, performance, health and well-being. DECI, Edward and RYAN, Richard. Facilitating Optimal Motivation and Psychological Well-Being Across Life's Domains, Canadian Psychology, vol. 49, n. 1, pp. 14-23. 2008. https://doi.org/10.1037/0708-5591.49.1.14 Along these lines, self-determination theory proposes that intrinsic motivation is facilitated when social contexts support people's need for autonomy by considering their perspective, minimising external controls and providing opportunities to exercise choice. WILD, Cameron, CUNNINGHAM, John. and RYAN, Richard. Social pressure, coercion, and client engagement at treatment entry: A self-determination theory perspective. Addictive Behaviors, v. 31, pp. 1858-1872, 2006. https://doi.org/10.1016/j.addbeh.2006.01.002 Some authors point out that, at best, such volitionality could be constructed as part of the process, but always depending on how the process is carried out. See: WEXLER, David and KING, Michael. Promoting legal and social responsiveness to rehabilitation: the role of therapeutic justice, IN: COOPER, Caroline (ed.). Drug Treatment Courts: An International Response for Drug Dependent Offenders. Washington D.C.: OAS, 2013, pp. 21-46, p. 38.

32 SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). Tribunales de tratamiento de drogas en las Américas, 2019, p. 32. Available at: https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf. Consulted on: 10th May 2021.

33 PHYSICIANS FOR HUMAN RIGHTS. Neither Justice nor Treatment, 2017. Available at: https://phr.org/wp-content/uploads/2017/06/phr_drug-courts_report_singlepages.pdf Consulte don: 14th May 2021.

34 MARLOWE, Douglas y MEYER, William (eds.) *The Drug Court Judicial Benchbook*. Alexandria, VA: National Drug Court Institute, 2011. Available

Although consent to take part in drug treatment is not always an alternative to prison (in Chilean drug treatment courts-TTD, for example), this belief or ignorance means that it is precisely the fear of imprisonment that motivates a high number of subjects to accept participation in drug treatment courts. Therefore, the voluntary nature of the participation is the TTD is not just that.[35] A study undertaken in Chile in 2011 demonstrated that many of TTD participants enrolled without having clearly understood that they did not risk prison for their crimes and that the acceptance of treatment was often based on the misconception that they were avoiding incarceration.[36]

Likewise, the disciplining spirit of the TTD reveals a state that intrudes into the lives of offenders, exerting pressure to normalise behaviour through the imposition of moral codes.[37] Referring to this paternalistic conception, Isaiah Berlin argues that what the state contemptuously does is to refer to an offender as follows: "If you will not discipline yourself, I must do it for you; and you cannot complain of lack of food, because the

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at: https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf Consulted on: 15th May 2021.

[35] This lack of voluntariness is comparable to negotiated justice in which defendants are forced to accept responsibility in order not to risk excessively severe penalties. LANGBEN draws a link between such plea bargains and medieval torture: "In twentieth-century America we have duplicated the main experience of medieval European criminal procedure: we have abandoned an adversarial system of attribution of guilt in favour of a non-adversarial system of concessions. We force the accused against whom probable cause has been established to confess guilt. To be sure, our means are much more considerate; we do not use the rack, the Spanish boot, or other instruments of leg-damaging torment. But like the Europeans of centuries ago who did use these machines, we make it terribly costly for an accused to claim the exercise of his right to the constitutional guarantee of previous trial." Cited in: ZYSMAN, Diego. Punishment and Sentencing in the United States. A study of the United States Sentencing Guidelines. Madrid: Marcial Pons, 2013, p. 223.

[36] PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 97.

[37] See: FOUCAULT, Michel. *Vigilar y castigar*: *nacimiento de la prisión,* traducción de Aurelio Garzón del Camino. México: Siglo XXI, 2002.

fact that you are in court is evidence that, as a child, a savage, an idiot, you are not ready for self-direction."[38]

The situation of TTDs is different depending on the context. Thus, in several US states, the only way to enter TTD is as a convicted offender, which, as we have seen, can press an offender to accept responsibility. In Chile, the situation is different, as the TTD operates only with respect to defendants who accept a conditional suspension of proceedings, which does not imply a criminal conviction. Although it appears to be positive that a conviction is not required for accessing drug treatment, as this does not encourage the acceptance of a conviction, it is also a limitation, as the criterion for admission to treatment should be the medical necessity of the treatment and not legal considerations such as the presence or absence of a criminal record. Therefore, the possibility to enter TTDs should be available to defendants, convicts and even recidivists.

In the United States, the association Physicians for Human Rights claim that the failure of TTDs is due to the fact that they provide treatment for those who do not necessarily need it, which in turn leaves patients requiring treatment without an opening. Therefore, Physicians for Human Rights critically refer to the TTDs with the slogan "neither justice nor treatment" since this system does not achieve either of these ends.[39]

According to Miller, the combination of criminal justice and medical criteria of treatment, essentially incompatible, prevents the fulfilment of goals in both directions. The therapy, in other words, ignores the hostile and political quagmire that characterises the offender's situation in favour of a personalised, exhortative model of individualised persuasion.[40] In a similar vein, Nolan warns that the medical nature of

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[38] MILLER, Eric. Drug, Courts and The New Penology. *Stanford Law & Policy Review,* v. 20, n. 2, 2009, p. 132. Available at: https://ssrn.com/abstract=1464353 Consulted on: May, 10th 2021.

[39] PHYSICIANS FOR HUMAN RIGHTS. Neither Justice nor Treatment, 2017, p. 2. Available at: https://phr.org/wp-content/uploads/2017/06/phr_drug-courts_report_singlepages.pdf Consulted on: May, 14th 2021; y DE REMENTERÍA, Ibán; SEPÚLVEDA, Eduardo y BARRA, Juan. *Los tribunales de tratamiento de drogas en Chile. Limitaciones y perspectivas*. Santiago de Chile: Aún Creemos en los Sueños, 2018, p. 34.

[40] MILLER, Eric. Drug, Courts and The New Penology. *Stanford Law & Policy Review,* v. 20, n. 2, 2009, p. 120. Available at: https://ssrn.com/abstract=1464353

drug treatment may recommend, regardless of the offence, a lengthy, invasive and potentially arduous treatment procedure.[41]

4. TTDs IN THE CONTEXT OF THE WAR ON DRUGS

The implementation of the War on Drugs, first in the United States and then in Latin America, has been socially and racially selective. In the US, "nothing has contributed more to the systematic and massive internment of people of colour in the United States than the War on Drugs".[42] The origin of this criminal policy has little to do with the scientific evidence that could support its effectiveness, but rather with populist decisions that gave great electoral gain to its promoters. As a war strategy

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Consulted on: May, 10th 2021.

41 NOLAN, James. Redefining Criminal Courts: Problem-Solving and the Meaning of Justice. *American Criminal Law Review,* v. 40, n.4, 2003. pp. 1541-1566.

42 ALEXANDER, Michelle. The colour of justice. La nueva segregación racial en Estados Unidos, translated by Carmen Valle and Ethel Odriozola. Salamanca: Capitán Swing Libros, 2012, p. 12. In the same sense, Tonry understands that the increase in the mass incarceration of blacks is a direct consequence of the "War on Drugs" policies first promoted by Ronald Reagan and expanded by his successors. TONRY, Michael. Malign Neglect: Race Crime and Punishment in America. New York: Oxford University Press, 1995. For ALEXANDER "from the beginning the war on drugs had little to do with public concern with narcotics and more to do with public concern with race". For this author, mass incarceration is a system of racial control that is not incompatible with current sensibilities because of its invisibility. The gatopardesque premise formulated by Giuseppe Tomasi de Lampedusa helps us to understand American racial segregation: everything changes, so that everything stays the same. First it was slavery, then the era of segregation, and today it is the penal regime that surreptitiously maintains the racial caste system in American society. That racism is not explicit does not mean that it does not exist. The arguments and rationalisations for racial discrimination and exclusion have mutated, but the results have remained much the same. ALEXANDER, Michelle. The Colour of Justice. La nueva segregación racial en Estados Unidos, translated by Carmen Valle and Ethel Odriozola. Salamanca: Capitán Swing Libros, 2012, p. 86. On the War on Drugs, it is essential to read Rosa del Olmo, see: DEL OLMO, Rosa. La cara oculta de la droga. Bogotá: Temis, 1998; DEL OLMO, R. Drogas: ¿percepciones o realidad? Nuevo Foro Penal, v. 12, n. 47, pp. 94-108. 1990. Available at: https://publicaciones.eafit.edu.co/index.php/nuevo-foro-penal/article/view/4133. Consulted on: 14th May 2021

focused on poor neighbourhoods, it makes it easy to convict those involved, but it is highly inefficient in its fight against drug trafficking, since by locking up small-time dealers (or users) they are quickly replaced by others due to the huge demand for illegal drugs.[43]

In 1971 President Nixon declared War on Drugs, announcing the need to restore the law and order policy,[44] declaring that drugs were a "modern curse of American youth"[45]. Soon, the War on Drugs was imposed in Latin America, first in cocaine-producing countries such as Bolivia, Peru and Colombia, then in the rest of the continent with disproportionately punitive norms, contrary to the liberal principles of criminal law.[46]

The effects obtained have not seen, as we have already mentioned, the reduction of trafficking activities, but the incarceration of the last links in the chain of trafficking and drug addicts.[47] It is paradoxical that

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[43] On the substitution of traffickers, see MAcCOUN, Robert and REUTER, Peter. Drug War Heresies: Learning from Other Vices, Times, and Places. New York: Cambridge University Press, 2001.

[44] SIMON, Jonathan. *Gobernar a través del delito*, traducción de V. Boschiroli, Buenos Aires: Gedisa, 2011, p. 10.

[45] GALEN, Ted. *Bad Neighbor Policy. Washington´s Futile War of Drugs in Latin America*. New York: Palgrave-Macmillan, 2003, p. 11.

[46] CUNEO, Silvio and OXMAN, Nicolás. Origin and consequences of the war on drugs. from the United States to Andean countries. Revista Brasileira de Políticas Públicas, v. 11, n. 1, 2021, pp. 451-469. https://doi.org/10.5102/rbpp.v11i1.6960 On the War on Drugs in the United States, in addition to the bibliography cited above, see the documentaries: Amendment XIII, 2016, directed by Ava DuVernay and Crack: Cocaine, Corruption & Conspiracy, 2020, directed by Stanley Nelson. Both are available on Netflix and Youtube

[47] Closely linked to the electoral profitability of punitivism in anti-drug legislation, the figure of "el narco" serves to justify the imposition of inefficient public policies. In general, the crime of drug trafficking at the end of the chain is exaggeratedly conspicuous and boisterous. Unlike other crimes in which the perpetrators seek to go unnoticed, it is not uncommon for drug trafficking crimes to involve shooting into the air and even throwing fireworks with various symbolisms. In this way, drug trafficking crimes generate enormous visibility, which means that many people, especially those who live with "narcos", rightly feel tired and intimidated. However, the prosecution of substitutable subjects keeps the trafficking going, making everything more dangerous and turning the trafficking itself into a far more lethal activity than the drugs themselves. Thus, the War on Drugs, rather than solving public

a policy that aims at justifying itself by promoting the defence of public health has opposite effects. Often small-scale trafficking forms part of the activities of addicted users, especially those who have problems financing their addiction. However, the law itself themselves presume anyone possessing or transporting drugs is trafficking, overturning the burden of proof and violating the presumption of innocence.

Usually in politics, and legislating criminal policy models, it is more important to appear to be concerned than to adequately deal with the problems. Hence, legislation is passed without thinking about the real impact of the legislation itself. Surely no one would deliberately acknowledge, when voting for a drug control law, that they expect it will lead to an increase in the incarceration of the poor and instead maintain widespread impunity for those who enrich themselves from trafficking activity. Nor do the promoters of criminal policy seem to address the harmful effects of imprisonment, including the level of drug use, prison violence and recidivism rates.[48]

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policy problems, generates more violence, and the drastic sanctions applied by virtue of these laws do not diminish the activity, since the waiting line of candidates for the trafficking business seems infinite. In this regard, DAMMERT's column is illustrative in that it calls for a change in the focus of criminal prosecution of drug trafficking offences. DAMMERT, Lucía, "¿Avance del narco? 2020". Available at: https://www.theclinic.cl/2020/05/29/columna-de-lucia-dammert-avance-del-narco/ Consulted on: 14th May 2021.

[48] In Chile, the studies that have measured the level of drug use in the prison population mostly seek to determine the likelihood of the criminal risk that drugs bring with them. To do so, they investigate, for example, whether the convicted offenders used drugs on the day they committed the crime, or they try to determine the prevalence of drug use during their lifetime prior to entering prison. See: VALENZUELA, Eduardo and LARROULET, Pilar. La relación droga y delito: Una estimación de la fracción atribuible. Estudios Públicos, n. 119, pp. 33-62. Available at: https://www.cepchile.cl/cep/site/artic/20160304/asocfile/20160304095323/rev119_valenzuela_larroulet.pdf Consulted on: May, 17th 2021; CONSEJO NACIONAL PARA EL CONTROL DE ESTUPEFACIENTES. CONACE. II Estudio Nacional de Drogas en Población Penal. Santiago de Chile. 2007; and CÁCERES, Javiera. Consumo de Drogas en Detenidos. Aplicación de la Metodología I-ADAM en Chile. Santiago de Chile: Fundación Paz Ciudadana, 2010. Available at: https://biblioteca.cejamericas.org/bitstream/handle/2015/460/pub_20110623110234.pdf?sequence=1&isAllowed=y Accessed 17 May 2021. In contrast, there are few Chilean studies that have examined the level of consumption within penal units. Among these, SÁNCHEZ and PIÑOL state that 20.5% of the total

A particularly sensitive matter regarding the effects of this war is the imprisonment of women.[49] Selectivity in women prisoners operates by locking up a very vulnerable group that for the main part shares three characteristics: they are women without power nor influence, usually imprisoned for drug trafficking offences; they have lived in poverty; and a high proportion belongs to ethnic minority groups.[50]

According to Antony, the constraints of motherhood prevent women from finding or keeping their jobs, which explains why they sometimes choose to engage in drug trafficking activities.[51] Due to the disadvantaged status of women, it is normal that their activity in the traffic

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number of persons surveyed deprived of liberty in Chile reported having consumed drugs or alcohol during the last month of imprisonment (marijuana being the substance with the highest prevalence level), figures considerably higher than those reported by the study in samples from countries such as Argentina, Peru, Brazil and Mexico. SÁNCHEZ, Mauricio and PIÑOL, Diego. Condiciones de vida en los centros de privación de libertad en Chile. Santiago de Chile: Instituto de Asuntos Públicos, Universidad de Chile, 2015, p. 28. Available at: https://www.cesc.uchile.cl/docs/CESC_condiciones_centros_privacion.pdf Accessed on: 10 May 2021. Comparatively, however, there is ample evidence regarding the impact of prison on drug use, on the initiation of new drugs, and on a range of dynamics and crimes associated with trafficking and corruption within prison. See: CREWE, Ben. Prisoner society in the age of hard drugs. Punishment and society, v. 7, n. 4, pp. 457-481, 2005. https://doi.org/10.1177/1462474505057122; BOYS, Annabel et al. Drug use and initiation in prison: results from a national prison survey in England and Wales. Addiction, v. 97, n. 12, pp. 1551 – 1560, 2002. https://doi.org/10.1046/j.1360-0443.2002.00229.x

[49] See: CHESNEY-LIND, Meda. *The Female Offender: Girls, Women and Crime*. New York: Sage Publications, 2003; y RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria. Volumen I*; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed. Buenos Aires: Editores del Puerto, 2009, p. 264.

[50] CARLEN, Pat. Cited in RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria*. Volumen I; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed. Buenos Aires: Editores del Puerto, 2009, p. 264.

[51] ANTONY, Carmen. Reflexiones sobre los procesos de criminalidad y criminalización de las mujeres de América Latina implicadas en delitos relacionados con drogas, EN: FACIO, Alda y FRIES, Lorena (edits.). *Género y Derecho*. Santiago de Chile: LOM. 2002, pp 511-516, 2002, p. 512.

corresponds to subordinate and highly visible tasks,[52] which makes them easily replaceable and apprehended.

Within this context of punitiveness without respect for basic principles such as proportionality, the presumption of innocence and respect for fundamental freedoms, in the legislation on illicit drug trafficking, it is curious that the legislator, again imposing US criminal policies, proposes a supposedly alternative path such as the existence of drug courts for an insignificant number of cases in relation to the high number of people prosecuted and imprisoned by the War on Drugs.[53] Its implementation and operation will be discussed below.

5. GENESIS OF THE TTD IN CHILE (THE CURIOUS ALLIANCE)

Before analysing the genesis of the TTDs in Chile, we would like to raise several points with the sole purpose of questioning the declared intentions of the promoters of the TTDs and suggesting possible unstated justifications for their implementation.

It appears difficult to understand what is intended by the introduction of the TTDs in Chile. As we have already pointed out, these are, yet again, impositions of systems born in the United States. TTDs may primarily fulfil the symbolic role of showing that it is not only about punishing but also about welcoming and protecting offenders with drug dependence problems. Even if, mainly due to an eligibility filter, this is a very slim possibility and its implementation is excessively onerous, the intention is to show a friendly side to anti-drug legislation.[54]

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[52] MAQUEDA, M. Luisa. *Razones y sinrazones para una criminología feminista*. Madrid: Dykinson, 2014, p. 247.

[53] In 2020 alone, there were 29,010 drug law charges brought by the Public Prosecutor's Office, of which 7,691 were convicted (26%) and 1,330 (4.6%) were subject to a conditional suspension of proceedings. Statistical Bulletin January-December 2020, National Prosecutor's Office. Available at: http://www.fiscaliadechile.cl/Fiscalia/estadisticas/index.do Consulted on: 20th May 2021.

[54] We spoke to two TTD judges in Chile and both agree that, while there are good results in individual cases, the programme is very incomplete and both

According to Jonathan Simon, TTDs, rather than an alternative to incarceration, have succeeded in expanding judicial control by adapting to a new metric of "rule by crime" and the strategy of accountability.[55] For David Garland, this is a feature associated with the new penology in which courts are involved in public-private partnerships with providers of various treatments and funding sources.[56]

All the previously discussed issues seek to question the reality of the intentions expressed by TTDs promoters in Chile. Just as no one should trust the good intentions of US participation in the development of drug control laws in Latin America, neither should we be naïve at the national level when we see that the intervention of the *Fundación Paz Ciudadana* (FPC) plays such an crucial role in the creation of public policies on crime and drug control in particular. Indeed, TTDs in Chile were first created in 2004, in a pilot project in Valparaiso with the participation of the US Embassy and the FPC.[57] It appears impossible not to link the

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would prefer treatment to be carried out by medical agencies led by professionals with expertise in addiction-related problems.

55 SIMON, Jonathan. *Gobernar a través del delito*, traducción de V. Boschiroli, Buenos Aires: Gedisa, 2011, pp. 13-18.

56 GARLAND, David. *Castigar y asistir. Una historia de las estrategias penales y sociales del siglo XX*, traducción de Elena Odriozola. México: Siglo XXI editores, 2018, p. 287.

57 SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). Drug Treatment Courts in the Americas, 2019, p. 48. Available at: https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf Accessed on: 10 May 2021. In 1992, at the beginning of the new democracy, under the presidency of Agustín Edwards, a non-profit institution called *Paz Ciudadana* was born. Edwards was a powerful businessman and journalist, owner of *El Mercurio Sociedad Anónima* and played a fundamental role in the overthrow of the government of President Salvador Allende. From the declassification of secret cables in 2014 by the United States, it has been proven that Edwards was financed by the CIA to collaborate with the creation of an environment that would destabilise democracy and the constitutional government. In this way, the businessman facilitated the creation of a climate conducive to justifying the coup d'état. One of the declassified reports refers to the "Covert Action (of the United States) in Chile 1963-1973" and acknowledges that: In addition to funding political parties [...] the Forty Committee approved large sums to support the opposition media and thus maintain a relentless opposition campaign. The CIA spent $1.5 million to support *El Mercurio*, the country's leading newspaper and the most important channel of propaganda

participation in this agreement between FPC and the US government to the role that *El Mercurio* and the CIA played in the Chilean coop in 1973.[58]

To conclude this section, and without wishing to question the TTDs merely because of their promoters, we have doubts as to why public bodies, whose participation seems justified, are signing the Convention that creates the TTDs in Chile together with two entities (the US Embassy and the FPC) both of which have serious murky pasts.

6. OPERATION OF TTD'S IN CHILE[59]

First and foremost, we appreciate that TTDs in Chile, unlike in numerous states of the US, do not require the acceptance of responsibility

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against Allende. After knowing the dark past of the president and founder of *Paz Ciudadana*, it is chilling to see how he is once again involved with the United States (formerly the CIA, now the embassy) in defining the future of Chilean men and women. For a full analysis of the early years of the FPC, see: RAMOS, Marcela and GUZMÁN, Juan. *La guerra y la paz ciudadana*. Santiago de Chile: LOM, 2000.

[58] The Foundation's early zeal in stigmatising the offender as a stereotype of a poor, uneducated young man with Lombrosian traits is also striking. The Foundation could well dedicate itself to the study of other, more complex crimes that its members should be familiar with from their own experience, such as Carlos Delano (businessman convicted of tax fraud), Bernardino Piñera (priest accused of sexual abuse), Enrique Montero (former under-secretary during the dictatorship), etc. Over the years, the Foundation has been cloaked in scholars to hide its essence as a communications platform at the service of business interests, to disguise itself as a centre for the study of crime (something similar happens in the US with the Manhattan Institute, the doctrines of the Broken Windows, etc.). Somehow, this link between marginality and crime is functional for its own members to divert attention from millionaire crimes. It is no coincidence that the Foundation's top management includes powerful politicians who have held important positions in the governments of the last 30 years, such as former minister Javiera Blanco, former parliamentarian and minister Alberto Espina, and former president Ricardo Lagos, among others.

[59] Although the main objective of this research is to undertake a critical analysis of the TTDs, especially the ones in Chile, it is important to mention a situation that, though different, can be linked to the addressed problem.

In Chile, the offence of trafficking in small quantities, contemplated in Article 4 of Law No. 20.000, has been the subject of heated debate as to whether it is necessary to determine the percentage of purity of the drug in order to

or a prior conviction, which prevents a defendant from being pressured to accept responsibility in order to benefit from treatment. However, and for above-mentioned reasons, it is possible that convicts and defendants who have not been able to access DST (TTDs) may be those most in need of treatment.

On the other hand, a problem at the root of TTDs is the difficulty of establishing a link between the commission of crime and drug use. While there is evidence of an association between the two variables,[60]

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be convicted. Although the jurisprudence of the Supreme Court has changed, lately, there has recently been a growing consensus that, in the case of chemical drugs, a determination of drug purity is required. With this regard, in the Chilean Supreme Court it is possible to observe this logic in a ruling (8th recital) which indicates that "...without the determination of percentage of purity and, therefore, the possible modification with some "cutting" substances, it is not possible to define whether what is seized is truly harmful to the health of all citizens, effectively endangering the legal right protected by the legislator, since the only thing accredited was that the appellants carried a dose of 'something' in which there was cocaine, but in a proportion and with a potential for harm that is unknown in the act and which must therefore be presumed, a reasoning that violates basic principles of an accusatory system such as the one that governs us". SCS Rol N° 4215-12. This matter is also linked with the discussion on the real impact that drug trafficking has on the legal good of "Public Health", which, mora than a collective good, can be understood, according to Roland Hefendehl- has the "sum of the individual legal goods". See: HRZIC, Boris. Comentario de la SCS de 25 de julio de 2012 (Rol. N° 4215-2012). En: AA.VV. *Revista Doctrina y Jurisprudencia Penal N° 13. Ley de Drogas (N° 20.000) I Parte.* Santiago: Editorial Thomson Reuters, pp. 107-119, 2013, p. 118. The following can also be consulted: RODRÍGUEZ, Manuel. Jurisprudencia de la Corte Suprema del trienio 2016-2018 sobre aspectos sustantivos de la Ley N° 20.000. *Revista Jurídica del Ministerio Público*, n. 75, pp. 77-155, 2019; RODRÍGUEZ, Manuel. Determinación de la pureza de la planta de cannabis sativa en el delito del artículo 8 de la Ley N° 20.000: Caminando en círculos. EN: CÁRDENAS, Claudia, GUZMÁN DALBORA, José Luis y VARGAS, Tatiana (Coords.) *XVI Jornadas chilenas de Derecho Penal y Ciencias Penales. En homenaje a sus fundadores.* Valencia: Tirant lo Blanch, pp. 67-84, 2021; y RETTIG, Mauricio. Naturaleza jurídica del delito del tráfico ilícito de pequeñas cantidades de sustancias o drogas estupefacientes o psicotrópicas. En: AA.VV. *Revista Doctrina y Jurisprudencia Penal N° 13. Ley de Drogas (N° 20.000) I Parte.* Santiago: Editorial Thomson Reuters, pp. 53-84, 2013.

[60] See STEVENS, Alex., TRACE, M. and BEWLEY-TAYLOR, D.R. (2005). *Reducing drug related crime: An overview of the global evidence. Report five*. Beckley Foundation: Oxford, 2005.

questions remain as to how to interpret this association. Some models suggests that drugs *cause* criminal behaviour or vice versa. Others suggest that both drug use and crime are the result of other underlying factors such as poverty and social exclusion. And it has also been argued that it is actually a spurious relationship, i.e. they simply coexist, but there is no causal relationship. It is also clear that there are many people who use drugs and do not break the law, and there are others who do without ever having used drugs.[61]

Apart from what studies in general can demonstrate about the relationship between the two variables, it is altogether a different matter demonstrating how this relationship has worked at the moment of committing a crime in one particular individual. This is of great forensic complexity and has implications regarding how such conduct is judged, given that, "while most addicts are criminally responsible for criminal conduct committed in connection with their addiction, addiction can in some cases undermine a person's freedom to control his or her conduct".[62] Such considerations are part of those involved in deciding whether a referral to a TTD is appropriate, and this is precisely why specialised professionals are required.

As already mentioned, in Chile there are no "specialised" drug courts, but they operate as a programme within the ordinary justice system in the Guarantee Courts[63] through a special form of alternative

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[61] The classic author who has categorised these possible causal relationships is: GOLDSTEIN, Paul. The drugs/violence nexus: A tripartite conceptual framework. Journal of Drug Issues, v. 15, n. 4, 1985, pp. 493-506.

[62] It is necessary to differentiate between the drug addict (intoxication, withdrawal, addiction) who commits crime as a direct result of the effects of the drug (pharmacological assumption) or by its absence (functional delinquency) from the drug offender, who often presents as an underlying cause an antisocial or narcissistic disorder, as well as a criminal history, in which drug use is an incidental event. See: ESBEC, Enrique. Violence and mental disorder. Cuadernos de Derecho Judicial, n. 8, 2005, pp. 57-154; and ECHEBURÚA, Enrique. FERNÁNDEZ-MONTALVO, Javier. Male batterers with and without psychopathy: An exploratory study in Spanish prisons. International Journal of Offender Therapy and Comparative Criminology, n. 51, 2007, pp. 254-263.

[63] The Gurantee Courts are criminal courts in Chile created by the Criminal Procedure Reform of 2000.

exit, meaning the conditional suspension of proceedings, which can only be applied to offenders without a criminal record or pending conditional suspensions, for crimes carrying a sentence of no more than three years imprisonment. That is to say, eligibility criteria are such that only a limited number of defendants are eligible for TTDs.

TTDs in Chile include a judge, who has the primary role, a prosecutor from the Public Prosecutor's Office, a defence lawyer, a psycho-social team, and a coordinator in charge of the programme.[64] It is the prosecutor or the defence lawyer who identifies the potential candidate. Then, where appropriate, a psychiatrist conducts an assessment of problematic drug use and its link to the crime under investigation. Afterwards, the prosecutor together with the psycho-social team and the defence lawyer, discuss a plan where both the possible treatment and the patient's eligibility requirements are analysed. The issues discussed at this meeting will prove key to determining the conditions for the hearing during which the conditional suspension of proceedings will be declared. After the conditional suspension hearing, the participant receives a treatment plan to be provided by a public or private body. This body provides information to the psycho-social team and monthly hearings are held, presided over by a judge, to analyse the treatment and determine new goals. At the end of the programme, a final hearing is held.[65]

Eligibility of candidates is reserved exclusively for first-time perpetrators of low-level offences, meaning those most in need of drug treatment are possibly excluded. This occurs specifically because the eligibility of candidates for treatment does not only respond to clinical criteria, but also, as an initial filter, to requirements linked to dangerousness. Therefore, on the one hand, the profile of people participating in TTDs is inconsistent with those who really need to follow such treatments,

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[64] REBOLLEDO, Lorena. El rol del fiscal en los tribunales de tratamiento de drogas, EN: Tribunales de Tratamiento de Drogas en Chile, Material educativo. In: DROPPELMANN, Catalina (ed.). Santiago de Chile: Fundación Paz Ciudadana, pp. 88-96, 2010, p. 141.

[65] PIÑOL, Diego. *et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile*. Santiago de Chile: CESC, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 76.

and, on the other hand, the profile of the participants is not the most suitable in relation to the objectives of TTDs.[66] It is at this point that one of the main problems of combining criminal justice and health criteria becomes apparent.

Ultimately, it is a costly system that, at best, achieves modest results and does not necessarily target those most in need of treatment from a health perspective. Therefore, "it is valid to ask how much it effectively contributes to the reduction of recidivism and how real the drug-crime link is when the cases dealt with correspond to minor offences committed by people who are not habitual offenders".[67]

While it is possible that TTD users do require such treatment, from a clinical point of view, the problem is created by setting up filters that leave out others who also need it. From a public health policy perspective, all that require (or *want*) such treatment should have access it,[68] and if prioritisation is required (given the limited resources), such prioritisation should also be based on health criteria (severity of use, vital risk, other concomitant health problems, history of adherence, etc.) and not on the basis of dangerousness. On the other hand, it is absurd to think that it would be possible to identify (regardless of the seriousness of the offence and/or penalty) those where a positive relationship between drug use and the commission of the offence is demonstrated, not only because this relationship is highly disputed, but also because criminal

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[66] PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 57.

[67] PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 33.

[68] In 2018, for adults aged 18-64, only 66,986 (10%) of the total Chilean population reported problematic use of alcohol and other drugs were effectively treated. In 2019, 649,160 people reported problematic use of alcohol and other drugs; however, during 2020, a total of 28,300 people were attended to in treatment programmes nationwide. MINISTRY OF THE INTERIOR AND PUBLIC SECURITY. Estrategia nacional de drogas 2021-2030, p. 62. Available at: https://www.senda.gob.cl/wp-content/uploads/2021/02/Estrategia-Nacional-de-Drogas-version-web.pdf Consulted on: 20th May 2021.

causality is too complex a matter to be determined solely on the basis of the drug use variable.

Another problem with treatment is that it does not assist participants in finding employment or training. Many of the participants are in a socially vulnerable situation and lack a support network.[69] To think that drug treatment alone can reduce recidivism is to fail to understand the psychosocial complexity that surrounds most drug users.

While it is true that the objectives of the TTDs in Chile to reduce drug use and recidivism are rather modest, they are nonetheless important. Even when treatment serves to rehabilitate only one person, we can argue that it will have been worthwhile.[70] However, from a public health point of view, access to treatment for problematic drug use should be a universal right and guaranteed by the state, and not determined by criteria of prioritisation or targeting based on cost.

Following the above, we can summarise and compare the advantages and disadvantages of the current model of TTD in Chile. This will be done on two levels. The first level is related to a macro-structural perspective, linked to the insertion of drug trafficking in the framework of the criminal justice system, public security, criminal policy and public policies as a whole. The second level -microstructural-, that observes the possible benefits and risks both in the operating systems

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[69] PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 92.

[70] A user who successfully graduated from the Viña del Mar TTD was interviewed and told us that he values the opportunity he had and, more than the TTD itself, the possibility of being able to receive psychological therapy. The user had a marijuana addiction problem. Possibly, in his own words, he did not require treatment for his addiction. However, the TTD allowed him to have psychological support, which represented for him a possibility of understanding many things and positive reinforcement. When asked about what he thinks of the eligibility requirements, he says he agrees because "while it helps those who need the least help, it helps those who have the best chance of successful treatment". He also points out that "a more complicated addict would not be able to get off drugs as easily". In conclusion, the user believes that the TTD is well designed because it prioritises modifying what is possible to modify.

of the implementing institution, as well as in relation to the individual impact, i.e with regards to the subjects that are users of this model.

As per the macrostructural level, it is possible to note that TTDs in Chile effectively pose a valid effort towards opening alternative responses on behalf of a juridical penal system and criminal policy. From this point of view, they constitute a valid attempt since – at least on the basis of their manifested intentions – they go against a legislative and state policy that in the last decades has been strongly marked by an increase in the punitive nature of the penal system. Thus, TTDs not only focus in the administration of punishment as a reactive policy, but also aim to understand and intervene in some or part of the root causes of crime. One advantage of this aspect is that the model has led to the involvement of other areas of public policy – such as the health sector – in the response towards the problem. This manner of understanding and approaching the problems appears to be more promising, insofar as it can effectively deal with the social complexity that underlies the various forms of criminality.

However, his broadening of the horizon of possibilities that TTDs seem to offer is obscured by the way in which the model is implemented. We are not dealing with areas of public policy that complement each other - at the same level - to tackle a problem, where each one contributes its competences and expertise. Rather TTDs promote a model where one area of public policy – such as health – remains subordinated to another area, such as criminal justice. Therefore, as we already mentioned, health criteria end up not counting as much as penal criteria and the contribution of health professionals remains restricted to the narrow margin (user selection criteria, time limits, etc.) imposed by legal operators.

This demonstrates in practice that the political criminal orientation does not renounce to its fundamentally repressive conception, and within this line, TTDs can even up serving to "whiten" the system, showing its best appearance while making invisible corruption, the impunity of big drug traffickers, the neighbourhood and prison violence generated by illegal drug markets and the incarceration of the poor, especially women. All of this is a consequence - to a large extent - of the political and criminal orientation of Law 20.000.

On the other hand, also at a macrostructural level, the option that TTDs offers, has not resulted in Chile in a reduction of imprisonment

rates. Demonstrating that this model operates more as an expansion mechanism of the penal network, at best with a marginal impact in terms of an alternative criminal policy proposal. Therefore, drug addiction in Chile, especially within the younger population, continues to be a primary issue of public health, that requires solid policies, appropriate budgets, relevant targeting criteria and effective intervention models.[71] In this regard, we believe that access to treatment for problematic drug use, should be a universally granted right.

Finally, we observe that the budgetary investment that TTDs in Chile represent, does not commensurate with its results and benefits,[72] which rightfully generates doubts as per the way this model has been conceived and designed.

Regarding the microstructural level, we can point out as advantages of the Chilean model, the fact that a conviction is not necessary to access TTDs, as this avoids promoting the acceptance of sentences that could end up being more onerous.

The incorporation of health professional in the model is also a success, despite the limits above analysed. Within the same context, we do not oppose a priori against the contribution of the private sector towards the design and evaluation of those programmes, as long as it is not them who impose political and crime orientation to be followed.

With regard to the disadvantages, although the fact that this programme takes place within the framework of the SCP is beneficial for the reasons already mentioned, it also implies limitations with regard to those who can access its eventual benefits. In practice, a very limited number of users are targeted, and not necessarily those that – according to health criteria – are in most need. On the other hand, the existence

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[71] Véase: ORGANIZACIÓN DE ESTADOS AMERICANOS (OEA). Informe sobre el Consumo de Drogas en las Américas 2019 Available at.: http://www.cicad.oas.org/oid/Informe%20sobre%20el%20consumo%20de%20drogas%20en%20las%20Am%C3%A9ricas%202019.pdf Consulted on: 16 de marzo 2022, pp. 58 y ss.

[72] Véase: FUNDACIÓN PAZ CIUDADANA. Evaluación de impacto y costo-beneficio de los tribunales de tratamiento de drogas en Chile. 2018. Available at: https://pazciudadana.cl/biblioteca/reinsercion/evaluacion-de-impacto-y-costo-beneficio-de-los-tribunales-de-tratamiento-de-drogas-en-chile/ Consulted on: 14 de mayo 2021, pp. 58 y ss.

itself of alternatives to the "criminal treatment", can discourage the justice system from considering drug consumption as a ground for lesser criminal liability and, as a consequence, from diversifying the response towards genuine alternatives outside the criminal justice system.

Other disadvantages of the model, although not exclusive of the Chilean experience, but rather of TTDs' functioning system itself, are the difficulties caused by the "voluntary-obligation" tension in relation to the user's participation. The logic of intervention under a coercive premises represents obstacles both for its therapeutic and penal supervision goals. It places its subjects in a complex position, adding confusion in a psychological scenario already surely chaotic enough, and whose timing is not adapted to their needs, but to those of the justice system.

Finally, evidence demonstrates that the intervention in population with a problematic drug consumption should not only focus on the "drug", but should open paths towards the resolution of more complex issues that are played in the emotial, family, educational, work and community area. However, TTDs appear to focus on a model that is still too clinic – individualistic. Here it can be noticed, for example, an interesting contribution that the private sector could make, collaborating with the possibility of access to effective educational and employment alternatives.

In summary, the comparison of the benefits and disadvantages of Chileans TTDs, both at a macro as well as microstructural level, shows poor results in favour of the current model. Further to the improvements that could be done, these ideas could lead to a rethinking of the criminal policy orientations that underlie them.

CONCLUSIONS AND SUGGESTIONS

Although TTDs have been promoted as an alternative to incarceration and a public policy that would reduce prison overcrowding and, at the same time, treat drug users more like patients than offenders, the truth is that rather than being a real alternative to incarceration, they have been shown to be complementary to it.

It also does not seem appropriate, given the received training, that those in charge of such treatment should be judges and that broad

powers should be given to prosecutors from the Public Prosecutor's Office. For neither judges nor prosecutors have the necessary tools to fulfil this task. While there is no doubt that they often participate with great motivation and sincere concern for patients, the relevant decisions and direction of such treatment should be made by health professionals with specific expertise in drug addiction issues. Furthermore, limiting treatments to legal deadlines may lead to having to stop treatments earlier than recommended or having them extended longer than necessary.

The US version of TTDs is not an alternative to incarceration, as defendants remain involved in criminal proceedings for the duration of their treatment and may, in numerous cases, remain incarcerated for longer than they would have been if they had opted for the regular criminal process. On the other hand, TTDs may expand the punitive network by requiring a guilty plea as a condition for access to TTDs.[73]

In the Chilean version, TTDs cannot be an effective instrument reducing imprisonment. Their contribution is minimal without having a real impact on criminal policy and their existence is more useful and functional to those who implement public policies, wanting to show a human face within a cruel system that encourages mass incarceration, particularly increasing the imprisonment of women. Furthermore, the high costs of TTDs, make it an inefficient system in relation to its outcomes[74] and, given the low number of admissions to TTDs, do not justify them as a public policy.[75]

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[73] SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). Tribunales de tratamiento de drogas en las Américas, 2019, p. 45. Available at: https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf Consulted on: May, 10th 2021.

[74] SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). Tribunales de tratamiento de drogas en las Américas, 2019, pp. 2 y 3. Available at: https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf Consulted on: May, 10th 2021.

[75] PIÑOL, Diego et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: CESC, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 120. Several studies have shown that other types of drug treatment are more effective than drug treatment courts, see: LEE, Stephanie, et al. Return on Investment: Evidence-Based Options to Improve Statewide Outcomes Olympia: Washington State Institute for Public

Any attempt at an alternative to mass incarceration is to be found neither in the creation of "alternative" penalties nor in the creation of therapeutic justice, but rather in the decriminalisation of behaviour. For example, decriminalising the consumption and possession of some drugs, or the relaxation of penalties for behaviour and the understanding that the sale of drugs is often an activity linked to the consumption itself, which is necessary to finance it. Several studies conclude that the problem of consumption should not be considered a crime.[76] However, in Chile, by virtue of the presumption of criminal liability under Law No. 20,000 on drug control, consumption is also considered a trafficking activity, since drug possession is presumed to be for the purpose of trafficking, and the accused must prove personal consumption in the near future, which, in any case, is also punishable under criminal law as a misdemeanor.[77]

Furthermore, we insist that when the drug users' financial situation does allow them to support their addiction, the sale of drugs, in many cases, should be considered as an addiction-related action and not as a trafficking activity. Otherwise, rather than protecting the legal good of "public health", we end up punishing the very victims of drugs. And, given the selective essence of criminal law, legislation will be harsher for those who are more vulnerable and permissive for those who are financially better off.

As a proposal, we would like to suggest, first of all, that it is not opportune to confuse justice criteria with public health criteria. This does not mean that both purposes (ensuring justice and protecting public

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Policy, 2012; and SEVIGNY, Eric, FULEIHAN, Brian and FERDIK, Frank. Do Drug Courts Reduce the Use of Incarceration? A Meta-Analysis. Journal of Criminal Justice, n. 41. 2013, pp. 416-425. https://doi.org/10.1016/j.jcrimjus.2013.06.005

[76] PÉREZ Catalina (coord.) *Justicia desmedida: Proporcionalidad y delitos de drogas en América Latina*. Ciudad de México: Editorial Fontamara, 2012.

[77] Although the illegal drug trafficking is punished with relatively high custodial sentences due to its criminal nature, it is no less true that, by virtue of Article 8 of Law No. 20.000, if the offenders proves exclusive personal use or consumption in the near future, such conduct is considered a "misdemeanour" and not a "crime", and is therefore punishable by fines, attendance at rehabilitation programmes, or the development of activities in aid of the community.

health) should not be pursued, but it should be undertaken by following the paths best suited to the attainment of each objective. Our proposal, broadly speaking, recommends less punishment and more treatment, but both objectives should be pursued along separate lines. Drug treatment should be increased, but not be made dependent on, or offered as an alternative to, criminal prosecution.[78] To conclude, we would like to summarise our proposal in three main key points:

1. Decriminalise behaviours:

Consumption and trafficking behaviour should be decriminalised, especially when it may be an ancillary activity to consumption itself.

This first point belongs to a more global theory that seeks the decriminalisation of various offences and the search for non-criminal responses to situations of lesser harm. It is also expected that for criminal offences, imprisonment will be limited only to those behaviours that are extremely harmful to the protected legal interests, prioritising other types of sanctions where possible. Mass imprisonment and overcrowding are not a natural fatality. They are the result of misguided policies that, with social and often racial biases, massively imprison human beings in undignified conditions without obtaining, with this, a decrease in crime levels, but rather, generating criminogenic behaviours among convicts.

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[78] Interestingly, Miller proposes incorporating a jury into TTDs. In this way, Miller believes, the relationship between, on the one hand, a judge and, on the other, an offender-consumer and the community, is replaced by a system with democratic participation of the community with the offender to be rehabilitated. Moreover, in this way, for Miller, it could contribute to an empowerment of community participation MILLER, Eric. Drug, Courts and The New Penology. Stanford Law & Policy Review, v. 20, n. 2, 2009, pp. 135 and 136. Available at: https://ssrn.com/abstract=1464353 Consulted on: 10th May 2021; and FUNG, Archon. Empowered participation: reinventing urban democracy, 2005. Available at: https://www.researchgate.net/publication/228382837_Empowered_Participation_Reinventing_Urban_Democracy#fullTextFileContent Consulted on: May, 18th 2021. On excessive costs over traditional justice, see: MEEKINS, Tamar. Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender. Berkeley Journal of Criminal Law, v. 12. 2007, pp. 75-126; and MEEKINS, Tamar. "Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm. Suffolk University Law Review, v. XL, n. 1. 2006, pp. 1-55.

Therefore, there are multiple alternatives that could be implemented to reduce mass imprisonment and, with this, build a more human society.[79]

The problems linked to drug use, including that of sale by users, should be treated as a public health problem, adopting public health criteria, taking into account specific needs related to patients' gender, age, culture, ethnicity, needs, etc.[80]

In the case of offences perpetrated by minors with problematic drug use, penal sanctions should be avoided due to the stigmatising effects they generate[81] and referral to drug treatment outside the criminal justice system should be made.

2. Reduce penalties:

We propose radical changes to establish a less harsh system of penalties, especially for those behaviours linked to drug use and drug dealing. The myth of the War on Drugs as a solution to the drug trafficking problem must be dispelled. In this light, we can observe how in the US, the effects of the war on drugs have not been to reduce trafficking or consumption, but rather to increase incarceration, which has not proven to be an effective tool for reducing crime or violence.

3. Increasing drug treatment provision:

Drug treatment should be made more available to those in need without being used as a supposed alternative to the penal system. Notwithstanding this, the criminal justice system can be an ideal place

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[79] RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria. Volumen I*; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed. Buenos Aires: Editores del Puerto, 2009; RIVERA, Iñaki, *Descarcelación, principios para una política pública de reducción de la cárcel (desde un garantismo radical)*. Valencia: Tirant lo Blanch, 2018, pp. 231-235; CUNEO, Silvio. *El encarcelamiento masivo*. Buenos Aires: Didot, 2017; CUNEO, Silvio. *Cárceles y pobreza. Distorsiones del populismo penal*. Santiago de Chile: Uqbar, 2018.

[80] It is essential to establish penal policies that result in the reduction of imprisonment of mothers who are in charge of their children, since in Chile, as a general rule, it is women who take care of their children and imprisonment implies the confinement or abandonment of minors. This exception could also be considered in the case of fathers who care for their children.

[81] On the effects of labelling that a criminal sanction can have on adolescents, see LARRAURI, Elena. La herencia de la criminología crítica, 2nd ed. Mexico: Siglo XXI, 1992.

to detect drug use problems, both in the case of defendants, convicted offenders and even victims. In no case should problematic drug use be used as a criterion to impose harsher sentences or impede obtaining prison benefits. Surreptitiously, problematic drug use often results in a poor qualification for parole or other prison benefits. Drug treatment should be a right for those who need it, be considered an essential health benefit and a social right, and the criterion for admission should be no other than the need for treatment, based on a public health approach, and not the fulfilment of eligibility requirements that relate to solely low dangerousness.

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A imputação e o crime de lavagem de capitais: um estudo crítico sobre a viabilidade da denúncia

The imputation and the crime of money laundering: a critical study on the viability of the accusation

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Resumo: Este artigo propõe um estudo aprofundado da viabilidade da denúncia, com foco no crime de lavagem de capitais. Diante do caráter complexo das operações de lavagem, é possível visualizar os problemas decorrentes da descrição insuficiente da conduta e da falta de corroboração empírica da hipótese acusatória. O artigo, portanto, divide-se em dois temas principais: *i)* a importância da descrição do enunciado fático contido na denúncia e *ii)* a urgência na definição de um *standard* de prova, com critérios lógicos e objetivos, a viabilizar o início formal do processo. A partir do estudo crítico da doutrina nacional e estrangeira relacionada ao tema, além da análise de precedentes dos tribunais superiores, demonstra-se como deve ser descrito o enunciado fático contido na inicial e qual nível de suporte probatório (*standard*) confere legitimidade à atividade processual. A decisão de recebimento da denúncia constitui importante filtro contra acusações infundadas, e, assim, deve ser devidamente motivada pelo julgador. Nesse contexto, o trabalho apresenta, por fim, uma proposta de alteração legislativa capaz de garantir maior controle e racionalidade para a decisão de recebimento da denúncia, tornando a submissão do indivíduo ao processo criminal justa e legítima.

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Palavras-chave: denúncia; fato processual; fato penal; *standard* de prova; lavagem de capitais.

Abstract: *This article seeks to deeply analyze the crime imputation, especially in cases of money laundering. Given the complex nature of money laundering operations, it is possible to visualize the problems related to the insufficient description of the criminal conduct and lack of empirical evidence for the accusation. Therefore, the article is divided into two main themes: i) the importance of describing the criminal conduct and ii) the urgency in defining a standard of proof with logical and objective criteria to establish the formal beginning of the process. From the critical study of the national and foreign doctrine related to the subject, in addition to the analysis of precedents from the superior courts, it is demonstrated how the factual statement contained in the criminal charge must be described and what level of evidence (standard of proof) confers legitimacy to the process. The judicial decision to receive the complaint is an important barrier against unfounded accusations, and, thus, it must be duly motivated by the judge. In this context, the article proposes a legislative change capable of guaranteeing greater control and rationality for that decision, so the individual's submission to the criminal process can be fair and legitimate.*

Keywords: *complaint; procedural fact; criminal fact; standard of proof; money laundering.*

Sumário: Introdução; 1. Considerações sobre a descrição típica da conduta e a definição de *standard*s de prova ao longo do processo; 1.1. A acusação e o exercício da defesa; 1.2. O conteúdo descritivo da imputação; 1.3. A fixação de *standards* de prova ao longo do processo; 1.4. O controle racional da decisão de recebimento da denúncia; 2. Estudo do crime de lavagem de capitais; 2.1. O combate à lavagem de dinheiro e a estrutura típica do delito; 2.2. O standard de prova e a denúncia na Lei nº. 9.613/98; 2.3. O conteúdo descritivo da imputação no crime de lavagem de capitais; Considerações finais; Referências bibliográficas.

Introdução

O artigo propõe um estudo aprofundado da imputação criminal, de modo a destacar o cumprimento dos pressupostos básicos para o legítimo recebimento de uma denúncia. O interesse pelo tema surge de uma constatação cotidiana na advocacia criminal, em que são recorrentes denúncias excessivamente longas, mas, não raro, sem a devida vinculação fática da conduta ao tipo penal, ou ainda, sem a demonstração do lastro probatório mínimo, capaz de sujeitar o indivíduo ao processo criminal.

O artigo divide-se em dois temas principais: *i)* a descrição do enunciado fático contido na denúncia e *ii)* a definição de um *standard* de prova, com critérios lógicos e objetivos, a viabilizar o início formal do processo. Nesse contexto, o trabalho se orienta pelos seguintes questionamentos: 1) Qual a importância do enunciado fático contido na inicial? 2) Como este enunciado deve ser descrito, a fim de possibilitar o exercício do direito de defesa? 3) Qual a relevância da fixação de *standards* de prova ao longo da persecução penal? 4) Como garantir maior racionalidade da decisão de recebimento da denúncia?

Para responder a essas perguntas, realizou-se uma divisão em dois itens: o primeiro item contém considerações gerais sobre a descrição típica das condutas e a definição de *standards* de prova ao longo do processo; já o segundo item propõe um estudo do crime de lavagem de capitais como forma de observar o problema na prática.

É inegável o crescimento recente dos escândalos envolvendo lavagem de dinheiro. As operações de lavagem possuem natureza complexa e, por isso, demandam uma descrição rigorosa da conduta criminosa. É necessária, ainda, para o combate eficiente a este crime, uma elevação dos níveis de conhecimento produzido pela investigação preliminar. Ao contrário, o que se constata são imputações genéricas, destituídas de base empírica sólida, limitando-se o órgão acusador a repetir os termos da lei, descrição, sem dúvida, insuficiente a atender ao postulado do devido processo legal e à garantia do direito de defesa que lhe é consectário.

Em termos de limitação, optou-se por não adentrar nas discussões relativas ao conceito de justa causa para ação penal, bastando, para os fins deste artigo, identificar como o fato deve ser descrito na denúncia e qual nível de suporte probatório propicia o seu recebimento.

Por último, já nas considerações finais, apresenta-se uma proposta de alteração legislativa, capaz de garantir maior controle e mínimo padrão de racionalidade para a decisão de recebimento da denúncia, tornando a submissão do indivíduo ao processo criminal justa e legítima.

1. Considerações sobre a descrição típica das condutas e a definição de *standards* de prova ao longo do processo

1.1. A acusação e o exercício da defesa

É incontroverso que o processo penal consiste em fenômeno distinto do processo civil (LOPES JR, 2016, p. 101), embora seja também inegável a influência de uma teoria geral (unitária) do processo[2] aproximando ambos. No âmbito penal, para formulação de qualquer acusação, exige-se a comprovação da justa causa[3], contendo os elementos mínimos da prática de um delito. Configurada a justa causa a legitimar o exercício da ação penal, o processo opera na reconstrução histórica do fato[4] supostamente criminoso, momento em que se torna essencial a descrição típica da conduta que compõe a acusação.

Não basta o cumprimento de critérios meramente formais. É mediante a acusação que se efetiva a jurisdição, atendendo ao axioma

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[2] Por todos, ver: JARDIM (1995, p. 27/31); e MARQUES (1998, p.104/105).

[3] Não se desconhece a difícil conceituação do termo. Todavia, sustenta-se que "tentar conceituar genericamente a justa causa apenas sob um de seus diversos ângulos constitui, em nosso entendimento, o grande equívoco da doutrina, o qual tem colaborado para a considerável divergência reinante na matéria, com reflexos, inclusive, na jurisprudência". Para os fins deste trabalho, portanto, mais do que uma definição concreta de justa causa, "faz-se imprescindível identificar quando a coação à liberdade jurídica é legítima, pois, caso contrário, a denúncia ou queixa não poderá ser recebida" (MOURA, 2001, p. 173-176).

[4] Sobre a impossibilidade de se chegar a um conhecimento absoluto sobre os fatos, destaca-se que, no campo processual, "situamo-nos plenamente no espaço do raciocínio probabilístico", pois mesmo que se considere que "não é possível verificar uma hipótese, isso não implica que não possamos *preferir* racionalmente uma hipótese em relação à outra com base na maior corroboração da primeira". (FERRER BELTRÁN, 2021, p. 135).

garantista *nullum judicium sine accusatione (não há processo sem acusação)* (FERRAJOILI, 2010, p. 91). Mas quando se inicia esta acusação? A partir de qual momento é possível falar em sua existência? Tais questões preliminares ajudam-nos a introduzir o tema e orientam as reflexões para a pesquisa.

Evidente que o estudo sobre a viabilidade da denúncia deve adotar a interpretação do texto constitucional como ponto de partida. A propósito, a Constituição da República não deixa margens para incompreensões quando assegura em seu artigo 5º, inciso LV, a garantia do contraditório e da ampla defesa aos "acusados em geral".[5] Ao utilizar esta expressão, o legislador constitucional atrelou o contraditório não só aos processos criminais, mas a qualquer procedimento de natureza acusatória, em oposição à supressão do direito de defesa vivenciado nos *anos de chumbo*.[6] Ampliou-se, portanto, o conceito de acusação, com vistas a garantir maior proteção ao indivíduo.

Garantidos, então, ao sujeito a ampla defesa e o contraditório em qualquer procedimento de índole acusatória, não se justifica a ideia de exclusividade da acusação após o recebimento da denúncia. É dizer: sempre que existir alguém a suportar uma imputação (acusado), devem-se respeitar as regras que compõem o contraditório e a ampla defesa, como forma de emprestar legitimidade ética e jurídica aos atos processuais. [7]

No contexto atual de combate à criminalidade organizada na forma dos megaprocessos,[8] o respeito ao direito de defesa durante a

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[5] "Art. 5º. (...) LV - aos litigantes, em processo judicial ou administrativo, e aos acusados em geral são assegurados o contraditório e ampla defesa, com os meios e recursos a ela inerentes."

[6] Para uma leitura das violações experimentadas pelos defensores dos presos políticos da ditadura civil-militar de 1964, ver: DOS SANTOS (2011, p. 243/250).

[7] No mesmo sentido, em relação à garantia do direito de defesa, Julio Maier sustenta: "*ella no se refiere, exclusivamente, al poder penal del Estado. Al contrario, la formula es amplia y también compreende al procedimento civil, laboral o administrativo, pues protege todo atributo de la persona (vida, libertad, patrimônio, etc.) o los derechos que pudieran corresponderle, susceptibles de ser intervenidos o menoscabados por uma decisión estatal*" (MAIER, 1999, p. 541).

[8] Como se sabe, Luigi Ferrajoili foi o responsável por identificar e descrever o fenômeno dos maxiprocessos, demonstrando que estes se manifestam no

fase de investigação[9] adquire ainda maior relevância. Isto porque, nesse modelo agigantado de persecução penal, ocorre um deslocamento do eixo informativo do processo para a investigação preliminar,[10] a qual se reveste de um caráter altamente aflitivo e invasivo, a partir da adoção dos "métodos ocultos de investigação" (PRADO, 2014, p. 59/62). A rigor, a própria natureza e estrutura organizacional das empresas, compostas por diversos setores operacionais, oferece terreno amplo e complexo para a atividade investigativa policial (MALAN, 2016, p. 219), o que se traduz, na prática, em uma crescente intromissão do poder penal na vida privada durante os atos de investigação.

1.2. O conteúdo descritivo da imputação

Após os primeiros comentários, importa demonstrar como é composta a descrição típica da conduta dita criminosa. A teoria da consubstanciação, de acordo com a qual o acusado se defende dos fatos contidos na denúncia e não de sua classificação jurídica, constitui manifestação frequente na jurisprudência.[11] Todavia, em geral, observa-se uma simples repetição da teoria, sem aprofundar as particularidades da reação defensiva e da descrição do conteúdo fático apresentado na inicial acusatória. A imputação, em essência, representa o juízo de atribuição (ônus do órgão acusador) que vincula o sujeito passivo (imputado) à prática do ato supostamente criminoso (FERNANDES, 2002, p. 102/103). Neste

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interior de um *subsistema penal de emergência*. A propósito, ver: FERRAJOLI (2010, p. 649/672).

9 Esse, aliás, tem sido o entendimento do Supremo Tribunal Federal ao assentar que "no âmbito dos inquéritos policiais e inquéritos judiciais originários, a jurisprudência do Supremo Tribunal tem caminhado no sentido de garantir, a um só tempo, a incolumidade do direito constitucional de defesa do investigado ou indiciado na regular apuração de fatos" (STF, ADPF n° 444, Tribunal Pleno, Rel. Min. Gilmar Mendes, DJe 22/05/2019).

10 Para um estudo aprofundado do fenômeno, ver: SANTORO (2020).

11 Nesse sentido, ver: STF, HC 90686, Primeira Turma, Rel. Min. Ricardo Lewandowski, DJ 11/05/2007; Inq 4093, Primeira Turma, Rel. Min. Roberto Barroso. DJ 18/05/2016; RHC 117694, Segunda Turma, Rel. Min. Carmen Lúcia, DJ 27/09/2013, entre outros.

ensaio, interessa justamente explicitar como se estabelece a vinculação do sujeito ao ato criminoso por meio da descrição de um fato.

O conceito de fato ultrapassa a ciência do direito, possibilitando as mais diversas conotações. O conceito processual é nitidamente distinto da noção penalística (BADARÓ, 2019, p. 104), sendo tal diferenciação indispensável para delinear o conteúdo insculpido na peça acusatória e como este deve ser descrito, a fim de possibilitar o regular exercício do contraditório e da ampla defesa. A base fática sobre a qual se estrutura toda investigação e toda instrução processual opera ainda como limite ao arbítrio e à opressão estatal, pois delimita o alcance da sentença penal e, com isso, evita surpresas para quem se defende (MAIER, 1999, p. 568).

O fato na concepção do direito penal deriva da previsão da norma em abstrato, isto é, uma situação hipotética descrita em um tipo penal. Por outro lado, o fato processual penal é um acontecimento histórico concreto (BADARÓ, 2019, p. 105). Neste último, trata-se de um fato naturalístico que se diz penalmente relevante. Consiste no recorte, destacado da realidade, de um evento histórico atribuído ao acusado, e sobre o qual incidirá a apreciação judicial para comprovar sua efetiva ocorrência e sua relevância jurídico-penal.

Em síntese: se, para o direito penal importa o fato, enquanto exata descrição hipotética e abstrata da norma, para o processo penal, interessa o real e concreto acontecimento histórico, praticado pelo sujeito em todas as suas circunstâncias (POZZER, 2001, p. 69). Essa distinção, embora relevante, é ainda insuficiente para definir com clareza o conteúdo descritivo da inicial acusatória. Afinal, a denúncia narra um fato concreto (fato processual penal) e, ao fim, atribui a este acontecimento uma qualificação jurídica, conforme o disposto na norma em abstrato (fato penal).

O regular exercício do contraditório e da ampla defesa exige uma imputação[12] determinada em todas as suas circunstâncias. Não se discute a dificuldade, inerente aos processos criminais, de se reconstruir fatos passados aos quais não se pode ter acesso de forma direta (TARANILLA,

[12] De maneira didática, "a imputação, contudo, não é só jurídica – proposta de adequação tipológica. É, também, fática, ou mais precisamente, a versão de um fato que se atribui a alguém. Envolve, portanto, a narração de um fato, a atribuição a alguém e a qualificação jurídico-penal deste fato" (ZILLI, 2016, p. 152).

2012, p. 46/47). Contudo, a restringir tal dificuldade, propõe-se uma definição concreta da narrativa acusatória contida na exordial, de modo que o conhecimento integral da imputação permita ao sujeito reagir de forma efetiva.[13] Logo, o conteúdo descritivo da imputação deve corresponder ao elemento de vinculação entre o fato processual (evento histórico determinado) e o fato penal (norma penal em abstrato). Afinal, o fato narrado na denúncia só tem valor quando ligado à norma incriminadora (FERNANDES, 2002, p. 232). [14]

A relevância do conteúdo descritivo da imputação torna-se ainda maior com a implementação do juiz de garantias. Isso porque, como se sabe, a competência do juiz de garantias cessa com o recebimento da denúncia (artigo 3º-C, *caput* da Lei nº. 13.964/2019), ficando os autos da investigação acautelados na secretaria do juízo (§3º). Com efeito, o juiz da instrução, preservando sua originalidade cognitiva, não terá acesso aos atos de investigação, mas tão somente ao enunciado fático descrito na inicial.

1.3. *A fixação de standards de prova ao longo do processo*

Até o momento vimos que os postulados do contraditório e da ampla defesa pressupõem a existência de uma acusação, ainda que esta não tenha se constituído formalmente por meio de uma denúncia, e que o conteúdo descritivo da imputação consiste no vínculo entre o

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[13] Em relação à descrição da conduta criminosa, posicionou-se a Corte Interamericana de Direitos Humanos: "*Al determinar el alcance de las garantías contenidas en el artículo 8.2 de la Convención, la Corte debe considerar el papel de la "acusación" en el debido proceso penal vis-à-vis el derecho de defensa. La descripción material de la conducta imputada contiene los datos fácticos recogidos en la acusación, que constituyen la referencia indispensable para el ejercicio de la defensa del imputado y la consecuente consideración del juzgador en la sentencia. De ahí que el imputado tenga derecho a conocer, a través de una descripción clara, detallada y precisa, los hechos que se le imputan*". CIDH, Fermín Ramírez vs. Guatemala, julgado em 20/06/2005. Disponível em: https://www.corteidh.or.cr/docs/casos/articulos/seriec_126_esp.pdf . Acesso em: 05/03/2022

[14] No mesmo sentido: "Um fato é *juridicamente relevante* (no jargão estadunidense: *material*) quando corresponde ao tipo de fato definido pela regra jurídica (escrita ou fundada em precedentes) considerada como possível base jurídica para a decisão" (TARUFFO, 2016, p. 61).

fato naturalístico (processual) e o fato em abstrato previsto na norma (penal). Entretanto, se é certo que a descrição da conduta penalmente relevante deve ter como base as premissas fixadas, para que se tenha uma denúncia hígida, é necessário um determinado grau de "prova"[15] que propicie o seu recebimento.

Nessa temática, algumas considerações teóricas são indispensáveis. De início, destaca-se que a "exposição do fato criminoso com todas as suas circunstâncias" [16] não significa que se exija do órgão acusador certeza quanto à relevância penal da conduta. Nem poderia ser diferente, já que o processo é o mecanismo apto a produzir conhecimento seguro[17] a respeito do caso penal, comprovando ou não a veracidade das proposições representativas do fato (GOMES FILHO, 2005, p. 317). O devido processo legal-constitucional caracteriza-se, portanto, como um processo originalmente fundado na incerteza, que encontra validade formal no respeito ao contraditório e à ampla defesa, e que reclama a produção de certeza como meta, em harmonia com preceitos garantidores da dignidade da pessoa (PRADO, 2014, p. 17).

A propósito, pergunta-se: se o devido processo legal-constitucional tem a certeza (da prática de uma infração penal) como meta, qual o grau de certeza exigido para o recebimento de uma denúncia? Em outras palavras, qual nível de fundamentação e corroboração da hipótese acusatória autoriza o início formal do processo?

Visando a atender tais questionamentos, é preciso estabelecer um limite a partir do qual se aceita determinada premissa como provada. Isto significa atribuir um grau mínimo de confiança e de credibilidade ao elemento probatório trazido aos autos, essencial para considerar determinado fato provado. Esse limite, o *standard* de prova, porém, não deve ser o mesmo para todas as decisões durante a persecução penal e

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[15] A palavra prova em diversas situações será utilizada entre aspas, a evidenciar que "a presença ou ausência de contraditório é o que distingue, respectivamente, ato de prova de ato de investigação" (BADARÓ, 2019, p. 197).

[16] Artigo 41 do Código de Processo Penal. No mesmo sentido, artigo 8.2., b da Convenção Americana de Direitos Humanos.

[17] A expressão refere-se ao ingresso da epistemologia no processo, não apenas como epistemologia pura, mas como epistemologia aplicada, ou seja, uma epistemologia judiciária. Ver: BADARÓ (2018, p. 53).

sua fixação exige que se atenda a determinadas valorações da política criminal (FERRER BELTRÁN, 2007, p. 2).

No Brasil, a ausência de previsão legislativa ou jurisprudencial[18] semelhante leva a uma indefinição quanto ao grau de "prova" exigido para adotar determinadas medidas - por exemplo, o recebimento da denúncia –, o que, não raro, reflete-se em uma postura decisionista do julgador, típica dos projetos autoritários, desvinculados da delimitação do poder estatal. [19]

Um argumento comum que contribui para este quadro de incerteza é o de que eventuais lacunas na denúncia serão supridas pela instrução processual.[20] A fundamentação é equivocada, já que a prova produzida ao longo da instrução deve necessariamente ter como pressuposto o enunciado fático da denúncia. A falha na produção deste enunciado não será suprida pela instrução, pois, neste caso, a instrução perpetuará uma

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[18] Em verdade, há exemplos na jurisprudência da utilização do *standard* para condenação "prova além da dúvida razoável" (*beyond a reasonable doubt*). Contudo, não raro, este é importado em descompasso com o que prevê a matriz teórica norte-americana, sendo utilizado não para sentença condenatória, mas sim para o recebimento da denúncia. Ver, a propósito: STF, Inq 2036/PA, Tribunal Pleno, Rel. Min. Carlos Britto, DJ 22/10/2004. Em outros casos, porém, o *standard* anglo-saxão é empregado de forma coerente com sua formulação original, isto é, constituindo o nível mais exigente de prova que, se superado, enseja uma sentença condenatória. Nesse sentido, ver: STF, AP 676, Primeira Turma, Rel. Min. Rosa Weber, DJ 06/02/2018. A falta de harmonia leva a uma visível insegurança, deixando clara a urgência na definição dos *standards* de prova, de modo a distribuir os riscos de erro e aumentar a qualidade epistemológica das decisões tomadas ao longo do processo.

[19] Em relação ao decisionismo, Juarez Tavares ensina: "Quando a base empírica dos elementos do delito é desconstruída e substituída por juízos de valor emitidos apenas de conformidade com o poder normativo, a ordem jurídica deixa de ser democrática e passa a ser a coletânea de enunciados jurisprudenciais, sem qualquer conteúdo crítico, com consequências desastrosas para a doutrina penal, que se transforma em seu mero repetidor" (TAVARES, 2018, p. 106).

[20] Na irretocável lição do Ministro Celso de Mello: "não tem sentido, sob pena de grave transgressão aos postulados constitucionais, permitir-se que a discriminação da conduta de cada denunciado venha a constituir objeto de prova a ser feita ao longo do procedimento penal." STF, HC 86.879-7, Segunda Turma, Rel. Min. Gilmar Mendes, DJ 24/02/2006.

falha irreparável.[21] Além da nítida possibilidade de violação do princípio da correlação entre acusação e sentença, posto que preencher as lacunas da imputação com a prova produzida em contraditório possibilita que a sentença vá além ou contrarie a descrição dos fatos apresentada na inicial.

O processo penal brasileiro adota um sistema escalonado (LOPES JR, 2016, p. 112), o que se reflete no *status libertatis* do acusado. Cada etapa da marcha processual proporciona um juízo de valor a respeito do cometimento ou não do crime investigado. A lógica reside em exigir maior grau de corroboração (*standard* mais elevado) das hipóteses fáticas com consequências mais gravosas para o indivíduo (MATIDA; VIEIRA, 2019, p. 11). Assim, o nível de certeza para cada medida adotada no curso do processo se modifica, sendo certo que a sentença penal condenatória exige o nível máximo de certeza, enquanto o recebimento da denúncia demanda um nível mais baixo, em relação à ocorrência do crime e sua autoria. [22]

1.4. *O controle racional da decisão de recebimento da denúncia*

A fixação de um *standard* de prova, como se viu, deriva da política criminal.[23] Ainda que não haja a definição normativa de critérios de

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[21] Não menos desarrazoadas são as decisões de recebimento da denúncia fundamentadas no imaginário princípio do *in dubio pro societatis* (STF, HC 93341, Segunda Turma, Rel. Min. Joaquim Barbosa, DJ 06/02/2009). O argumento de que o interesse da sociedade reside na elucidação do caso pelo prosseguimento do processo pode até ser sedutor dentro de uma perspectiva utilitarista, porém, desconsidera o fim máximo de proteção do indivíduo inerente aos Estados de Direito, nos quais o interesse da sociedade reside justamente na impossibilidade de se submeter a uma acusação infundada. Na mesma linha, "a incompreensão a respeito da distribuição da carga probatória nestas fases processuais e o grau de convicção pelo juízo diante do estado inicial de incerteza levam à infeliz confusão a respeito do conteúdo da presunção de inocência no processo, abrindo margem para a criação da estranha figura do "princípio" *in dubio pro societate*" (LUCCHESI, 2019, p. 169).

[22] É indispensável, portanto, que o grau de exigência probatória seja distinto para cada fase do processo. Afinal, "*de otro modo, las decisiones intermedias no serían más que uma anticipación de la decisión final, haciendo inútil todo el procedimento subsiguiente*" (FERRER BELTRÁN, 2018, p. 415).

[23] Não se desconsidera a dificuldade inerente à construção de um *standard* de prova. Alguns países, mesmo alheios à tradição do *common law*, quando procuraram legislar sobre o tema, adotaram a terminologia norte-americana do

suficiência probatória, é inequívoca a escolha constitucional pela preservação do estado de inocência, o que se reflete na distribuição da carga da prova, verificada ao longo da instrução e não apenas no julgamento de mérito (LUCCHESI, 2019, p. 179). No recebimento da denúncia, portanto, assim como em toda a marcha processual, o *standard* probatório deve ter como base a presunção de inocência, sendo a dúvida quanto à legitimidade da persecução criminal resolvida por meio do único critério objetivo de solução da incerteza presente no processo penal brasileiro, qual seja: o *in dubio pro reo*.[24]

Este é um importante critério jurídico de decisão que dá ao magistrado a possibilidade de decidir mesmo diante de uma lacuna cognitiva (GUZMÁN, 2020, p. 56/57), mas que não se confunde com o *standard* de prova, já que o *in dubio pro reo* não estabelece quando pode ser superado esse estado de dúvida (VASCONCELLOS, 2020, p. 7). Embora a doutrina tenha se dedicado mais recentemente a debater a fixação de um *standard* de prova adequado à condenação, neste ensaio, interessa refletir sobre o nível de corroboração suficiente para o recebimento da denúncia.

A decisão que dá início formal ao processo reclama, por imposição lógica e constitucional, sua devida motivação.[25] Não se trata de mero despacho, mas sim de uma mudança no status processual do acusado. A rigor, com a força hipertrofiada da investigação preliminar, promove-se muitas vezes uma verdadeira disfuncionalidade no processo penal, fazendo o próprio resultado do julgamento se diluir frente ao impacto estigmatizante causado pelos primeiros passos da ação penal

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beyond a reasonable doubt. Sobre a possibilidade de adoção do *beyond a reasonable doubt* no ordenamento brasileiro, a partir de critérios lógicos e racionais, ver: VASCONCELLOS (2020). Em oposição, para uma crítica à importação de tal modelo no Brasil, ver: BADARÓ (2019, p. 253/254) e MATIDA; VIEIRA (2019).

[24] Assim, "em todos os instantes de dúvida fática judicial o "*in dubio pro reo*" deverá ser obedecido como manifestação da presunção de inocência" (ZANOIDE DE MORAES, 2010, p. 418).

[25] Art. 93, IX da CRFB e, reforçando ainda mais a necessidade de motivação das decisões judiciais, a Lei 13.964/2019 introduziu no CPP o art. 315 § 2º. Para uma análise da resposta (inadequada) do Superior Tribunal de Justiça à exigência constitucional de motivação no juízo de admissibilidade da denúncia, ver: ANDRADE; SANTIAGO; CAMINHA (2021).

(ZILLI, 2016, p. 148/149). A motivação consiste, na verdade, no mais significativo instrumento jurídico de racionalização da função judicial, operando não como uma exigência técnica da decisão, mas, sobretudo, como fundamento de legitimidade da atuação estatal (GASCÓN ABELLÁN, 2010, p. 170/171).

O objetivo central da fixação de *standards* de prova ao longo do processo reside justamente na possibilidade de exercer um controle intersubjetivo[26] dessas decisões, de modo a afastar o subjetivismo judicial e aumentar a qualidade epistemológica das decisões não terminativas. O recebimento da denúncia constitui verdadeiro ato decisório, com graves repercussões para esfera pessoal. Logo, como forma de garantir coerência e legitimidade a esse ato, é importante uma releitura do conceito de justa causa,[27] estabelecendo-se critérios objetivos a partir dos quais é possível constatar a "prova da materialidade e os indícios suficientes de autoria". [28]

2. Estudo do crime de lavagem de capitais

2.1. O combate à lavagem de dinheiro e a estrutura típica do delito

No segundo item, o objetivo é aprofundar a análise da questão a partir do estudo do crime de lavagem de capitais. A natureza complexa deste tipo penal e as altas penas cominadas demandam rigor técnico na

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[26] Nesse ponto, destaca-se que "nos ordenamentos de *civil law*, por outro lado, o controle da racionalidade da decisão se realizaria *ex post* mediante o controle da motivação" (FERRER BELTRÁN, 2021, p. 66).

[27] Em razão das limitações de espaço, optou-se, neste artigo, por não aprofundar as discussões relativas ao conceito de justa causa para ação penal, bastando reforçar que "se o que está em análise é uma "justa" causa para a existência de uma "ação penal", nada mais certeiro do que identificar no instituto um mecanismo para um bloqueio crítico de demandas sem "justificativa" ou para as quais não haja um critério de "justiça" em sua existência ou prosseguimento" (DIVAN, 2015, p. 483).

[28] Embora existam opiniões divergentes na doutrina, essa é a posição que concordamos no sentido de que "não há justa causa para a ação penal se não se tem certeza da ocorrência de um crime. Sem a certeza do crime a ação penal seria injusta e desnecessária" (BADARÓ, 2013. p. 411/412).

descrição da conduta e na demonstração da justa causa, a fim de possibilitar o regular exercício do direito de defesa.[29] A relevância do direito de defesa, nesse contexto, eleva-o à condição de garantia ao redor da qual todo o processo gravita (FERNANDES, 2000, p. 254), superando a concepção de defesa como mero direito subjetivo do acusado.

Com base no exposto até aqui, no crime de lavagem, não basta que o acusador descreva a conduta praticada pelo agente, mas também é necessário que a peça inaugural demonstre, com menor grau de corroboração, como a conduta foi capaz de "ocultar ou dissimular a natureza, origem, localização, disposição, movimentação ou propriedade de bens, direitos ou valores provenientes, direta ou indiretamente, de infração penal".[30] De igual forma, não é suficiente que a acusação repita os elementos normativos do tipo, sem especificar como estes se manifestaram no plano da realidade, pois, neste caso, haveria a descrição do fato penal, sem individualizar a atuação dos sujeitos, descrição insuficiente para oportunizar o legítimo exercício do direito de defesa e a consequente realização da jurisdição. [31]

No cenário internacional, o combate à lavagem de dinheiro ganhou força a partir da década de 80, com o crescimento e a sofisticação do narcotráfico. Percebeu-se, na época, a relevância de enfrentar o poderio dessas organizações por meio da identificação e do bloqueio de seus fluxos financeiros. A partir de então, foram aprovadas diversas convenções

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[29] Nessa linha, constata-se que "o crime de lavagem de dinheiro, ao visar ocultar, dissimular a origem ilícita de dinheiro, bem ou valor, é praticado muitas vezes, a partir de muitas ações, porque quanto mais ações, mais difícil a persecução e mais difícil se chegar à origem do bem". Por conseguinte, "em nome da persecução penal e da sua urgência (seja pelo caráter sociológico da noção de risco seja pela celeridade processual), a denúncia passa a ser oferecida mesmo sem elementos suficientes para o exercício de defesa" (BONACCORSI, 2017. p. 240).

[30] Artigo 1º, *caput* da Lei 9.613/98.

[31] Remarque-se, a propósito, que a garantia do direito de defesa supera os limites de uma ótica subjetiva, que a constitui unicamente como direito do acusado. Aqui, "adquire relevância o perfil objetivo da defesa, como ofício essencialmente social: defesa, portanto, como condição de regularidade do procedimento, na ótica do interesse público à atuação do contraditório, defesa, em última análise, legitimante da própria jurisdição" (FERNANDES, 2000, p. 253/254).

sobre o tema – Convenção de Viena (1988), Convenção de Palermo (2000) e Convenção de Mérida (2003), além da criação do Grupo de Ação Financeira contra Lavagem de Dinheiro e Financiamento ao Terrorismo (1989) –, com o fim de impedir que esses grupos *reciclassem* o dinheiro de origem criminosa.

No ordenamento brasileiro, a Lei 12.683/2012, ao alterar diversos dispositivos da Lei 9.613/98, representou importante marco no combate à lavagem de dinheiro. A principal mudança foi a extinção do rol de crimes antecedentes, o qual era taxativo (legislação de segunda geração). Hoje, no Brasil, qualquer infração penal pode ser considerada antecedente para fins de lavagem[32] (legislação de terceira geração).[33] Para tanto, basta que a peça acusatória aponte indícios de uma infração penal antecedente que gerou recursos, sendo dispensável a demonstração, de antes da reforma legislativa,[34] de que tal infração constituiu alguma das puníveis no antigo rol de crimes antecedentes.

O crime de lavagem de capitais pressupõe a prática de uma infração penal antecedente, da qual se extraem bens, direitos ou valores,[35] os quais serão introduzidos na economia formal, como forma de ocultar/dissimular sua origem ilícita. Afinal, se o dinheiro não é *sujo*, não se cogita a possibilidade de *lavá-lo*. O injusto possui, então, uma acessoriedade material (PITOMBO, 2003, p. 109/110) em relação a um crime que já ocorreu e já produziu seus efeitos – obrigatoriamente financeiros. Nesse ponto, surge o primeiro elemento constitutivo do crime de lavagem de capitais: o delito antecedente.

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[32] Questão relevante diz respeito à violação do princípio da proporcionalidade ao se permitir que uma contravenção penal constitua infração penal antecedente para fins de lavagem. Ver: TAVARES; MARTINS (2020. p. 132/133).

[33] Sobre as gerações legislativas do crime de lavagem, ver: MACHADO (2015, p. 34/43).

[34] Nesse sentido, "tendo o crime sido praticado antes da alteração legislativa [Lei 12.683/2012], a denúncia teve o cuidado de imputar ao paciente a conduta conforme previsão legal à época dos fatos". STJ, HC 276.245/MG, Quinta Turma, Rel. Min. Reynaldo Soares da Fonseca, julgado em 13/06/2017.

[35] "Com a inclusão de direitos e valores, o tipo penal da lavagem diferencia-se da receptação (art. 180 CP), constituindo um tipo complementar a esta" (TAVARES; MARTINS, 2020, p. 112).

Embora não seja necessário um processo autônomo referente ao crime antecedente,[36] será indispensável a certeza de sua ocorrência e de que tal conduta rendeu produto financeiro, capaz de ser ocultado, dissimulado e, posteriormente, reinserido na economia, dando aparência de licitude. Assim, os elementos concretos que caracterizam a infração antecedente devem ser descritos com todas as suas circunstâncias (BADARÓ; BOTTINI, 2016, p. 324).

O segundo componente essencial do crime de lavagem de capitais traduz-se no núcleo da ação típica (na modalidade do art. 1º, *caput* da Lei nº. 9.613/98)[37], composto pelos verbos *ocultar* e *dissimular*. Aqui, vale recordar que uma imputação hígida demanda mais do que a mera repetição dos termos da lei (BADARÓ; BOTTINI, 2016, p. 323), pois estes se referem ao fato penal. É crucial que a acusação demonstre como tais ações típicas se manifestaram no plano da realidade (fato processual penal), permitindo a vinculação do fato processual ao fato penal. Delimita-se, desta forma, o enunciado fático (objeto de prova) que será refutado ao longo do processo pela defesa técnica.

O terceiro elemento que compõe a estrutura básica do delito em estudo consiste na relação de causalidade entre o crime antecedente e as ações de ocultação e de dissimulação. Evidente que a condenação pelo ilícito demanda que o conhecimento produzido dialeticamente durante o processo comprove não só a existência de uma infração penal antecedente, como também o nexo de causalidade entre os valores auferidos ilicitamente e as ações de ocultação/dissimulação. Na prática, definir esta relação não é tarefa fácil, já que, em regra, é difícil diferenciar precisamente os valores

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[36] Artigo 2º, inciso II, da Lei 9.613/98.

[37] É certo que a Lei nº. 9.613/98 prevê outras formas de execução para o crime de lavagem de capitais, a saber: conversão em ativos lícitos (art. 1º, § 1º, I); condutas assemelhadas à receptação (art. 1º, § 1º, II); superfaturamento/subfaturamento de importação e exportação (art. 1º, § 1º, III); utilização de valores espúrios em atividade econômica ou financeira (art. 1º, § 2º, I) e participação em grupo dirigido à prática de lavagem (art. 1º, § 2º, II). Contudo, para os fins deste trabalho, limita-se o estudo ao tipo legal previsto no *caput*, pois, além de ser o mais corriqueiro, dentro de uma interpretação sistemática do texto normativo, este necessariamente se harmoniza com os outros dispositivos.

ilícitos dos valores lícitos.[38] Todavia, a dificuldade no terreno da prova, marcante nos delitos econômicos, recomenda, com ainda maior razão, a preservação de um modelo ideal de processo concebido como entidade epistêmica (PRADO, 2015, Introdução), apto a sedimentar as balizas do sistema acusatório, elevando os níveis de conhecimento produzido por meio do contraditório.

O último componente da conduta típica é o dolo direcionado à ocultação e dissimulação dos valores de origem criminosa. O delito é necessariamente doloso, não havendo hipótese de responsabilização por culpa.[39] A rigor, deve haver por parte do sujeito ativo a consciência da origem ilícita dos valores,[40] além da intenção voltada à prática das ações contidas no núcleo do tipo.

2.2. O standard de prova e a denúncia na Lei nº. 9.613/98

Com relação ao exercício da ação penal, o artigo 2º, §1º da Lei de Lavagem[41] estabelece o conteúdo específico da justa causa para este delito. A primeira parte do dispositivo dispõe serem necessários indícios da infração antecedente que gerou recursos para legitimar o exercício da ação pelo órgão ministerial. O termo "indícios" não se refere à prova indireta. Neste caso, "indícios" representa uma prova mais tênue (BADARÓ;

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[38] Questão especialmente complexa no crime de lavagem refere-se à mescla do capital ilícito com o lícito. Para uma breve análise das teorias acerca do tema, ver: BADARÓ; BOTTINI (2016, p. 111/115) e TAVARES; MARTINS (2020, p. 114/116).

[39] Há, no entanto, discussão doutrinária a respeito da aplicação do dolo eventual e da teoria da cegueira deliberada. Sobre o tema, ver: LUCCHESI (2018).

[40] De igual forma, no ordenamento espanhol, "*el sujeto que blanquea (art. 301.2) o pretende blanquear (art. 301.1) lo ha de hacer "sabiendo" que el origen de los bienes es delictivo. No para ahí el dolo: el sujeto activo debe saber eso y debe saber también que oculta o encubre ese origen*" (MARTIN et al. 2018, p. 515).

[41] "Art. 2º (...) § 1º A denúncia será instruída com indícios suficientes da existência da infração penal antecedente, sendo puníveis os fatos previstos nesta Lei, ainda que desconhecido ou isento de pena o autor, ou extinta a punibilidade da infração penal antecedente".

BOTTINI 2016, p. 317).[42] Significa, na linha preconizada por este artigo, que se admite um rebaixamento do *standard* de prova para oferecimento da inicial acusatória, o que é natural, já que a certeza (em tese) só pode ser alcançada sob o crivo do contraditório judicial. Assim, justifica-se, em um primeiro momento, um mero juízo de probabilidade e não de certeza no que se refere ao delito antecedente (BADARÓ; BOTTINI, 2016, p. 318/319).

Remarque-se que os "indícios suficientes da existência da infração penal antecedente" relacionam-se tão somente com o nível de corroboração da tese acusatória para o oferecimento de denúncia, "devendo ser outro o comportamento em relação a eventual juízo condenatório" (Exposição de Motivos da Lei de Lavagem, item 61). O *standard*, a despeito de certa vagueza semântica,[43] estabelece a justa causa que possibilita o início de um processo de natureza criminal.

A segunda parte do dispositivo, por sua vez, indica ser desnecessária a constatação da autoria do delito antecedente para a denúncia por crime de lavagem de capitais. Logo, não é preciso aferir a culpabilidade quanto à infração antecedente – no que tange ao delito acessório, o de lavagem, o elemento subjetivo, todavia, permanece indispensável.

A justa causa para oferecimento de denúncia por crime de lavagem exige, pois, "indícios suficientes" da prática da lavagem e do

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[42] Em igual sentido, "a palavra 'indício' usada na Lei de Lavagem representa uma prova dotada de eficácia persuasiva atenuada (prova semiplena), não sendo apta, por si só, a estabelecer a verdade de um fato, ou seja, no momento do recebimento da denúncia, é necessário um início de prova que indique a probabilidade de que os bens, direitos ou valores ocultados sejam provenientes, direta ou indiretamente, de um dos crimes antecedentes". STF, HC 93368, Rel. Min. Luiz Fux, Primeira Turma, julgado em 09/08/2011. Por relevante, destaca-se, ainda, que "não é possível confundir-se o *indício* – sempre um dado objetivo, em qualquer das acepções acima referidas – com a simples suspeita, que não passa de um estado de ânimo – fenômeno subjetivo – que pode até possuir um valor heurístico, orientado a pesquisa sobre os fatos, mas que não tem aptidão para fundar o convencimento judicial" (GOMES FILHO, 2005, p. 311).

[43] É natural alguma margem de vagueza na formulação de um *standard* probatório. Nestes casos, como se viu, "faz-se necessária uma regra de segunda ordem, que estabeleça o que deve ser realizado no caso de dúvida sobre a satisfação do *standard*. E é aqui onde resultaria aplicável a presunção de inocência como *in dubio pro reo*" (FERRER BELTRÁN, 2018, p. 175).

crime antecedente que gerou recursos, configurando uma "justa causa duplicada".[44] Deste modo, é necessária a demonstração não apenas da forma de execução do branqueamento de capitais (com a caracterização de sua estrutura típica), mas também do lastro probatório mínimo a garantir a existência de bens, direitos e valores provenientes da infração penal antecedente.

Melhor entendimento, entretanto, sustenta que não há motivo justo para sujeitar um indivíduo às mazelas de um processo criminal[45] sem que haja certeza ao menos da existência de um fato contrário à ordem jurídica.[46] Se, após toda a investigação direcionada a colher elementos informativos aptos a corroborar a hipótese acusatória, não se tem certeza nem mesmo de que houve uma ação criminosa anterior que gerou valor econômico a ser lavado, não se atinge o *standard* mínimo a dar prosseguimento à acusação,[47] o que só revela a urgência na definição de um grau de "prova" adequado, tornando a submissão do sujeito ao processo criminal legítima e absolutamente necessária.

Não se diga, por último, que em razão do princípio da obrigatoriedade da ação penal pública haveria um dever indeclinável do órgão ministerial em oferecer denúncia, não obstante a fragilidade dos elementos informativos colhidos pela investigação. É evidente que não há uma imposição irracional no exercício da ação penal, sendo esta condicionada

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[44] STJ, RHC 106.107/BA. Quinta Turma, Rel. Min. Ribeiro Dantas, julgado em 25/07/2019.

[45] A deflagração de uma ação penal coloca em risco a liberdade do indivíduo e inicia um violento processo de estigmatização, pois "não se consegue afastar a imagem negativa formada em torno da pessoa acusada pelo simples fato da instauração do processo, imagem que cresce e se propaga pelos meios de comunicação" (FERNANDES, 2002, p. 29).

[46] Nesse sentido, "a ação somente poderá ser promovida se houver prova do fato e, pelo menos, suspeita de autoria" (TORNAGHI, 1988, p. 41).

[47] Nesse sentido: "não se revela admissível, em juízo, imputação penal destituída de base empírica idônea, ainda que a conduta descrita na peça acusatória possa ajustar-se, em tese, ao preceito primário de incriminação. Impõe-se, por isso mesmo, ao Poder Judiciário, rígido controle sobre a atividade persecutória do Estado, notadamente sobre a admissibilidade da acusação penal, em ordem a impedir que se instaure, contra qualquer acusado, injusta situação de coação processual". STF, Inquérito 1.9780, Rel. Min. Celso de Mello, Plenário, julgado em 13/09/2006.

a uma análise criteriosa dos elementos informativos produzidos pela investigação.[48]A obrigação de agir da acusação pública respalda-se em um processo de conhecimento e de reflexão a partir de uma notícia de crime, até porque pode culminar em pedido de arquivamento ou de absolvição (FERRAJOILI, 2010, p. 457) caso se considere o fato penalmente irrelevante ou faltem indícios de autoria ou de materialidade da infração.

2.3. O conteúdo descritivo da imputação no crime de lavagem de capitais

No tocante à descrição típica da conduta, "a exposição do fato criminoso, com todas as suas circunstâncias",[49] reclama uma narrativa concreta dos meios utilizados para o branqueamento dos valores. De nada adianta a acusação aferir a justa causa para o exercício da ação penal e não retratar de forma minuciosa os elementos que compõe a conduta delituosa. Na verdade, a exposição da conduta, com todos os seus elementos essenciais e circunstanciais,[50] condiciona o próprio âmbito temático da decisão judicial, pois o enunciado fático delimita o objeto que, submetido ao contraditório judicial,[51] empresta legitimidade jurídica à sentença penal.

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[48] Nessa linha, "se inexistentes elementos que recomendem o azo inicial à necessidade de um processo criminal, a ação não merece exercício nem guarida. Não há qualquer razoabilidade, fundamento, assento legal nem inteligência na malfadada e falsária equalização entre uma "obrigatoriedade" do exercício da ação penal e uma espécie de "compulsoriedade" acéfala e inquestionável para com o mesmo" (DIVAN, 2015, p. 488).

[49] Em referência ao artigo 41 do Código de Processo Penal, fundamental a "exposição minuciosa, não somente do fato infringente da lei, como também de todos os acontecimentos que o cercaram; não apenas de seus acidentes, mas ainda das causas, efeitos, condições, ocasião, antecedentes e consequentes" (TORNAGHI, 1988, p. 43).

[50] STF, HC 84.436/SP, Segunda Turma, Rel. Min. Celso de Mello, julgado em 05 de setembro de 2006. O ex-ministro, com precisão, sustenta que "a pessoa sob investigação penal tem o direito de não ser acusada com base em denúncia inepta".

[51] A propósito, destaca-se que "a estrutura contraditória, típica da apontada metodologia de exercício do poder, permitindo ao interessado a participação ativa nas atividades de preparação das decisões que possam afetá-lo, constitui o mais seguro antídoto contra o arbítrio estatal" (GOMES FILHO, 2001, p. 239).

Pela natureza acessória do crime de lavagem, é inequívoco o dever do Ministério Público de narrar a infração penal antecedente, sendo certo que a superveniência de sentença condenatória não poderá suprir as omissões fáticas da denúncia.[52] A descrição de como se deu o delito antecedente é ainda mais relevante, tendo em vista a regra de independência do processo e julgamento nos crimes de lavagem (artigo 2º, inciso II, da Lei 9.613/98). Isto porque o Estado-juiz do processo por lavagem pode precisar conhecer de questões incidentais, relativas à infração antecedente, a fim de formar seu convencimento, tais como: a data em que ela ocorreu[53] e se, de fato, foram gerados recursos a serem lavados (BADARÓ; BOTTINI, 2016, p. 324).

Há, desse modo, uma dependência necessária entre a prática de um delito prévio e o crime de lavagem de dinheiro.[54] Malgrado o processo por lavagem possa ser instaurado de forma autônoma, constitui ônus da acusação demonstrar o elo de causalidade entre os dois ilícitos, já que tal relação "não pode ser presumida, sob pena de ofensa ao princípio da presunção de inocência" (BORGES, 2021, p. 171).

A imputação no crime de lavagem de capitais, além de evidenciar em concreto como ocorreram os atos de ocultação/dissimulação, demanda a descrição do delito antecedente e da relação de causalidade entre o produto gerado por este e os atos posteriores que configurariam o núcleo da conduta criminosa. Embora a exigência da comprovação empírica de tais aspectos seja evidentemente menor do que em uma sentença condenatória, sem essa definição, não é possível vincular o acontecimento histórico (fato processual) à norma penal prevista na

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52 O processo penal acusatório, regido pela separação funcional das posições de acusar e julgar, impede a atuação do julgador para suprir lacunas deixadas pela acusação. Ver: STF, HC 132.179/SP. Segunda Turma. Rel. Min. Dias Toffoli, julgado em 26/07/2017.

53 Até para estabelecer uma relação lógica de antecedência entre a obtenção dos bens, direitos e valores e os atos posteriores de ocultação e dissimulação.

54 "*La comisión de ese delito previo constituye el pressupuesto indispensable que sirve de nexo con el objeto sobre el que van recaer las conductas constitutivas de blanqueo de bienes. De no existir ese nexo, no podrá haber objeto material idóneo para cometer el delito de blanqueo de bienes*" (CARPIO DELGADO, 1997, p. 284).

Lei de Lavagem (fato penal). Tal vinculação, entretanto, carece de uma exposição ainda mais detalhada.

No que se refere ao produto da infração penal antecedente, indaga-se: a imputação deve necessariamente individualizar este produto? Para responder ao questionamento, é indispensável uma avaliação sistemática da Lei nº. 9.613/98. Neste ponto, a legislação assegura que os bens passíveis de lavagem são os provenientes, "direta ou indiretamente, de infração penal" (artigo 1º, *caput*).[55] Somente o produto ou proveito do crime é suscetível de ser lavado (BADARÓ; BOTTINI, p. 110). Não há sentido falar em lavagem se não ficar claro quais os bens, direitos e valores provenientes de uma infração antecedente foram posteriormente ocultados/dissimulados e reinseridos na economia formal.

Seguindo a análise do texto legal, veja-se que a condenação penal definitiva pelo crime de lavagem produz consequências secundárias, que poderão repercutir nas esferas civil e administrativa. Ao tratar dos efeitos desta condenação, o artigo 7º, inciso I, prevê a perda, em favor do Erário, "de todos os bens, direitos e valores relacionados, direta ou indiretamente, à prática dos crimes previstos nesta Lei".[56] Diante de tal previsão, fica evidente a necessidade de se explicitar o produto da lavagem, como meio de delimitar a incidência da norma. Afinal, como proceder com o perdimento de valores, se não se identifica quais valores seriam esses?

A considerar que a existência de parte maculada do patrimônio não contamina sua integralidade (BADARÓ; BOTTINI, 2016, p. 114), resta clara a imposição lógica de se indicar o produto do crime antecedente. Do contrário, o artigo 7º, inciso I, teria uma aplicação muito ampla e indiscriminada, inviabilizando o exercício da defesa. A denúncia, como se viu, delimita todo o conteúdo que será submetido ao contraditório judicial e, por isso, deve conter a individualização do produto da infração

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[55] Em igual sentido, artigo 2º, e, Convenção de Mérida (Decreto 5.687/06): "Por "produto de delito" se entenderá os bens de qualquer índole derivados ou obtidos direta ou indiretamente da ocorrência de um delito;".

[56] Na verdade, tal previsão se harmoniza com os efeitos genéricos da condenação, previstos no Código Penal: "art. 91 - São efeitos da condenação: (...) II - a perda em favor da União, ressalvado o direito do lesado ou de terceiro de boa-fé: (...) b) do produto do crime ou de qualquer bem ou valor que constitua proveito auferido pelo agente com a prática do fato criminoso."

antecedente, sob pena de rejeição por inépcia – artigo 395, inciso I, do Código de Processo Penal.

A defesa exercerá seu múnus constitucional a partir dos estreitos limites estabelecidos pelo conteúdo da imputação contido na inicial. Se essa imputação não aponta, em um *standard* mínimo, o produto da infração penal antecedente, torna-se inviável não só a fixação da necessária relação de causalidade dos bens, direitos e valores lavados com o delito antecedente, mas também não se demarca o possível efeito civil da condenação por lavagem, de forma que o artigo 7º, inciso I, da Lei nº. 9.613/98 perde a eficácia.

O último componente a ser descrito na inicial consiste no dolo direcionado a ocultar ou dissimular os valores ilícitos.[57] Antes da edição da Lei nº. 12.683/2012, o rol taxativo de crimes antecedentes repercutia no aspecto subjetivo do tipo, exigindo do órgão ministerial indícios da prática de um dos crimes pressupostos e ainda da consciência do autor desta proveniência ilícita (TIGRE MAIA, 1999, p. 86). Hoje, qualquer infração penal pode ser considerada antecedente da prática de lavagem,[58] o que não exclui a demonstração do dolo nas ações destinadas a ocultar/dissimular a origem espúria dos bens, direitos e valores. [59]

O elemento subjetivo deve indicar a finalidade específica de dar aparência lícita aos valores oriundos da infração penal antecedente. Nestes termos, a simples intenção de esconder tais valores configuraria

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[57] Sobre o tema: "Imprescindível seria à denúncia indicar o dolo e condutas de escondimento ou dissimulação da prévia corrupção imputada, como apontado pela Corte local, de modo que a ausência dessas condições torna impossível manter a persecução criminal por lavagem de capitais". STJ, REsp 1.746.470/DF. Sexta Turma. Rel. Min. Nefi Cordeiro, julgado em 27/11/2018.

[58] Assim também estabelece a Convenção de Palermo (Decreto 5.015 de 2004) ao prever que o crime de lavagem resulta da "*mais ampla gama possível de infrações principais*" (artigo 6, 2, a).

[59] Como explicitado, a configuração típica do crime de lavagem exige a demonstração da vontade direcionada à prática dos verbos nucleares (ocultar e dissimular), e do conhecimento sobre a origem espúria dos valores. A propósito, "(...) necessário, isto sim, que o sujeito ativo do delito de lavagem de dinheiro tenha inteira ciência quanto aos elementos do tipo, aí incluído o conhecimento quanto à origem criminosa dos bens ou valores". STJ, HC 88.791/SP, Rel. Min. Félix Fischer, Quinta Turma, DJe 10/11/2008.

fato atípico,[60] pois trata-se de mero exaurimento da conduta anterior, isto é, um pós-fato impunível. A despeito de não ser obrigatória, para o recebimento da denúncia ou para a condenação, a completa realização das três fases da lavagem,[61] com a consequente reintrodução dos valores na economia formal, faz-se necessária, na imputação ministerial, a descrição de um estratagema específico capaz de conformar o acontecimento histórico à norma penal. [62]

Em síntese, uma imputação hígida por lavagem de capitais, para possibilitar o seu regular recebimento pelo Juízo competente, deve descrever: *i)* a infração penal antecedente que gerou recursos; *ii)* a relação de causalidade desta com as ações de ocultação/dissimulação; *iii)* a individualização do produto da infração antecedente e *iv)* o elemento subjetivo do tipo (dolo), com a exposição em concreto dos atos de ocultação e dissimulação dos bens, direitos e valores. Havendo esta descrição, em um *standard* adequado de corroboração da hipótese acusatória, será necessária e legítima a submissão do indivíduo, protegido pela presunção de inocência, a um processo criminal, com a incidência do contraditório judicial, como mecanismo apto a comprovar empiricamente sua culpabilidade.

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60 "Ora, o esconder o dinheiro, mesmo comprovadamente lícito, é diferente do esconder, dissipar ou ocultar a natureza, a origem ilícita do dinheiro. A ideia da lavagem de dinheiro e do seu combate é que aquele que pretende lavar o dinheiro o faz para dar aparência lícita a algo obtido ilicitamente". Voto do Min. Alexandre de Moraes. STF, Inq 3.515/SP. Primeira Turma. Rel. Min. Marco Aurélio, julgado em 08/10/2019.

61 "A doutrina majoritária e os principais órgão reguladores do tema destacam serem três as fases: colocação ou ocultação, estratificação ou escurecimento e integração ou lavagem propriamente dita. (...) as fases são teoricamente divididas para fins de estudo, mas na prática não ocorrem necessariamente de forma separada, ou podem ocorrer concomitantemente" (CALLEGARI; WEBER, 2017, p. 27/37).

62 Sobre o tema, manifestou-se o Ministro Cezar Peluso: "creio não se deva confundir o ato de 'ocultar' e 'dissimular' a natureza ilícita dos recursos, presente no tipo penal de lavagem de dinheiro, e o que a doutrina especializada descreve como estratagemas comumente adotados para que o produto do crime antecedente — já obtido — seja progressivamente reintroduzido na economia, agora sob aparência de licitude, com os atos tendentes a evitar-lhe o confisco ainda durante o iter criminis do delito antecedente, em outras palavras, para garantir a própria obtenção do resultado do delito" STF, AP 470/DF. Rel. Min. Joaquim Barbosa, julgado em 29/08/2012. Acórdão disponível em: https://www.conjur.com.br/dl/ap470.pdf . Acesso em 07 de março de 2021.

Considerações finais

Diante do exposto neste artigo, é preciso retomar os problemas que orientaram o seu desenvolvimento: 1) Qual é a importância do enunciado fático contido na inicial? 2) Como este enunciado deve ser descrito, a fim de possibilitar o exercício do direito de defesa? 3) Qual é a relevância da fixação de *standards* de prova ao longo da persecução penal? 4) Como garantir maior racionalidade da decisão de recebimento da denúncia?

1. Como se viu, o direito de defesa se estrutura a partir dos limites estabelecidos pelo conteúdo da imputação. Assim, o enunciado fático descrito na inicial adquire enorme relevância ao delimitar o objeto que, submetido ao contraditório judicial, empresta legitimidade jurídica à sentença penal. A exposição da conduta, por conseguinte, condiciona o próprio âmbito temático da decisão sobre os fatos.
2. Não é possível se defender de fatos indeterminados. Neste artigo, demonstrou-se que a imputação deve atender a parâmetros rígidos, de modo que o conhecimento integral permita ao sujeito reagir de forma efetiva. O órgão acusador precisa, por dever de ofício, especificar o vínculo descritivo entre o fato processual (acontecimento histórico) e o fato penal (norma em abstrato), impedindo a nunca abandonada tentação autoritária de recorrer a práticas ilegais para obter uma punição. Para tanto, o estudo do crime de lavagem é fundamental, já que reclama uma descrição complexa das operações, como forma de possibilitar o exercício da defesa.
3. O processo penal adota um sistema escalonado, de modo que cada etapa da marcha processual proporciona um juízo de valor a respeito do cometimento do crime investigado. As decisões interlocutórias também causam impactos na vida e na liberdade dos indivíduos, sendo necessário estabelecer diferentes graus de suficiência probatória ao longo do processo. A imputação por lavagem de capitais possui consequências não só de natureza penal, mas também civil e administrativa e, por isso, é indispensável a definição de critérios racionais para cada decisão.

4. É inequívoco o dever de motivação das decisões judiciais. A fundamentação não representa apenas uma exigência técnica dos atos judiciais, mas, sobretudo, uma garantia de racionalidade, capaz de conferir legitimidade à atuação estatal. Dada a relevância da decisão que submete o indivíduo ao processo criminal, esta precisa ser intersubjetivamente controlável. Nesse contexto, por fim, propõe-se uma alteração legislativa simples, mas capaz de garantir maior controle da decisão de recebimento da denúncia. Sugere-se, portanto, a incorporação, em um dos incisos do art. 581 do CPP, do cabimento de Recurso em Sentido Estrito contra a decisão que recebe a denúncia.[63] Tal medida proporcionaria maior equilíbrio na dialética processual e, ainda, evitaria a proliferação de *habeas corpus* visando ao trancamento da ação penal.

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[63] Recorde-se, pois oportuno, que a decisão que não recebe a denúncia ou queixa já é passível de impugnação por meio do mesmo recurso (art. 581, I do CPP).

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Medidas cautelares

Preventive measures

Encarceramento provisório na pandemia do coronavírus (Sars-CoV-2) na jurisprudência do Superior Tribunal de Justiça: prisão preventiva como *ultima ratio*?

Pre-trial incarceration in the coronavirus pandemic (Sars-CoV-2) in the jurisprudence of the Superior Tribunal de Justiça: preventive detention as the ultima ratio?

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Resumo: Considerando-se o contexto pandêmico e a necessidade de adoção de políticas de enfrentamento à disseminação do coronavírus no cárcere, o Conselho Nacional de Justiça editou a Recomendação nº 62/2020. Entre as medidas ali descritas, está a recomendação aos/às magistrados/as que observem, com maior rigor, a excepcionalidade da prisão preventiva. Diante de tal quadro, o presente estudo visa analisar a aplicação de tal recomendação pelo Poder Judiciário neste contexto pandêmico. Para tanto, são analisadas decisões proferidas pelo Superior Tribunal de Justiça, no período de 01.01.2021 a 01.07.2021, visando-se responder à seguinte pergunta: nos tempos pandemia, a prisão preventiva tem sido tratada como *ultima ratio* pelo STJ? Diante dos dados apresentados pela pesquisa empírica aqui trazida, conclui-se que, na realidade, a política carcerária proposta pelo CNJ não tem sido

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observada, tendo sido verificada sua relativização por tal Tribunal Superior até mesmo nos casos em que, em tese, caberia a aplicação de medidas cautelares menos gravosas.

Palavras-Chave: prisão preventiva; pandemia; excepcionalidade.

Abstract: *Considering the pandemic context and the need to adopt policies to fight the dissemination of the coronavirus in prison, the National Council of Justice issued Recommendation No. 62/2020. Among the measures described there, there is the recommendation to magistrates to observe, with greater rigor, the exceptionality of preventive detention. Given this situation, this study aims to analyze the application of such a recommendation by the Judiciary in this pandemic context. Therefore, decisions issued by the Superior Court of Justice, from 01.01.2021 to 07.01.2021, are analyzed in order to answer the following question: in times of pandemic, has preventive detention been treated as an ultima ratio by the STJ? In view of the data presents by this empirical research, it is concluded that, in reality, the prison policy proposed by the CNJ has not been observed, having been verified its relativization by this Superior Court even in cases where, in theory, it would be enough the application of less burdensome precautionary measures.*

Keywords: *preventive detention; pandemic; exceptionality.*

Sumário: Introdução; 1. Da declaração do estado inconstitucional de coisas do sistema prisional brasileiro e a necessidade da mudança da política carcerária frente à pandemia do coronavírus; 2. Da excepcionalidade para decretação da prisão preventiva; 3. Do reforço à excepcionalidade da prisão preventiva na Recomendação nº 62/2020 do Conselho Nacional de Justiça durante a pandemia do SARS-CoV-2; 4. Da aplicação da Recomendação nº 62 do Conselho Nacional de Justiça na jurisprudência do Superior Tribunal de Justiça; Considerações Finais; Referências.

Introdução

Como se sabe, o sistema prisional brasileiro é marcado por uma intensa crise há décadas. Para além do hiperencarceramento, o sistema apresenta péssimas condições físicas e estruturais, as quais são incapazes

de garantir o mínimo de dignidade às pessoas privadas de liberdade. A gravidade das questões que circundam o cárcere levou, inclusive, o Supremo Tribunal Federal a declará-lo como "estado de coisas inconstitucional" na ADPF nº 347. Diante de tal quadro, o Conselho Nacional de Justiça, em razão do contexto pandêmico que assola nossa sociedade, reconheceu a precariedade de nosso sistema prisional para seu enfrentamento, editando a Recomendação nº 62/2020.

Pode-se dizer, assim, que a Recomendação nº 62/2020 do CNJ é oriunda de política carcerária com vistas à colaboração do Poder Judiciário no que tange ao enfrentamento da pandemia nos sistemas prisionais. Dentre as medidas ali descritas, foram propostas recomendações aos magistrados da fase de conhecimento para que observassem a excepcionalidade da prisão preventiva, devendo esta ser decretada somente em casos pontuais a fim de evitar o encarceramento em massa no contexto no qual o isolamento social é medida de rigor para evitar a propagação do vírus. O ato normativo em epígrafe, portanto, pretendeu reforçar à excepcionalidade da prisão preventiva, já prevista no art. 5º, inciso LXVI, da Constituição da República, bem como nos artigos 282, §6º (redação dada pela Lei nº 13.964/2019) e 310, inciso II, do Código de Processo Penal (redação conferida pela Lei nº 12.403/2011).

Nessa esteira, considerando a importância do papel do Poder Judiciário no enfrentamento da pandemia no sistema prisional, no que tange à necessidade de redução da propagação do coronavírus, por meio da observância do princípio da excepcionalidade da prisão preventiva, o presente estudo tem como principal objetivo responder à seguinte questão: *como a excepcionalidade da prisão preventiva vem sendo tratada pelo Poder Judiciário no período de pandemia?* Para tanto, será realizada pesquisa empírica tendo como escopo a análise de decisões proferidas pelo Superior Tribunal de Justiça, tendo em vista sua relevância constitucional no que tange à uniformização da jurisprudência nacional, verificando-se a aplicação (ou não) das medidas previstas na Recomendação nº 62/2020 do Conselho Nacional de Justiça.

O presente artigo, assim, será dividido em quatro partes: (i) no primeiro capítulo, discorrer-se-á sobre dados da crise do sistema prisional brasileiro e a declaração do estado inconstitucional de coisas pelo STF; (ii) no segundo capítulo, serão abordados alguns aspectos dogmáticos

sobre a prisão cautelar, em especial, o princípio da excepcionalidade; (iii) no terceiro capítulo, discorrer-se-á sobre os fundamentos e a edição da Recomendação nº 62/2020 do CNJ e (iv) no quarto capítulo, serão apresentados os resultados da pesquisa empírica acerca da jurisprudência do Superior Tribunal de Justiça.

1. Da declaração do estado inconstitucional de coisas do sistema prisional brasileiro e a necessidade da mudança da política carcerária frente à pandemia do coronavírus

A crise do sistema prisional brasileiro é notória. A superpopulação carcerária somada à precariedade de condições físicas e estruturais para garantia de um mínimo de dignidade à pessoa presa corresponde à problema já amplamente difundido em estudos acadêmicos, na mídia e em pesquisas estatísticas sobre o cárcere no âmbito nacional[2]. Nas últimas décadas, tem-se notado um excessivo crescimento do encarceramento no sistema prisional pátrio. De se ressaltar, assim, que, conforme dados fornecidos pelo relatório do INFOPEN de junho de 2016, no período de 1990 a 2016, houve aumento de 707% na população prisional brasileira. No ano de 2020, o vultuoso número de pessoas presas no nosso sistema penitenciário levou o Brasil a ocupar, por mais uma vez, o terceiro lugar entre os países que mais encarceram. Segundo dados estatísticos do *World Prision Population List,* publicado em 02 de abril de 2020, no ano de 2019, o Brasil, com a enorme população de 690.000 presos, somente estava atrás da China, com 1,65 milhões de pessoas presas e dos Estados Unidos, com

[2] Nesse sentido, ver: MALAN, Diogo. Prisão processual: limites no sistema interamericano de direitos humanos. In: FERNANDES, Márcia Adriana; PEDRINHA, Roberta Duboc (Org.). *Escritos transdisciplinares de criminologia, direito e processo penal:* homenagem aos mestres Vera Malaguti e Nilo Batista. Rio de Janeiro: Revan, 2014; SHIMIZU, Bruno. Sobre o cárcere, o judiciário e irresponsabilidades. *Boletim IBCCRIM*, São Paulo, v. 23, n. 274, p. 20-21, set. 2015; SANTORO, Antonio Eduardo Ramires; TAVARES, Natália Lucero Frias; GOMES, Jefferson de Carvalho Gomes. A perspectiva dinâmica da população provisoriamente encarcerada no contexto do superencarceramento brasileiro. *Boletim IBCCRIM*, São Paulo, v. 25, n. 300, p. 8-10, nov. 2017.

2,1 milhão de presos[3]. Conforme dados do Departamento Penitenciário Nacional, até junho de 2020, havia, no Brasil, 702.069 (setecentos e duas mil e sessenta e nove) pessoas privadas de liberdade[4]. De se destacar que entre tal montante, 29,81% da população prisional é formada por presos provisórios[5]. Inegável, assim, a significativa contribuição das prisões cautelares para a superlotação do sistema prisional.

Para além da questão do hiperencarceramento no sistema prisional brasileiro, este ainda enfrenta inúmeras mazelas relacionadas à precariedade de condições físicas e estruturais, tais como: condições insalubres das celas, falta de fornecimento de alimentação adequada às pessoas presas, ausência de assistência básica de saúde e precariedade de políticas educacionais e laborativas[6]. Em estudo publicado pelo Conselho Nacional de Justiça no ano de 2020, 25,7% dos presídios brasileiros apresentavam péssimas condições; 10,2% apresentavam condições ruins; 48,4% apresentavam condições regulares; 14,1% apresentavam condições boas e somente 1,6% apresentavam condições consideradas excelentes[7].

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3 INSTITUTE FOR CRIMINAL POLICY RESEARCH. World Prison Population List. Disponível em: <<www.prisonstudies.org%2Fsites%2Fdefault%2Ffiles%2Fresources%2Fdownloads%2Fwppl_12.pdf&clen=472035&chunk=-true>>. Acesso em: 22/03/2021.

4 BRASIL, DEPARTAMENTO PENITENCIÁRIO NACIONAL. *Presos em unidades prisionais no Brasil*. Disponível em: <https://app.powerbi.com/view?r=eyJrIjoiMjU3Y2RjNjctODQzMi00YTE4LWEwMDAtZDIzNWQ5YmIzMzk1IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9>. Acesso em 22/03/2021.

5 BRASIL, DEPARTAMENTO PENITENCIÁRIO NACIONAL. *Presos em unidades prisionais no Brasil*. Disponível em: << https://app.powerbi.com/view?r=eyJrIjoiMjU3Y2RjNjctODQzMi00YTE4LWEwMDAtZDIzNWQ5YmIzMzk1IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9>>. Acesso em: 22/03/2021.

6 SHIMIZU, Bruno. Sobre o cárcere, o judiciário e irresponsabilidades. *Boletim IBCCRIM*, São Paulo, v. 23, n. 274, p. 20-21, set. 2015; MALAN, Diogo. Prisão processual: limites no sistema interamericano de direitos humanos. In: FERNANDES, Márcia Adriana; PEDRINHA, Roberta Duboc (Org.). *Escritos transdisciplinares de criminologia, direito e processo penal:* homenagem aos mestres Vera Malaguti e Nilo Batista. Rio de Janeiro: Revan, 2014.

7 BRASIL. CONSELHO NACIONAL DE JUSTIÇA. Geopresídios. Disponível em: <<https://www.cnj.jus.br/inspecao_penal/mapa.php>>. Acesso em: 15/03/2021.

A crise do sistema nacional penitenciário gerada, sobretudo, pelo hiperencarceramento, levou o Supremo Tribunal Federal, sob inspiração de precedentes do Tribunal Constitucional Colombiano, a declará-lo como *estado inconstitucional de coisas*, na ADPF nº 347[8]. Nesse sentido, em seu voto, o Ministro Luís Roberto Barroso reconheceu a violação à dignidade da pessoa humana e à integridade física e moral dos presos. Além disso, ressaltou que não há no caso, como de praxe, na ADPF, a indicação de um ato específico do Poder Público, mas um conjunto de ações e de omissões notórias que fazem com que se tenha esse estado de generalizada inconstitucionalidade por falha estrutural do sistema. Dentre as medidas cautelares deferidas pelo Supremo Tribunal Federal na ADPF nº 347, estão algumas propostas de melhoria ao sistema carcerário, tais como a determinação à União que libere o saldo acumulado do Fundo Penitenciário Nacional para utilização com a finalidade para a qual foi criado, abstendo-se de realizar novos contingenciamentos e a determinação para que a União e Estados encaminhem ao Supremo Tribunal Federal informações sobre a situação prisional[9].

Diante dessa quadratura, considerando a crise do sistema prisional brasileiro, reconhecida, inclusive, pelo Supremo Tribunal Federal, o presente estudo visa analisar o tratamento conferido ao encarceramento provisório durante a pandemia do coronavírus (Sars-CoV-2) pelo Poder Judiciário. Isto porque, após a declaração do estado de emergência sanitária pela OMS, países do mundo todo passaram a adotar medidas para contenção da disseminação do novo vírus, adotando, inclusive políticas voltadas aos sistemas prisionais[10]. No Brasil, não foi diferente. O Conselho Nacional de Justiça, considerando o reconhecimento do estado de coisas inconstitucional do sistema penitenciário pelo Supremo Tribunal

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8 BRASIL. Supremo Tribunal Federal. ADPF 347. Rel. Min. Marco Aurélio. Plenário. Julgamento: 9.9.2015.

9 Os autos, ainda, conforme consulta no sítio eletrônico do Supremo Tribunal Federal, aguardam o julgamento pelo Pleno.

10 Nesse sentido, ver: HEARD, Catherine. Towards a health-informed approach to penal reform? *Evidence from ten countries. Institute for Criminal Policy Research, London*. Disponível em: <www.prisonstudies.org%2Fsites%2Fdefault%2Ffiles%2Fresources%2Fdownloads%2Ficpr_prison_health_report.pdf&clen=2462687&chunk=true>. Acesso em 20/07/2021.

Federal, na ADPF nº 347, e destacando a ausência de condições materiais e estruturais para o combate da disseminação do novo vírus entre as pessoas presas, editou a Recomendação nº 62/2020, como política carcerária para a contenção da pandemia dentro do sistema prisional. Dentre as medidas ali descritas, foram propostas recomendações aos/às magistrados/as de da fase de conhecimento para que observassem a excepcionalidade da prisão preventiva, devendo esta ser decretada somente em casos pontuais.

Assim, o presente estudo tem como principal objetivo responder à seguinte questão: como a excepcionalidade da prisão preventiva vem sendo tratada no contexto pandêmico? Para tanto, analisar-se-ão decisões do Superior Tribunal de Justiça, verificando-se a aplicação (ou não) das medidas previstas na Recomendação nº 62/2020 do Conselho Nacional de Justiça. Muito embora tal recomendação não tenha caráter cogente, correspondendo a um conjunto de orientações aos/às magistrados no contexto inédito de crise sanitária, trata-se de relevante ato normativo que veio a reforçar a observância do princípio da excepcionalidade. Assim, diante da crise já vivenciada pelo sistema prisional pátrio, entende-se inegável a relevância de tal recomendação como conjunto de diretrizes a compor uma política carcerária no contexto pandêmico. Imperiosa, assim, sua observância pelos magistrados/as.

2. Da excepcionalidade para decretação da prisão preventiva

2.1. Algumas notas sobre a coexistência da prisão preventiva e da presunção de inocência

Como se sabe, as medidas cautelares processuais penais visam assegurar que o resultado do processo seja eficiente[11]. Devem, assim, ser utilizadas excepcionalmente, ante a presença de risco à segurança

[11] TUCCI, Rogério Lauria; DELMANTO JUNIOR, Roberto. Sistematização das medidas cautelares processuais penais. *Revista do Advogado*, São Paulo, v. 24, n. 78, p. 111-122, set. 2004, p. 115.

da marcha processual e à aplicação da lei penal[12]. No que tange à prisão preventiva, medida cautelar que restringe a liberdade de ir e vir, de maneira mais drástica, somente poderá ser decretada quando eminentemente cautelar[13]. Sob tal ótica, para Antonio Magalhães Gomes Filho, a prisão preventiva somente poderá ser decretada quando encontrar justificação ante a garantia da presunção de inocência, ou seja, "na excepcionalidade de situações em que a liberdade do acusado possa comprometer o regular desenvolvimento e a eficácia da atividade processual"[14].

Com efeito, como regra de tratamento, a garantia da presunção de inocência veda qualquer forma de identificação do acusado como culpado[15]. Trata-se, assim, de aspecto que torna o princípio da dignidade

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[12] Nesse sentido, é o credenciado magistério de Antonio Magalhães Gomes Filho: "A cautelaridade constitui uma técnica processual destinada a superar os riscos inerentes à própria estrutura do processo; esta, ao estabelecer dilações para a correta averiguação da situação trazida ao conhecimento do órgão judiciário, assegurando especialmente a participação dos interessados na formação do provimento desejado, traz em si o perigo de que, a final, o estado das coisas tenha sofrido alterações substanciais capazes de tornar absolutamente ineficaz a intervenção estatal para solução do conflito." (GOMES FILHO, Antonio Magalhães. *Presunção de inocência e prisão cautelar*. São Paulo: Saraiva, 1991, p. 49.)

[13] Nesse sentido, Junya Rodrigues Barletta lembra que: "as prisões cautelares deverão tutelar situações fáticas que corporifiquem o *fumus comissi delicti* e o *periculum libertatis*, de forma que, desaparecendo as razões que a *priori* justificavam o encarceramento a título cautelar, o imputado deverá ser colocado imediatamente em liberdade, através da revogação da prisão. Devido ao seu caráter provisional, toda medida cautelar poderá ser objeto de revisão a qualquer tempo, podendo ser substituída, e inclusive, cumulada com outra(s) medida(s) cautelar(es), se tiver sido modificada a situação fática que a ensejou. (BARLETTA, Junya Rodrigues. *Prisão provisória e Direitos Humanos*. Uma análise baseada nos parâmetros do Sistema Interamericano dos Direitos Humanos, São Paulo: D´Plácido, 2019, p. 35).

[14] GOMES FILHO, Antonio Magalhães. *Presunção de inocência e prisão cautelar*. São Paulo: Saraiva, 1991, p. 65.

[15] Nesse sentido, assevera Odone Sanguiné: "Portanto, trata-se de regra destinada a impedir toda forma de equiparação do imputado ao culpado, isto é, veda de maneira absoluta que as medidas cautelares coercitivas possam desempenhar a função de pena imediata, de castigo antecipado, em relação a uma infração juridicamente ainda sequer definida e a uma pessoa ainda não reconhecida culpada. Como a Constituição prevê simultaneamente a presunção de inocência e também a legitimidade da prisão preventiva, aquela é interpretada como 'regra dirigida a impedir uma antecipação da pena em

humana premissa fundamental do Estado[16]. Assim, qualquer efeito negativo que decorra da imputação anteriormente ao trânsito em julgado da sentença condenatória ou que importe o reconhecimento da culpabilidade do acusado viola a garantia da presunção de inocência[17]. Nessa esteira, consoante leciona Maurício Zanoide de Moraes, o recolhimento ao cárcere anterior à condenação definitiva somente poderá ocorrer quando detectados, no caso concreto, atos ou comportamentos pelos quais o acusado demonstre efetivamente sua insubordinação por ato praticado no curso da persecução, devendo o juiz demonstrar a existência de elementos mínimos a configurar o *periculum libertatis*[18].

Assim, somente a cautelaridade é capaz de justificar a coexistência da prisão decretada no curso do processo e a garantia da presunção de inocência, prevista no art. 5º, inciso LVII, da Constituição da República e no art. 8.2 da Convenção Americana de Direitos Humanos[19]. Nessa esteira, Antonio Magalhães Gomes Filho assevera que apenas as formas de prisão anteriores à condenação que atendam a finalidades

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relação à condenação definitiva'". (SANGUINÉ, Odone. *Prisão cautelar, medidas alternativas e direitos fundamentais*. Rio de Janeiro: Forense, 2014, p. 187).

16 "Il reconoscimento della presunzione d'innocenza, come regola di tratamento, ha la consequenziliatá di uma dimonstrazione matemática. Se condizione necessaria per l'inflizione della pena è una condanna pronunciata nei modi di legge, è evidente che senza um símile atto – e fino a quel momento – il citadino non può in nessun caso essere considerato colpevole, nè può essere sottoposto a sanzione." (ILLUMINATI, Giulio. *La presunzione d'innocenza dell'imputato*. Bologna: Zanichelli, 1979, p. 33)

17 GOMES FILHO, Antonio Magalhães. *Presunção de inocência e prisão cautelar*. São Paulo: Saraiva, 1991, p. 35.

18 MORAES, Maurício Zanoide de. *Presunção de inocência no processo penal brasileiro:* análise de sua estrutura normativa para a elaboração legislativa e para a decisão judicial. São Paulo: Lumen Juris, 2010, p. 460. Nesse sentido, cf. GIACOMOLLI, Nereu José. *Prisão, liberdade e as cautelares alternativas ao cárcere*. São Paulo: Marcial Pons, 2013, p. 24; CRUZ, Rogério Schietti Machado. *Prisão Cautelar*: dramas, princípios e alternativas. 2. ed. Rio de Janeiro: Lumen Juris, 2011, p. 69.

19 SAAD, Marta. Prisão processual para recuperação de ativos: uma prática desfuncionalizada. In: MALAN, Diogo; BADARÓ, Gustavo; ZILLI, Marcos; MOURA, Maria Thereza Rocha de Assis; SAAD, Marta; MORAES, Maurício Zanoide de. *Processo Penal Humanista*. Escritos em homenagem a Antonio Magalhães Gomes Filho. São Paulo: D'Plácido, 2019, p. 268.

processuais, de natureza instrumental e final, destinadas a assegurar a própria realização do processo ou dos resultados, não viola, em princípio, a presunção de inocência[20]. A prisão cautelar, portanto, não pode assumir função essencialmente punitiva. Para Giulio Illuminati, não é admissível que a prisão cautelar tenha como escopo prevenir o perigo que representa à sociedade, em razão da gravidade abstrata dos fatos por ele praticados[21].

O Código de Processo Penal, no art. 312, apresenta os requisitos de decretação da prisão preventiva, quais sejam: (i) garantia da ordem pública ou da ordem econômica; (ii) conveniência da instrução criminal, (iii) aplicação da lei penal e (iv) perigo gerado pelo estado de liberdade do imputado. Contudo, para Antonio Magalhães Gomes Filho, dentre tais hipóteses, apenas a conveniência da instrução criminal (cautela instrumental) e a necessidade de aplicar a lei penal (cautela final) constituem justificativas idôneas para privação da liberdade do acusado antes do trânsito em julgado da sentença condenatória. Quanto ao requisito da ordem pública, o autor entende que sua função é extraprocessual, superando os limites impostos pelo princípio da legalidade estrita, que se postula fundamental à matéria, para propiciar a atribuição de um amplo poder discricionário ao juiz[22]. Nesse sentido,

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[20] GOMES FILHO, Antonio Magalhães. Medidas cautelares e princípios constitucionais. In: FERNANDES, Og (Org.). *Medidas cautelares no processo penal:* prisões e alternativas. Comentários à Lei 12.403, de 04.05.2011. São Paulo: Revista dos Tribunais, 2011, p. 24.

[21] ILLUMINATI, Giulio. *La presunzione d'innocenza dell'imputato*. Bologna: Zanichelli, 1979, p. 44 e 46.

[22] GOMES FILHO, Antonio Magalhães. *Presunção de inocência e prisão cautelar.* São Paulo: Saraiva, 1991, p. 67. Sobre o conceito de ordem pública, Odone Sanguiné explica que: "Todavia, entre todos os critérios que fundam a prisão provisória, a garantia da ordem pública ou da segurança pública, aparece como a mais controvertida e contestada. Com fronteiras nebulosas e incertas, variando ao gosto da subjetividade dos juízes, o motivo da ordem pública se afirma como uma justificativa que se pode manobrar em todos os sentidos. Seu exato significado nunca foi realmente elaborado, mas constitui uma maneira deturpada de reagir à gravidade do crime cometido e à possível reação da sociedade. O motivo está, portanto, estreitamente relacionado à punição do crime e à extensão da desaprovação social de determinado comportamento (...)" (SANGUINÉ, Odone. *Prisão cautelar, medidas alternativas e direitos fundamentais*. Rio de Janeiro: Forense, 2014, P. 284).

Aury Lopes Júnior afirma que "trata-se de conceito vago e indeterminado, sendo recorrente a definição de risco para ordem pública como sinônimo de clamor público, gravidade do delito, credibilidade das instituições, ameaça à integridade física do imputado/acusado, e, ainda, credibilidade da justiça"[23]. Por outro lado, Mauricio Zanoide de Moraes reconhece, excepcionalmente, a possibilidade de decretação da prisão preventiva como garantia da ordem pública. Para o autor, trata-se de prisão provisória, por motivos materiais, excepcionalmente condizente ao Estado democrático de direito, desde que presentes três requisitos: (i) a pena deve ter uma certa magnitude; (ii) as circunstâncias e a forma demonstrada de cometimento do suposto crime e (iii) relação temporal entre o conhecimento da autoria e o momento da decretação da prisão preventiva[24].

Assim, sob perspectiva da excepcionalidade da prisão preventiva, somente devem ser admitidas prisões que visam acautelar o resultado útil do processo. Por tal razão, as regras que se aplicam à prisão provisória devem ser interpretadas à luz das garantias constitucionais, em especial, da garantia da presunção de inocência. A prisão preventiva, portanto, não poderá ter outra finalidade senão a garantia do próprio processo no qual é decretada[25].

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[23] LOPES JÚNIOR, Aury. *Prisões cautelares*: Lei n. 12.403/2011. 4. ed. São Paulo: Saraiva, 2013, p. 92. Sobre a fundamentação da garantia da ordem pública, ver: LEÃO, Bernardo S. C; PRADO, Alessandra R. M. A periculosidade na decretação de prisão preventiva por furto em Salvador: controle racial e de classe. *Revista Brasileira de Direito Processual Penal*, vol. 7, n. 3, p. 1713-1749, set./dez. 2021.

[24] MORAES, Maurício Zanoide de. *Presunção de inocência no processo penal brasileiro:* análise de sua estrutura normativa para a elaboração legislativa e para a decisão judicial. São Paulo: Lumen Juris, 2010, p. 390.

[25] SAAD, Marta. Prisão processual para recuperação de ativos: uma prática desfuncionalizada. In: MALAN, Diogo; BADARÓ, Gustavo; ZILLI, Marcos; MOURA, Maria Thereza Rocha de Assis; SAAD, Marta; MORAES, Maurício Zanoide de. *Processo Penal Humanista*. Escritos em homenagem a Antonio Magalhães Gomes Filho. São Paulo: D'Plácido, 2019, p. 268.

2.2. Da excepcionalidade da prisão preventiva: a prisão como medida cautelar *ultima ratio*

Consoante já asseverado, a prisão preventiva deve ser decretada, de maneira excepcional, somente quando presentes elementos concretos que dizem com a necessidade de se resguardar o resultado útil do processo. Por ser medida que implica severa violação ao direito de liberdade pessoal do acusado, além de submetê-lo a sofrimento psicológico e à estigmatização social, deverá ser decretada como *extrema ratio*[26]. Nesse sentido, aduzem Rogério Lauria Tucci e Roberto Delmanto Junior que "quanto mais grave a restrição a direitos, maior será a excepcionalidade. Assim, a prisão é a última das medidas cautelares, só utilizável quando todas as demais se projetarem inúteis"[27].

Diante das consequências gravosas ao acusado, a excepcionalidade da prisão provisória encontra eco em diversos tratados internacionais de direitos humanos. A título de exemplo, na Convenção Americana de Direitos Humanos, está prevista no art. 7.2, o qual enuncia que: "ninguém pode ser privado de sua liberdade física, salvo pelas causas e nas condições previamente fixadas pelas constituições políticas dos Estados Partes ou pelas leis de acordo com elas promulgadas". Por sua vez, o Pacto Internacional de Direitos Civis e Políticos prevê no seu art. 9º, inciso 3º: "a prisão preventiva de pessoas que aguardam julgamento não poderá constituir a regra geral".

A Corte Interamericana de Direitos Humanos, inclusive, em alguns casos têm ressaltado a importância da excepcionalidade da prisão

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[26] Cf. PRADO, Geraldo. Excepcionalidade da prisão provisória. In: FERNANDES, Og (org). *Medidas cautelares no processo penal, prisões e suas alternativas*. São Paulo: Revista dos Tribunais, 2012, p. 121-123; SANGUINÉ, Odone. *Prisão cautelar, medidas alternativas e direitos fundamentais*. Rio de Janeiro: Forense, 2014, p. 401-404.

[27] TUCCI, Rogério Lauria; DELMANTO JUNIOR, Roberto. Sistematização das medidas cautelares processuais penais. *Revista do Advogado*, São Paulo, v. 24, n. 78, p. 111-122, set. 2004, p. 118. Nesse sentido, aduz Teresa Armenta Deu que "La excepcionalidad significa que la ley processal opta decididamente por la libertad provisional como la regla general y primera opción que se debe acoger frente la prisión provisional, en tanto concurran, claro está, los pressupuestos legales al efecto". (ARMENTA DEU, Teresa. *Lecciones de Derecho Procesal Penal*. 3. ed. Madrid: Marcial Pons, 2007, p. 180).

preventiva para assegurar as garantias do devido processo penal. Segundo o entendimento que tem exarado, a principal consequência que deriva da excepcionalidade do encarceramento preventivo consiste na restrição de sua aplicação a casos em que não há possibilidade de se garantir os fins do processo de outra maneira. Nesse sentido, no caso López Álvarez vs. Honduras[28], assim se manifestou a Corte Interamericana de Direitos Humanos:

> La prisión preventiva está limitada por los principios de legalidad, presunción de inocencia, necesidad y proporcionalidad, indispensables en una sociedad democrática83. Constituye la medida más severa que se puede imponer al imputado, y por ello debe aplicarse excepcionalmente84. La regla debe ser la libertad del procesado mientras se resuelve acerca de su responsabilidad penal.68. La legitimidad de la prisión preventiva no proviene solamente de que la ley permite aplicarla en ciertas hipótesis generales. La adopción de esa medida cautelar requiere un juicio de proporcionalidad entre aquélla, los elementos de convicción para dictarla y los hechos que se investigan. Si no hay proporcionalidad, la medida será arbitraria.

No caso paradigma Tibi vs. Equador[29], a Corte Interamericana de Direitos Humanos para além da ilegalidade da prisão preventiva decretada contra o senhor Tibi, manifestou-se pela violação à excepcionalidade de tal medida. É o que se vislumbra do trecho ora destacado:

> 106. La Corte considera indispensable destacar que la prisión preventiva es la medida más severa que se le puede aplicar al imputado de un delito, motivo por el cual su aplicación debe tener un carácter excepcional, en virtud de que se encuentra limitada por los principios de legalidad, presunción de inocencia, necesidad y proporcionalidad, indispensables en una sociedad democrática.

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[28] CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso López Alvarez vs. Honduras*, §63. Julgado em: 01 de fevereiro de 2006. Disponível em: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_141_esp.pdf>. Acesso em: 24/03/2021.

[29] CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso Tibi vs. Equador*. Julgado em 07 de setembro de 2004. Disponível em http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_esp.pdf. Acesso em: 24/03/2021.

Ainda, no âmbito do sistema interamericano de proteção dos direitos humanos, de se destacar que a Comissão Interamericana de Direitos Humanos, no seu Informe nº 86/2009, ao analisar o caso Peirano vs. Uruguai, manifestou-se pela excepcionalidade da decretação da prisão preventiva, ressaltando que: "o princípio dirigente para estabelecer a legalidade da prisão preventiva é o de 'excepcionalidade', em virtude do qual se intenta evitar que a prisão preventiva se converta em regra e, assim, se descaracterize seu fim" (n. 93)[30].

A excepcionalidade da prisão preventiva, no sistema jurídico brasileiro, está prevista no art. 5º, inciso LXVI, da Constituição da República, bem como nos artigos 282, §6º (redação dada pela Lei nº 13.964/2019) e 310, inciso II, do Código de Processo Penal (redação conferida pela Lei nº 12.403/2011). Segundo o artigo 5º, inciso LXVI, da Constituição da República, "ninguém será levado à prisão ou nela mantido, quando a lei admitir a liberdade provisória, com ou sem fiança". O artigo 282, §6º[31], do Código de Processo Penal, prevê que a prisão preventiva somente será determinada quando não for cabível a sua substituição por outra medida cautelar[32]. Por fim, o inciso II, do artigo 310, do Código de Processo Penal, preconiza que a conversão da prisão em flagrante em prisão preventiva deverá observar a presença dos requisitos constantes do artigo 312, do Código de Processo Penal, bem como a inadequação e a insuficiência das medidas cautelares diversas da prisão. A prisão preventiva, assim, somente será cabível quando presentes, no caso concreto, de forma inequívoca, o *fumus comissi delicti* e o *periculum libertatis*, bem como a real

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[30] "El principio rector para establecer la legalidad de la prisión preventiva es el de 'excepcionalidad', en virtud del cual se intenta evitar que la prisión preventiva se convierta en regla y, así, se desvirtúe su fin". COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Caso Peirano vs. Uruguai*, §93. Informe nº 86/09 – 06 de agosto de 2009. Disponível em: <https://www.cidh.oas.org/annualrep/2009sp/Uruguay12553.sp.htm>. Acesso em: 24/03/2021.

[31] Ver GIACOMOLLI, Nereu José. *Prisão, liberdade e as cautelares alternativas ao cárcere*. São Paulo: Marcial Pons, 2013, p. 41.

[32] Art. 282, §6º, do Código de Processo Penal: A prisão preventiva somente será determinada quando não for cabível a sua substituição por outra medida cautelar, observado o art. 319 deste Código, e o não cabimento da substituição por outra medida cautelar deverá ser justificado de forma fundamentada nos elementos presentes do caso concreto, de forma individualizada).

ameaça à integridade do conteúdo probatório e à aplicação da lei penal[33], não sendo suficientes as demais medidas cautelares pessoais previstas no ordenamento jurídico.

Ao estudar a excepcionalidade da prisão provisória, Geraldo Prado dividiu-a em três vetores: a) vinculação do juízo e do legislador aos pressupostos e requisitos autorizadores da prisão preventiva; b) possibilidade de se alcançar a tutela do processo por meio menos gravoso e c) duração da prisão preventiva[34]. Segundo o primeiro vetor, o legislador e o intérprete deverão atentar-se aos parâmetros legais que disciplinam a prisão cautelar. Dessa forma, deverá, por exemplo, o magistrado observar os pressupostos e requisitos previstos nos artigos 312 e 313, do Código de Processo Penal. Em razão do segundo vetor, caberá ao intérprete verificar se há outra medida cautelar menos invasiva que seja adequada e suficiente para resguardar o fim útil do processo[35]. Por derradeiro, diante da excepcionalidade da prisão preventiva, esta deverá durar o lapso temporal necessário a resguardar a finalidade do processo, devendo ser revisada periodicamente, sob pena de violar a garantia prevista no art. 5º, inciso LXXVIII, da Constituição da República[36].

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[33] Nesse sentido, ver: WEDY, Miguel Tedesco. Prisão Cautelar e Principios Constitucionais. *Revista Justica do Direito,* Passo Fundo, n. 1, p. 77-94, 2004.

[34] PRADO, Geraldo. Excepcionalidade da prisão provisória. In: FERNANDES, Og (org) *Medidas cautelares no processo penal, prisões e suas alternativas*. São Paulo: Revista dos Tribunais, 2011, p. 121-123.

[35] É o que dispõe o art. 282, §6º, do Código de Processo Penal. Nas palavras de Aury Lopes Jr.: "O dispositivo é importante e consagra a prisão preventiva como último instrumento a ser realizado, enfatizando a necessidade de análise sobre adequação e suficiência das demais medidas cautelares." (LOPES JÚNIOR, Aury. *Prisões cautelares*: Lei n. 12.403/2011. 4. ed. São Paulo: Saraiva, 2013, p. 42)

[36] De se ressaltar, assim, que a prisão preventiva, por assegurar uma situação fática, deve ter breve duração, não podendo assumir contornos de pena antecipada, sob pena de violação à garantia da presunção de inocência. De rigor, assim, a observância ao que dispõe o art. 7.5, da Convenção Americana de Direitos Humanos: "Toda pessoa detida ou retida deve ser conduzida, sem demora, à presença de um juiz ou outra autoridade autorizada pela lei a exercer funções judiciais e tem direito a ser julgada dentro de um prazo razoável ou a ser posta em liberdade, sem prejuízo de que prossiga o processo. Sua liberdade pode ser condicionada a garantias que assegurem o seu comparecimento

Diante de tal quadro, verifica-se que prisão preventiva somente poderá ser decretada ou mantida quando "estritamente necessária" ao alcance das finalidades do processo penal e quando presentes os requisitos impostos pela legislação[37]. Assim, caberá ao/à magistrada, no exame do caso concreto, verificar, de maneira percuciente, a adequação e suficiência das medidas cautelares pessoais previstas no art. 319, do Código de Processo Penal para assegurar as finalidades do processo, devendo lançar mão da prisão preventiva somente em *ultima ratio*[38].

3. Do reforço à excepcionalidade da prisão preventiva na Recomendação nº 62/2020 do Conselho Nacional de Justiça durante a pandemia do SARS-CoV-2

Como é sabido, aos 30 de janeiro de 2020, a Organização Mundial da Saúde reconheceu, formalmente, a propagação do coronavírus (SARS-CoV-2)[39] como estado de emergência sanitária, resultando, assim, na tomada de inúmeras medidas pelos países do mundo inteiro para a prevenção e combate da doença por ele provocada. No Brasil, não foi diferente. Aos 06 de fevereiro de 2020, foi promulgada a Lei nº 13.979/2020, com o intuito de determinar diversas medidas voltadas ao combate do novo vírus que já estava a se espalhar ao longo de todo território nacional. Assim, em observância às diretrizes da OMS, na busca da concretização do direito à saúde, referido diploma normativo dispôs acerca de várias

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em juízo." Sobre o tema, ver: RYU, Daiana. *Prisão cautelar e direito ao julgamento no prazo razoável*. Belo Horizonte/São Paulo: D'Plácido, 2021.

37 SANGUINÉ, Odone. *Prisão cautelar, medidas alternativas e direitos fundamentais*. Rio de Janeiro: Forense, 2014, p. 401.

38 LOPES JÚNIOR, Aury. *Prisões cautelares*: Lei n. 12.403/2011. 4. ed. São Paulo: Saraiva, 2013, p. 41. Nesse sentido, é a lição de Banacloche Palao: "la prisión provisional, em cuanto limitativa del derecho fundamental de la libertad personal, tiene que aplicarse excepcionalmente, debiendo optarse en caso de duda por decretar la libertdad del imputado". (BANACLOCHE PALAO, Julio. *La libertad prisional y sus limitaciones*. Madri: Macgraw, 1996, p. 381)

39 WORLDO HEALTH ORGANIZATION. Public Health Emergency of International Concern declared. Disponível em: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>. Acesso em 15/03/2021.

providências para o enfrentamento da emergência de saúde pública, tais como o isolamento social, a quarentena, a determinação compulsória de exames médicos e vacinação e o uso obrigatório de máscaras de proteção individual.

Diante de tal quadro, foram, ainda, envidados esforços pelos três Poderes com a implantação de medidas de prevenção e de proteção da contaminação pelo novo coronavírus. O Poder Judiciário, por meio do Conselho Nacional de Justiça, por sua vez, dentre os vários atos normativos que editou durante a pandemia, publicou a Resolução nº 62/2020, no dia 17 de março de 2020[40], considerando o alto índice de transmissibilidade do novo coronavírus e o agravamento significativo do risco de contágio em estabelecimentos prisionais e socioeducativos, tendo em conta a notória precariedade do sistema prisional, reconhecida, inclusive, pelo Supremo Tribunal Federal, na Arguição de Descumprimento de Preceito Fundamental nº 347. Dessa forma, referido ato normativo dispôs acerca de várias recomendações aos/às magistrados/as com vistas a evitar a disseminação da Covid-19 no sistema prisional brasileiro, buscando-se, assim, sobretudo, garantir o direito à saúde das pessoas presas.

Dentre o rol de providências emanadas pelo Conselho Nacional de Justiça, foram editadas algumas medidas a serem observadas pelo/a magistrado/a, na fase de conhecimento, a fim de diminuir o encarceramento provisório, evitando-se, assim, os riscos da propagação do novo coronavírus nos estabelecimentos prisionais. Nesse sentido, dispõe o art. 4º, da Recomendação nº 62/2020, sobre a necessidade de reavaliação periódica das prisões provisórias, nos termos do art. 316, do Código de Processo Penal, devendo os/as magistrados/as priorizar as mulheres gestantes, lactantes, mães ou pessoas responsáveis por criança de até doze anos ou pessoa com deficiência, assim como idosos, indígenas, pessoas com deficiência ou que se enquadrem no grupo de risco. Dispõe, ainda, sobre a priorização da reavaliação das prisões preventivas que tenham excedido o prazo de 90 (noventa dias), observando-se, assim, a provisoriedade da prisão cautelar, esta concretizada no art. 316, parágrafo único, do Código de Processo Penal, introduzido pela Lei nº 13.964/2019, bem

[40] Alterada pelas Recomendações nº 68/2020, de 17/06/2020, nº 78, de 15/09/2020 e 91, de 15/03/2021.

como a necessidade de priorizar-se a reavaliação das prisões preventivas relacionadas a crimes praticados sem violência ou grave ameaça à pessoa. Por derradeiro, o inciso III, do art. 4º, da Recomendação nº 62/2020, do Conselho Nacional de Justiça, dispõe sobre "a máxima excepcionalidade de novas ordens de prisão preventiva, observado o protocolo das autoridades sanitárias". Trata-se, assim, de um reforço ao que dispõe o art. 282, §6º, do Código de Processo Penal.

De mais a mais, em relação ao controle da prisão em flagrante, o art. 8º, da referida recomendação, além de suspender a audiência de custódia, em razão do período de restrição sanitária, dispôs sobre a excepcionalidade da conversão da prisão em flagrante em preventiva, ao dispor que ao analisar o auto de prisão em flagrante, o magistrado proferirá decisão para:

> a) relaxar a prisão ilegal;
>
> b) conceder liberdade provisória, com ou sem fiança, considerando como fundamento extrínseco, inclusive, a necessidade de controle dos fatores de propagação da pandemia e proteção à saúde de pessoas que integrem o grupo de risco;
>
> ou c) excepcionalmente, converter a prisão em flagrante em preventiva, em se tratando de crime cometido com o emprego de violência ou grave ameaça contra a pessoa, desde que presentes, no caso concreto, os requisitos constantes do art. 312 do Código de Processo Penal e que as circunstâncias do fato indiquem a inadequação ou insuficiência das medidas cautelares diversas da prisão, observado o protocolo das autoridades sanitárias.

A intensa preocupação dos diferentes poderes quanto ao enfrentamento da pandemia provocada pelo novo coronavírus provocou, portanto, o estabelecimento de medidas para a contenção do alastramento do novo vírus entre a população. No que tange à população prisional presa, verifica-se que o Conselho Nacional de Justiça, ciente da precariedade do sistema prisional pátrio, em razão da já reconhecida superpopulação, das condições insalubres e da escassez de prestação de assistência médica adequada, determinou várias recomendações aos/às magistrados/as da fase de reconhecimento a fim de evitar a contaminação das pessoas encarceradas pelo coronavírus. Dessa forma, determinou aos atores do Poder Judiciário

que observem, mais do que nunca, os caracteres da proporcionalidade e da excepcionalidade da prisão cautelar[41]. Diante de tal quadro, segundo se depreende do quanto previsto na Recomendação nº 62/2020 do CNJ, a imposição da medida cautelar extrema deve ser deixada aos crimes de maior gravidade, ou seja, aqueles cometidos mediante violência ou grave ameaça, desde que comprovada a presença dos requisitos e pressupostos da prisão cautelar, conforme dispõe o art. 8º, §1º, alínea "c". Além disso, dispôs sobre novo fator a permitir a concessão da liberdade provisória durante a vigência do estado de emergência sanitária, qual seja "a necessidade de controle dos fatores de propagação da pandemia e proteção à saúde de pessoas que integrem o grupo de risco". Dessa forma, os casos que envolvem delitos cometidos sem violência ou grave ameaça devem ser analisados com maior cuidado pelo Poder Judiciário, eis que, segundo as diretrizes do Conselho Nacional de Justiça, a regra em casos tais é a concessão da liberdade provisória.

Para além da preocupação na contenção do alastramento do novo coranavírus no ambiente prisional, visando-se resguardar o direito à saúde da pessoa presa, as medidas acima delineadas objetivam, portanto, resguardar o valor supremo da liberdade, através da observância dos caracteres da proporcionalidade e da excepcionalidade da prisão preventiva. Assim, o/a magistrado/a, ao analisar o caso concreto, além de verificar a suficiência de elementos a indicar a necessidade de imposição da medida extrema, deve se atentar, à análise da proporcionalidade e da excepcionalidade da imposição da prisão preventiva, à luz do contexto dos protocolos sanitários.

Diante dessa quadratura, há, é certo, a efetivação do papel do Poder Judiciário como protagonista quanto à adoção de medidas para o enfrentamento do encarceramento em massa no sistema prisional brasileiro, em especial, neste contexto pandêmico.

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[41] Sobre a necessidade de observância à proporcionalidade e à excepcionalidade da prisão preventiva, ver: FEDATO, Matheus Arcangelo; KAZMIERCZAK, Luiz Fernando. Prisão cautelar, argumentação e proporcionalidade: uma proposta para a fundamentação das decisões judiciais. *Revista Brasileira de Direito Processual Penal*, Porto Alegre, vol. 6, n. 1, p. 483-514, jan./abr. 2020.

4. Da aplicação da Recomendação nº 62 do Conselho Nacional de Justiça na jurisprudência do Superior Tribunal de Justiça

Diante da reconhecida crise que assola o sistema penitenciário pátrio, sobretudo, em razão da superlotação, das condições insalubres e da falta de assistência médica e hospitalar, bem como do fato de que tais condições precárias são propícias a propagar a disseminação de doenças infectocontagiosas no ambiente prisional[42], o Conselho Nacional de Justiça editou vários atos normativos com recomendações aos/às magistrados/as a fim de evitar o aumento do encarceramento. Conforme já exposto, a prisão preventiva, então, deve ser, mais do que nunca, considerada como medida de *ultima ratio*. Nos termos do art. 4º, inciso III, da referida recomendação, os magistrados devem observar "a máxima excepcionalidade de novas ordens de prisão preventiva, observado o protocolo das autoridades sanitárias".

Dessa forma, considerando o importante papel do Poder Judiciário na política carcerária durante a pandemia do coronavírus, esta pesquisa tem como objeto analisar se, de fato, no contexto de tal crise sanitária, a prisão cautelar tem sido tratada como medida excepcional, tal como já dispõe o art. 282, §6º, do Código de Processo Penal. Para tanto, tendo em conta a relevância do Superior Tribunal de Justiça na uniformização da interpretação da lei federal, analisar-se-ão julgados de tal Tribunal Superior. Visa-se, assim, verificar se o Superior Tribunal de Justiça, neste contexto pandêmico, para além das medidas de desencarceramento previstas na Recomendação nº 62/2020 do CNJ, tem observado às diretrizes já previstas no ordenamento jurídico pátrio quanto à excepcionalidade da prisão preventiva. Em outras palavras, almeja-se responder à seguinte pergunta: neste contexto de pandemia, a prisão preventiva tem sido tratada como *ultima ratio* pelo STJ?

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[42] SHIMIZU, Bruno. Sobre o cárcere, o judiciário e irresponsabilidades. *Boletim IBCCRIM*, São Paulo, v. 23, n. 274, p. 20-21, set. 2015.

4.1. Da pesquisa empírica: delimitação da metodologia e do espaço amostral

Para atingir o objetivo acima exposto qual seja o de verificar a aplicação do princípio da excepcionalidade da prisão preventiva pelo Superior Tribunal de Justiça, no contexto pandêmico, será necessária a realização de pesquisa empírica, tendo como objeto as decisões proferidas pelo Tribunal Superior. Com vistas a verificar estatisticamente o perfil das decisões (resultado do julgamento da liminar, parecer do Ministério Público, resultado do julgamento final), bem como os tipos de argumento utilizados pelo órgão julgador e eventual aplicação ou não das medidas de desencarceramento recomendadas pelo Conselho Nacional de Justiça, será realizada análise quantitativa[43]. De outro lado, objetivando-se verificar a motivação das decisões e destrinchar seus argumentos com maior acuidade será realizada análise qualitativa[44].

Para a realização desta pesquisa empírica, tendo em vista ser inviável analisar todas as decisões do Superior Tribunal de Justiça acerca do tema aqui proposto, mister é a formação de uma amostra. Nesse sentido, cabe mencionar que para conferir um maior direcionamento à pesquisa de jurisprudência deve-se lançar mão dos "recortes jurisprudenciais"[45]. Estes correspondem a todas as estratégias para delimitação do tema, sendo que os mais recorrentes são os institucionais, temáticos, processuais e

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[43] PIRES, Álvaro. Amostragem e pesquisa qualitativa: ensaios teóricos e metodológicos. POUPART, Jean; DESLAURIERS, Jean-Pierre; GROULX, Lionel-H; LAPERRIERE, Anne; MAYER, Robert; PIRES, Alvaro (Org.). *A pesquisa qualitativa*: enfoques epistemológicos e metodológicos. Tradução Ana Cristina Nasser. Petrópolis: Vozes, 2008, p. 157.

[44] PIRES, Álvaro. Amostragem e pesquisa qualitativa: ensaios teóricos e metodológicos. POUPART, Jean; DESLAURIERS, Jean-Pierre; GROULX, Lionel-H; LAPERRIERE, Anne; MAYER, Robert; PIRES, Alvaro (Org.). *A pesquisa qualitativa*: enfoques epistemológicos e metodológicos. Tradução Ana Cristina Nasser. Petrópolis: Vozes, 2008, p. 157.

[45] PALMA, J. B. D.; FEFERBAUM, M.; PINHEIRO, V. M. Meu trabalho precisa de jurisprudência? Como posso utilizá-la? QUEIROZ, R. M. R. FEFERBAUM, M. (Coord.). *Metodologia jurídica:* um roteiro prático para trabalhos de conclusão de curso. São Paulo: Saraiva, 2012, p. 144.

os temporais[46], os quais serão utilizados na tarefa de melhor restringir a amostra do presente estudo.

Em relação ao recorte institucional, justifica-se a escolha das decisões do Superior Tribunal de Justiça, eis que se trata do órgão que tem como atribuição principal "o controle da inteireza positiva, da autoridade e da uniformidade de interpretação da lei federal"[47], nos termos do artigo 105, inciso III, alíneas "a", "b" e "c", da Constituição da República. Considerando que o recorte temático corresponde à própria delimitação do tema[48], conforme já explicitado, o foco será a pesquisa das decisões proferidas pelo Superior Tribunal de Justiça quanto à aplicação do princípio da excepcionalidade da prisão preventiva, quando invocada as diretrizes previstas na Recomendação nº 62/2020 do CNJ.

No que tange ao recorte temporal, considerando-se a impossibilidade material de analisar todos os acórdãos proferidos desde o início da vigência da Recomendação nº 62/2020 e o escopo de apresentar decisões recentes sobre o tema estudado, delimitou-se o lapso temporal da pesquisa empírica no período de 01.01.2021 a 01.07.2021. Quanto ao recorte processual, por meio do qual se elege um instrumento processual específico para ser trabalhado na pesquisa[49], optou-se, neste artigo, utilizar as decisões proferidas em sede de *habeas corpus*, eis que corresponde ao instrumento utilizado, por excelência, para tratar da violação da liberdade de locomoção.

Delimitados os recortes jurisprudenciais, faz-se necessário explicitar as palavras-chave que nortearam a pesquisa dos acórdãos. Assim, no

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46 PALMA, J. B. D.; FEFERBAUM, M.; PINHEIRO, V. M. Meu trabalho precisa de jurisprudência? Como posso utilizá-la? QUEIROZ, R. M. R. FEFERBAUM, M. (Coord.). *Metodologia jurídica:* um roteiro prático para trabalhos de conclusão de curso. São Paulo: Saraiva, 2012, p. 144.

47 Ibidem, p. 573.

48 PALMA, J. B. D.; FEFERBAUM, M.; PINHEIRO, V. M. Meu trabalho precisa de jurisprudência? Como posso utilizá-la? QUEIROZ, R. M. R. FEFERBAUM, M. (Coord.). *Metodologia jurídica: um roteiro prático para trabalhos de conclusão de curso*. São Paulo: Saraiva, 2012, p. 145.

49 PALMA, J. B. D.; FEFERBAUM, M.; PINHEIRO, V. M. Meu trabalho precisa de jurisprudência? Como posso utilizá-la? QUEIROZ, R. M. R. FEFERBAUM, M. (Coord.). *Metodologia jurídica:* um roteiro prático para trabalhos de conclusão de curso. São Paulo: Saraiva, 2012, p. 146.

campo *Pesquisa livre* do sítio eletrônico do Superior Tribunal de Justiça foi inserida a expressão *recomendação e CNJ e prisão preventiva e Covid 19 e excepcional*, limitando-se o período em 01.01.2021 a 01.07.2021 e inserindo-se na classe processual o tema do *habeas corpus*.

Ao final desse procedimento de busca, obteve-se 60 (sessenta) acórdãos prolatados pelo Superior Tribunal de Justiça. No entanto, considerando-se que a escolha dos julgados não deve se esgotar com os resultados fornecidos pela pesquisa *online* de um tribunal, conforme aduz Rafael Mafei Rabelo Queiroz, é preciso examinar a pertinência dos resultados gerados pelo sistema[50]. Assim, do número total de acórdãos encontrados foi necessário o descarte de alguns julgados que não interessavam aos fins deste trabalho, quais sejam: (i) aqueles cujo objeto não versava sobre prisão provisória e (ii) aqueles em que não havia a discussão sobre a Recomendação nº 62/2020 do CNJ.

Do número total de acórdãos selecionados, foram excluídos 10 (dez), sendo que: (i) em 02, o objeto não versava sobre constrangimento ilegal de paciente preso cautelarmente, mas tratava de assunto relativo à execução penal[51]; (ii) em 8 (oito), não houve discussão sobre a aplicação da Recomendação nº 62/2020 em relação aos pacientes presos provisoriamente. Assim, consolidou-se o número de 50 (cinquenta) acórdãos para análise[52].

Feita a explanação acerca da metodologia empregada para coleta e seleção dos julgados, passa-se à exposição dos resultados.

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[50] QUEIROZ, Rafael Mafei Rabelo. *Monografia jurídica: passo a passo*. São Paulo: Método, 2015, p. 102.

[51] AgRg no HC 657458 / SP, 5ª Turma, Rel. Min. Joel Ilan Paciornik, J: 22/06/2021 e AgRg no HC 603081/SP, 6ª Turma, Rel. Min. Sebastião Reis Júnior, J: 02/02/2021.

[52] De se ressaltar que a pesquisa, por meio dos critérios utilizados para busca no sítio eletrônico do STJ, apenas resultou em acórdãos que versavam sobre a impetração de ordem de *habeas corpus* individual. Não houve o encontro de HC coletivo.

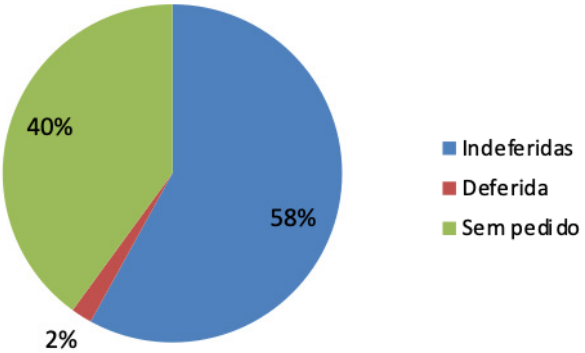
Tabela de dados depositada em acesso aberto pela autora em: https://doi.org/10.6084/m9.figshare.19566091.v1

4.2. Dos resultados da análise quantitativa

4.2.1. Liminares

Considerando o espaço amostral de 50 (cinquenta) acórdãos selecionados para a presente pesquisa, verificou-se que em 32 (trinta e dois) houve o pedido de liminar[53], sendo que: (i) foi deferida uma liminar e (ii) foram indeferidas 31 (trinta e uma) liminares, o que corresponde a 58% do espaço amostral, consoante se vislumbra do gráfico abaixo:

Gráfico 1. Liminares

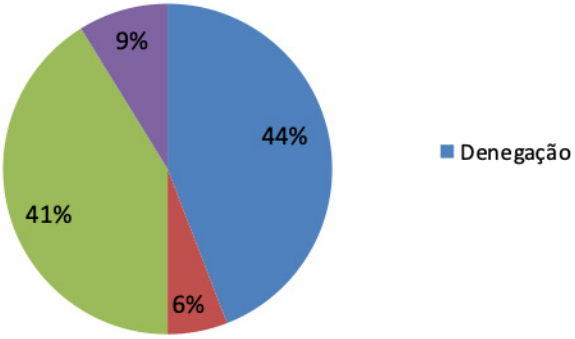


4.2.2. Pareceres do Ministério Público

Dos 50 (cinquenta) acórdãos analisados, em 34 (trinta e quatro), o Ministério Público se manifestou. Desse rol, somente 02 (dois) pareceres foram pela concessão da ordem de *habeas corpus*; 14 (quatro) pelo não conhecimento; 03 (três) pelo não conhecimento da ordem ou denegação e 15 (quinze) foram pela denegação da ordem, o que corresponde a 44% dos casos analisados. No gráfico abaixo, é notória a discrepância entre o número de denegações e o número de concessões da ordem de *habeas corpus*:

[53] Esclarece-se que 18 dos acórdãos decorreram do julgamento de Agravo Regimental em Habeas Corpus, recurso em que não há pedido liminar.

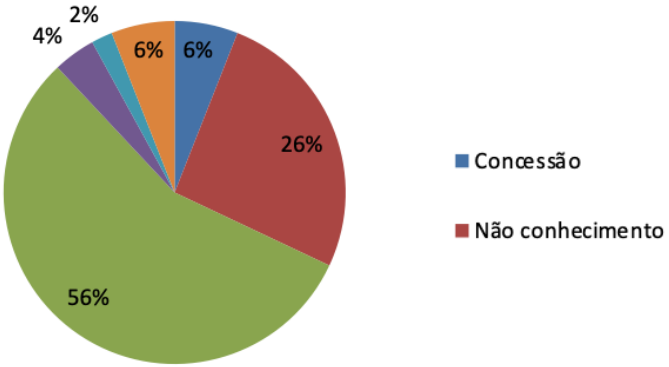
Gráfico 2. Pareceres do Ministério Público



4.2.3. Resultado do julgamento

No que tange ao resultado do julgamento dos *habeas corpus* analisados, nota-se que há maior número de não conhecimento (13) ou denegações da ordem (28) do que de concessões da ordem (5). No gráfico abaixo, possível notar a maior porcentagem de casos em que o Superior Tribunal de Justiça denegou ou não conheceu a ordem de *habeas corpus*, mantendo-se a prisão cautelar do paciente.

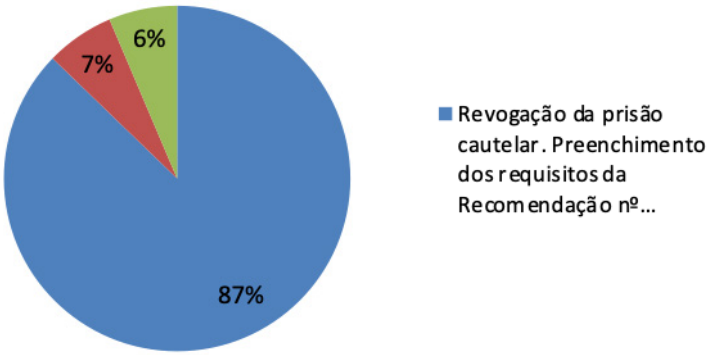
Gráfico 3. Resultado do julgamento



4.2.4. Pedidos da defesa

Do rol de julgados selecionados, foi possível identificar 02 (dois) tipos de pedido da defesa, sendo eles classificados em: (i) revogação da custódia cautelar em razão da ausência dos requisitos para sua decretação e presença dos requisitos previstos na Recomendação nº 62/2020 do CNJ (41); (ii) colocação em prisão albergue domiciliar em razão da pandemia/filhos menores (3) e (iii) excesso de prazo da prisão cautelar (3)[54]. No gráfico abaixo, comparam-se os diversos tipos de pedido formulados pela defesa acerca do constrangimento ilegal consistente na permanência do preso cautelar durante o contexto pandêmico:

Gráfico 4. Pedidos da defesa



4.2.4. Aplicação da Recomendação nº 62/2020 do Conselho Nacional de Justiça pelo Superior Tribunal de Justiça

4.2.4.1. Dados sobre aplicação/afastamento da Recomendação nº 62/2020 do CNJ

Em todos os casos selecionados para compor o espaço amostral da presente pesquisa empírica, o Superior Tribunal de Justiça foi provocado

[54] Esclarece-se que em três acórdãos, proferidos em sede de agravo regimental em habeas corpus, foram abordados pedidos do Ministério Público.

a se manifestar sobre a aplicação do teor da Recomendação nº 62/2020 do CNJ no que tange à possibilidade de reconhecimento da excepcionalidade da prisão preventiva com a consequente soltura do paciente. Dentre os acórdãos que denegaram ou não conheceram a ordem de *habeas corpus*, em 44 (quarenta e quatro), as diretrizes estabelecidas pela Recomendação em epígrafe foram expressamente afastadas pelo Tribunal. De outro lado, verificou-se que nas decisões em que houve a concessão da ordem, em 06 (seis) houve a aplicação da Recomendação nº 62/2020 do Conselho Nacional de Justiça.

Tabela 1. Aplicação da Recomendação nº 62/2020 do CNJ

Resultado do julgamento	Quantidade total	Aplicação da Recomendação nº 62/2020 do CNJ	Afastamento da Recomendação nº 62/2020 do CNJ
Denegação/não conhecimento da ordem/ conhecimento parcial + denegação	44	—	44
Concessão da ordem/ Concessão de ofício	6	6	—

4.2.4.2. Argumentos utilizados para denegação/não conhecimento ou concessão da ordem de habeas corpus

Na análise dos acórdãos que denegaram ou não conheceram a ordem de *habeas corpus*, foi possível identificar seis tipos de discurso: (i) o Tribunal não poderia se pronunciar sobre a incidência ou não da Recomendação nº 62/2020, do CNJ, sob pena de supressão de instância (4); (ii) o paciente não se encontrava inserido no grupo de risco de contaminação do coronavírus (27); (iii) o paciente pertencia a um grupo de risco, mas com quadro de saúde estável (1); (iv) o paciente não preenchia os requisitos para concessão da liberdade provisória segundo a Recomendação nº 62/2020, do CNJ (3); (v) no caso concreto, não estavam preenchidos os requisitos formulados pela jurisprudência para aplicação da Recomendação nº 62/2020 do CNJ (3); (vi) ausência de

comprovação quanto à precariedade do estabelecimento prisional para o enfrentamento da pandemia ou outra situação excepcional (6).

Por outro lado, ao reconhecer a existência de constrangimento ilegal em razão da aplicação da Recomendação nº 62, do CNJ ao caso concreto, o Superior Tribunal de Justiça nos seis acórdãos em que concedeu a liberdade provisória ao paciente, fundamentou sua decisão no reconhecimento da gravidade da pandemia e na necessidade de contenção da propagação do coronavírus no ambiente prisional.

No gráfico abaixo, verifica-se a distribuição dos argumentos utilizados pelo Superior Tribunal de Justiça para denegar/não conhecer ou conceder os *writs*:

Gráfico 5. Argumentos utilizados para denegação ou não conhecimento da ordem de *habeas corpus* no contexto pandêmico

4.3. Análise qualitativa

4.3.1. Argumentos para denegação ou não conhecimento da ordem de habeas corpus

A) "O paciente não faz parte do grupo de risco" ou "não comprovou a gravidade do estado de sua saúde"

Conforme exposto no item acerca da análise quantitativa, verificou-se que em algumas decisões que denegaram ou não conheceram a ordem de *habeas corpus*, o Superior Tribunal de Justiça, muito embora a Recomendação nº 62/2020 não exija, necessariamente, que o preso provisório seja do grupo de risco de contaminação do coronavírus para concessão da liberdade provisória, tem mantido as custódias cautelares sob o argumento de que o paciente não se enquadra na parcela da população reconhecida como mais vulnerável pelos órgãos de saúde. O argumento é utilizado, inclusive, em casos em que se verifica o preenchimento dos requisitos para concessão da liberdade provisória, ou seja, casos que não envolvem o cometimento de delitos mediante violência ou grave ameaça, cujo prognóstico da pena permitiria a fixação de regime diverso do fechado.

No HC nº 632922/SP, de relatoria do Min. Joel Ilan Paciornik, julgado em 02/03/2021 pela Quinta Turma, a ordem foi denegada sob o fundamento de que não se vislumbrava no caso concreto constrangimento ilegal em razão da manutenção da custódia do paciente. Muito embora o caso não envolvesse crime praticado mediante violência ou grave ameaça, eis que ao paciente era imputado o delito de tráfico e associação para o tráfico de drogas, a prisão cautelar foi mantida. O caso ainda não apresentava gravidade exacerbada que permitisse a aplicação da medida extrema. Isto porque o paciente foi surpreendido na posse de 340,04g de maconha, 20,06g de cocaína e 26,34g de crack, quantidade que não é considerada exagerada pela jurisprudência. Contudo, segundo o relator, o paciente não comprovara ser do grupo de risco, fator preponderante na concessão da liberdade provisória para a aplicação da Recomendação nº 62/2020 do CNJ. Nas palavras do relator:

> Nesse sentido, cumpre salientar que o risco trazido pela propagação da doença não é fundamento hábil a autorizar a revogação automática de toda custódia cautelar, *sendo imprescindível, para tanto, que*

> *haja comprovação de que o réu encontra-se inserido na parcela mais suscetível à infecção*, bem como, que haja possibilidade da substituição da prisão preventiva imposta. Na hipótese dos autos, ficou demonstrada, de forma concreta, a necessidade da manutenção da prisão preventiva do ora paciente, para garantia da ordem pública, nos termos já elencados em linhas pretéritas. – grifos nossos.

Em semelhança ao quanto sustentado no acórdão acima, no AgRg no RHC 130100/RS, de relatoria do Min. Sebastião Reis Júnior, julgado em 22/06/2021, a Sexta Turma negou provimento ao agravo regimental, mantendo a custódia cautelar do paciente, sob o fundamento da gravidade concreta dos fatos e do fato de não haver comprovação nos autos de que pertencesse ao grupo de risco. Assim, muito embora tenha sido a ele imputado os delitos de associação criminosa, receptação, porte e disparo de arma de fogo, crimes cometidos sem violência ou grave ameaça, sua custódia foi mantida.

> Entretanto, tais atitudes devem ser tomadas em conformidade com a recente Recomendação n. 62/2020 do Conselho Nacional de Justiça, que orienta aos magistrados com competência para a fase de conhecimento que, com vistas à redução dos riscos epidemiológicos e em observância ao contexto local de disseminação do vírus, reavaliem as prisões provisórias. *No caso, verifica-se que o Tribunal estadual afirmou que, até o momento, não há provas de que o ora agravante faça parte do grupo de risco,* ressaltando que (fls. 412/413 - grifo nosso): [...] Na hipótese dos autos, não há notícia de que o paciente esteja no grupo de risco. Na mesma banda, não há informações, até o presente momento, advinda dos órgãos oficiais, sobre a detecção de algum caso suspeito no sistema carcerário. Pelo contrário, no âmbito estatual, a Secretaria da Administração Penitenciária já adotou, por meio da Nota Técnica 01/2020, medidas de prevenção e controle do COVID-19 nos estabelecimentos penais, com base no disposto nas Notas Técnicas 04/2020 da Agência Nacional de Vigilância Sanitária, Nota Técnica do DEPEN das Medidas de Controle e Prevenção do Novo Coronavírus no SPF e Decreto n° 55.115/2020. Inexiste, portanto, motivação razoável para deferir a liberdade ao paciente com base no risco epidemiológico, que, por sinal, pode ser igual ou até maior fora do cárcere. [...] – grifos nossos.

Já no AgRg no HC 605343/RS, de relatoria do Min. João Otavio de Noronha, julgado em 08/06/2021, a Quinta Turma denegou o *writ*, sob a justificativa de que o paciente embora apresentasse comorbidade consistente na hipertensão arterial, os exames por ele apresentados não indicavam quadro grave de saúde que o tornasse suscetível ao contágio por Covid-19. A Corte, assim, ratificou os fundamentos da autoridade judiciária apontada como coatora a qual havia se manifestado no sentido de que seria "*despropositada a soltura de presos por integrarem o referido grupo de risco da Covid-19*". O Ministro Relator, então, assim se pronunciou:

> De fato, não se extrai dos referidos documentos que o recorrente padece de enfermidades cardíacas. Ao contrário, o laudo médico emitido pela unidade prisional limita-se a informar que o paciente apresenta quadro de hipertensão arterial, de arritmia cardíaca e de furunculose, tendo sido receitados anti-hipertensivos e solicitados exames gerais. Adicionalmente, os exames clínico-laboratoriais demonstram índices dentro dos valores de referência, o que afasta a tese defensiva de baixa imunidade ou de quadro grave de enfermidade que agrave o risco de contágio por covid-19. Também não consta dos referidos documentos que o paciente padece de quadro de hipertensão que não possa ser controlado com o uso das medicações prescritas pela unidade de saúde do presídio, que, ressalte-se, vem disponibilizando tratamento clínico suficiente.

Diante de tal quadro, verifica-se que a mitigação do escopo da Recomendação nº 62/2020 do CNJ. Nos acórdãos acima analisados, muito embora versem sobre casos que se enquadrariam nos requisitos previstos no art. 4º de tal ato normativo para concessão da liberdade provisória no período de pandemia, houve a denegação da ordem de *habeas corpus* sob fundamento extra, qual seja a necessidade de comprovação pelo paciente de que pertenceria ao grupo de risco. Para além da mitigação da política carcerária almejada pela recomendação em questão, há clara violação ao princípio da excepcionalidade da prisão provisória em tais casos.

B) *"O paciente não preenche os requisitos previstos na Recomendação nº 62/2020"*

Em outros acórdãos que denegaram a ordem de *habeas corpus*, o Superior Tribunal de Justiça tem exarado o entendimento de que, embora reconheça a gravidade do contexto emergencial sanitário pelo qual passamos, a Recomendação nº 62/2020 não implica a liberação automática das pessoas presas preventivamente, devendo os requerentes apresentarem elementos concretos que dizem com o preenchimento dos requisitos previstos na Recomendação nº 62/2020 do CNJ.

O Superior Tribunal de Justiça, assim, ao interpretar os requisitos previstos na Recomendação nº 62/2020 do CNJ, criou um rol de critérios que o paciente deve preencher a fim de ser beneficiado com a concessão da liberdade provisória ou com a substituição da prisão cautelar pela prisão domiciliar. São eles: "a) sua inequívoca adequação no chamado grupo de vulneráveis da COVID-19; b) a impossibilidade de receber tratamento no estabelecimento prisional em que se encontra; e c) risco real de que o estabelecimento em que se encontra, e que o segrega do convívio social, cause mais risco do que o ambiente em que a sociedade está inserida, inocorrente na espécie."

Verificou-se que pelo menos seis julgados aqui analisados, o Superior Tribunal de Justiça afastou a aplicação dos termos da Recomendação nº 62/2020 do CNJ utilizando o rol de tais critérios. De se ressaltar que os dois últimos critérios, que dizem respeito à comprovação do estado do estabelecimento prisional onde se encontra, são de dificílima comprovação, uma verdadeira *probatio diabolica*. A escassez de publicação de dados sobre o verdadeiro estado dos estabelecimentos prisionais somada à dificuldade de obtenção dos dados existentes tornam praticamente impossível a comprovação pela pessoa presa quanto "ao risco real" de que o estabelecimento prisional seja mais perigoso à sua saúde no contexto pandêmico do que o convívio social. De mais a mais, tal critério parece ignorar a crise do sistema penitenciário nacional, reconhecido, inclusive pelo Supremo Tribunal Federal na ADPF nº 347, em razão da situação precária e insalubre dos estabelecimentos prisionais nacionais. Em pesquisa realizada pelo Institute for Criminal Policy Research no ano de 2019, concluiu-se que as pessoas privadas de liberdade apresentam maior

risco a desenvolver problemas de saúde do que o restante da população, em razão do reduzido acesso à luz natural, ao ar fresco, acesso precário à assistência médica e condições precárias de alimentação[55].

Entre os julgados encontrados nesse sentido, no HC 638738/SP, de relatoria do Min. Reynaldo Soares da Fonseca, julgado em 23/02/2021, a Quinta Turma, muito embora o paciente tenha sido preso cautelarmente pela suposta prática do delito de furto, o qual em tese enquadra-se nas hipóteses de concessão de liberdade provisória previstas na Recomendação nº 62/2020 do CNJ, negou seu pedido de revogação da custódia cautelar, afastando a incidência de tal diploma normativo. Ressaltou, assim, a ausência de preenchimento dos requisitos previstos em tal ato normativo do CNJ:

> A recomendação contida na Resolução n. 62, de 18 de março de 2020, do CNJ não implica automática substituição da prisão cautelar pela domiciliar. É necessário que o eventual beneficiário do instituto demonstre: a) sua inequívoca adequação no chamado grupo de vulneráveis da COVID-19; b) a impossibilidade de receber tratamento no estabelecimento prisional em que se encontra; e c) risco real de que o estabelecimento em que se encontra, e que o segrega do convívio social, cause mais risco do que o ambiente em que a sociedade está inserida, inocorrente na espécie.

De igual modo, no AgRg no RHC 136960/RJ, de relatoria do Min. João Otavio de Noronha, julgado em 16/03/2021, acerca de caso envolvendo o delito de tráfico de drogas, o Superior Tribunal de Justiça rechaçou o pedido de liberdade provisória do paciente sob o argumento de que os requisitos previstos na Recomendação nº 62/2020 do CNJ não estavam preenchidos. Ressaltou, assim, que a aplicação de tal diploma normativo não assegura a flexibilização da medida extrema de forma automática. Nas palavras do relator:

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[55] Heard, Catherine (2019) Towards a health-informed approach to penal reform? *Evidence from ten countries. Institute for Criminal Policy Research, London*. Disponível em: <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.prisonstudies.org%2Fsites%2Fdefault%2Ffiles%2Fresources%2Fdownloads%2Ficpr_prison_health_report.pdf&clen=2462687&chunk=true>>. Acesso em 20/07/2021.

> No que diz respeito à aplicação da Recomendação CNJ n. 62/2020, o STJ firmou o entendimento de que a flexibilização da medida extrema não ocorre de forma automática (AgRg no HC n. 574.236/SP, relator Ministro Reynaldo Soares da Fonseca, DJe de 11/5/2020; e HC n. 575.241/SP, relatora Ministra Laurita Vaz, DJe de 3/6/2020). Para tanto, é necessária a demonstração de que o preso preenche os seguintes requisitos: a) inequívoco enquadramento grupo de vulneráveis à covid-19; b) impossibilidade de receber tratamento no estabelecimento prisional em que se encontra; e c) exposição a mais risco de contaminação no estabelecimento onde está segregado do que no ambiente social (AgRg no HC n. 561.993/PE, relator Ministro Reynaldo Soares da Fonseca, Quinta Turma, DJe de 4/5/2020).

Nessa linha, observo que, em alguns julgados, o Superior Tribunal de Justiça exigiu de maneira assertiva que o paciente tivesse comprovado a condição estrutural precária do estabelecimento prisional onde se encontrava, ressaltando ser tal condição essencial para que a liberdade provisória fosse concedida. No HC nº 655215/SP, de relatoria do Ministro Joel Ilan Paciornik, julgado em 18/05/2021, por exemplo, em caso envolvendo tráfico de drogas, assim o Superior Tribunal de Justiça se pronunciou:

> Nesse sentido, cumpre salientar que o risco trazido pela propagação da doença não é fundamento hábil a autorizar a revogação automática de toda custódia cautelar, sendo imprescindível, para tanto, que haja comprovação de que o réu encontra-se inserido na parcela mais suscetível à infecção, bem como, que haja possibilidade da substituição da prisão preventiva imposta. Na hipótese dos autos, não há falar em revogação da custódia ou na sua substituição por prisão domiciliar em razão da pandemia da COVID-19, especialmente porque o paciente não comprovou a deficiência estrutural do presídio em que se encontra, sendo certo que as autoridades sanitárias e de segurança pública têm agido para minimizar os riscos. – grifos nossos.

Nesse sentido, também decidiu a Sexta Turma, nos autos do AgRg no HC 657942/SP, de relatoria do Min. Rogério Schietti Cruz, julgado em 04/05/2021. Para o ministro relator, a comprovação da condição precária

do estabelecimento prisional corresponde a requisito fundamental para a concessão da liberdade provisória:

> A Recomendação n. 62/2020 do Conselho Nacional de Justiça estipula medidas preventivas à propagação da infecção pelo novo Coronavírus no âmbito dos sistemas de justiça penal e recomenda a reavaliação das prisões provisórias. No entanto, essa recomendação não reflete uma diretriz obrigatória de se ter de soltar, irrestritamente, todos aqueles que se encontram presos provisoriamente, mas sim um elemento interpretativo a ser levado em consideração em cada caso concreto, tendo-se em conta o trazido pela parte interessada. *Na hipótese, seria necessária a demonstração nos autos da incapacidade do estabelecimento prisional de gerir a crise da Covid-19, bem como da análise feita especificamente sobre a questão da saúde do paciente pela direção do presídio e pela autoridade judiciária competente, o que não ocorreu.* – grifos nossos

Por fim, cabe consignar que, consoante se vislumbra do teor da Recomendação nº 62/2020, esta não exige que o paciente comprove o estado do estabelecimento prisional no qual se encontra preso. Trata-se, assim, a nosso ver, de obrigação do próprio poder estatal, por meio de seus dados, ter ciência quanto a situação presídio ou centro de detenção provisória onde o paciente se encontra preso, especialmente, em razão da dificuldade de a pessoa presa cautelarmente obter tais dados.

4.3.2. Concessão da ordem: gravidade da pandemia e necessidade de redução da propagação do coronavírus

Em outras decisões, o Superior Tribunal de Justiça reconheceu, contudo, a gravidade do contexto pandêmico e seus impactos no sistema prisional, ao conceder a ordem de *habeas corpus* aos pacientes. Em suma, exarou o entendimento de que a prisão preventiva trata-se de medida excepcional a qual somente deve ser imposta quando presentes elementos concretos que dizem com sua necessidade. Assim, em alguns casos em que não havia o envolvimento de crime cometido com violência ou grave ameaça, o Superior Tribunal de Justiça, observando as diretrizes da Recomendação nº 62/2020, do CNJ e o princípio da excepcionalidade,

concedeu a ordem para colocar o paciente em liberdade provisória ou substituir a medida extrema por medidas cautelares pessoais alternativas.

Dessa forma, no RHC 143523/RJ, de relatoria do Ministro Joel Ilan Paciornik, julgado em 04/05/2021, a Quinta Turma, em caso de tráfico de drogas, envolvendo paciente que havia sido surpreendido na posse de 27 g de cocaína, concedeu-lhe liberdade provisória mediante a imposição de medidas cautelares pessoais. Ressaltou que a prisão preventiva se trata de medida excepcional e que no caso concreto as medidas cautelares alternativas seriam suficientes para assegurar o processo. Ademais, chamou atenção à gravidade da pandemia e a necessidade de se conter a propagação do vírus no cárcere:

> Além disso, não se pode ignorar a gravidade vivenciada diante da Pandemia do vírus Covid-19, sendo necessário prevenir e reduzir os fatores de propagação do vírus e as aglomerações no âmbito dos sistemas de justiça penal e socioeducativos, nos termos estabelecidos pela Recomendação n. 62/2020 do Conselho Nacional de Justiça. Nesse diapasão, consoante bem ponderado pelo ilustre Ministro Rogério Schietti Cruz, "À luz do princípio da proporcionalidade do necessário enfrentamento da emergência atual de saúde pública, das novas alternativas fornecidas pela Lei n. 12403/2011 e das alterações ao Código de Processo Penal determinadas pela intitulada "Lei Anticrime" (Lei n. 13.964/2019), há razoabilidade na opção, pela autoridade judiciária, por uma ou mais das providências indicadas no art. 319 do CPP como meio bastante e cabível para obter o mesmo resultado - a proteção do bem jurídico sob ameaça - de forma menos gravosa" (HC 597.650/SP, SEXTA TURMA, DJe 24/11/2020).

No HC 612243/MS, de relatoria do Ministro Sebastião Reis Júnior, julgado em 27/04/2021, a Sexta Turma do Superior Tribunal de Justiça, muito embora o acusado tenha se envolvido em delito de tráfico de drogas no qual foram apreendidos 354kg de maconha, entendeu ser possível a concessão da ordem. Entendeu que o paciente não tivera participação significativa no delito, eis que exercia a função de "batedor", ou seja, de escolta do veículo que carregava o entorpecente. Ressaltou que o paciente possuía condições subjetivas favoráveis e que a prisão preventiva, como medida excepcional, não deveria ser aplicada no caso concreto, eis que

suficientes as medidas cautelares alternativas. Destacou, ademais, a importância de se evitar a propagação do coronavírus no cárcere:

> De acordo com reiteradas decisões desta Corte Superior, as prisões cautelares são medidas de índole excepcional, somente podendo ser decretadas ou mantidas caso demonstrada, com base em elementos concretos dos autos, a efetiva imprescindibilidade de restrição ao direito constitucional à liberdade de locomoção.
>
> (...)
>
> Além disso, a situação do paciente amolda-se às hipóteses indicadas na Resolução n. 62/2020 do Conselho Nacional de Justiça, notadamente quanto à recomendação aos Tribunais e aos magistrados quanto à adoção de medidas preventivas à propagação da infecção pelo novo coronavírus - Covid-19 no âmbito dos sistemas de justiça penal e socioeducativo.

No HC 658149/RJ, de relatoria do Min. Joel Ilan Paciornik, julgado pela Quinta Turma em 11/05/2021, muito embora o habeas corpus não tenha sido conhecido, a ordem foi concedida de ofício, em razão da desproporcionalidade da medida extrema em relação ao caso concreto. No caso em apreço, o paciente era primário e foi apreendido na posse de 26,5g de cocaína. Além disso, a Quinta Turma entendeu o fato de não ser possível ignorar a pandemia da Covid-19, sendo medida de rigor a prevenção de fatores de propagação do vírus e aglomerações nos sistemas prisionais. Nesse sentido:

> Além disso, não se pode ignorar a gravidade vivenciada diante da Pandemia do vírus Covid-19, sendo necessário prevenir e reduzir os fatores de propagação do vírus e as aglomerações no âmbito dos sistemas de justiça penal e socioeducativos, nos termos estabelecidos pela Recomendação n. 62/2020 do Conselho Nacional de Justiça. Nesse diapasão, consoante bem ponderado pelo ilustre Ministro Rogério Schietti Cruz, "À luz do princípio da proporcionalidade do necessário enfrentamento da emergência atual de saúde pública, das novas alternativas fornecidas pela Lei n. 12 403/2011 e das alterações ao Código de Processo Penal determinadas pela intitulada "Lei Anticrime" (Lei n. 13.964/2019), há razoabilidade na opção, pela autoridade judiciária, por uma ou

> mais das providências indicadas no art. 319 do CPP como meio bastante e cabível para obter o mesmo resultado - a proteção do bem jurídico sob ameaça - de forma menos gravosa" (HC 597.650/SP, SEXTA TURMA, DJe 24/11/2020).

De se destacar que, assim agindo, o Tribunal Superior além de observar o ato normativo aqui estudado, alinha-se à praxe adotada em diversos países na atual realidade em que vivemos. De acordo com pesquisa publicada pelo Institute for Criminal Policy Research, com a pandemia do coronavírus, vários países passaram a adotar políticas carcerárias com vistas à redução propagação do vírus na sociedade e nos estabelecimentos prisionais, tais como a redução do número de prisões e o privilégio de medidas alternativas ao cárcere[56]. É a concretização do princípio da excepcionalidade.

Considerações finais

Como se sabe, um dos princípios que norteiam a prisão cautelar é a excepcionalidade. A medida cautelar extrema deve, assim, ser aplicada somente quando presentes elementos concretos que dizem com a necessidade de se resguardar o resultado útil do processo. Dessa forma, por se tratar de medida que implica severa violação ao direito de liberdade pessoal do acusado, além de submetê-lo a sofrimento psicológico e à estigmatização social, deverá ser decretada como *extrema ratio*

Considerando o contexto pandêmico e a crise institucionalizada vivenciada pelo sistema prisional brasileiro há décadas, o Conselho Nacional de Justiça editou a Recomendação nº 62/2020, com medidas voltadas ao desencarceramento a fim de conter a propagação do coronavírus no ambiente prisional. Dessa forma, o artigo 4º, inciso III, prevê que os/as magistrados/as devem observar *"a máxima excepcionalidade*

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[56] Heard, Catherine. (2021) Locked in and locked down – prison life in a pandemic: Evidence from ten countries London: ICPR. Disponível em: <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.prisonstudies.org%2Fsites%2Fdefault%2Ffiles%2Fresources%2Fdownloads%2Flocked_in_and_locked_down.pdf&clen=532108&chunk=true>>. Acesso em: 20/07/2021.

de novas ordens de prisão preventiva, observado o protocolo das autoridades sanitárias". O ato normativo, assim, tem como escopo o reforço ao princípio da excepcionalidade da medida extrema, devendo ser esta aplicada somente em casos de maior gravidade. Tanto é assim que o artigo 8º da recomendação dispõe que somente "*excepcionalmente o magistrado deve converter a prisão em flagrante em preventiva, nos casos de crime cometido com emprego de violência ou grave ameaça contra a pessoa, desde que presentes, no caso concreto, os requisitos os requisitos constantes do art. 312 do Código de Processo Penal e que as circunstâncias do fato indiquem a inadequação ou insuficiência das medidas cautelares diversas da prisão, observado o protocolo das autoridades sanitárias".*

No entanto, a pesquisa empírica apresentada no presente estudo revelou que o Poder Judiciário, aqui representado pelo Superior Tribunal de Justiça, em que pese a gravidade do contexto emergencial e sanitário que assola nossa sociedade, tem relativizado o princípio da excepcionalidade da prisão preventiva, bem como a aplicação da Recomendação nº 62/2020 do CNJ, inclusive, em casos em que, em tese, estariam preenchidos seus requisitos. Verificou-se, assim, que, dentre o espaço amostral analisado no presente estudo, em 56% dos casos, houve a denegação da ordem de *habeas corpus* e somente em 6% dos casos houve a concessão da ordem, mediante a observância das diretrizes previstas na recomendação em epígrafe. Nesse sentido, de se ressaltar que o Tribunal Superior, ao negar o pedido defensivo para concessão da liberdade provisória e aplicação da Recomendação nº 62/2020 do CNJ, tem utilizado fundamentos inidôneos, tais como a necessidade de comprovação de que o paciente está inserido em grupo de risco e a comprovação de que o estabelecimento prisional traz "real risco" de contaminação pelo vírus. Verificou-se, assim, na pesquisa empírica realizada, a mitigação do escopo do ato normativo em questão, em clara violação ao princípio da excepcionalidade da prisão cautelar. Em diversos casos que comportariam a concessão da liberdade provisória, em observância ao quanto dispõe o art. 4º, da Recomendação nº 62/2020, a prisão preventiva dos pacientes foi mantida sob o fundamento da necessidade de comprovação da inclusão do paciente no grupo de risco ou na necessidade de se comprovar a precariedade do estabelecimento prisional para o enfrentamento da circulação do coronavírus.

Os números da pesquisa empírica ora analisados e o teor dos acórdãos desvelam, portanto, que mesmo no atual contexto de emergência sanitária e a tentativa de adoção de medidas voltadas ao desencarceramento, a prisão preventiva não tem sido tratada como *ultima ratio*. Pela análise dos acórdãos, muito embora em alguns casos houve a concessão da ordem de *habeas* corpus a fim de se observar o quanto previsto na Recomendação nº 62/2020 do CNJ, verificou-se, na maior parte dos acórdãos analisados, certa resistência do Superior Tribunal de Justiça em reconhecer o preenchimento dos requisitos previstos no art. 4º do referido ato normativo, mitigando-se, assim, a observância ao princípio da excepcionalidade.

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Teoria da Prova Penal

Criminal evidence theory

Oitivas e interrogatórios baseados em evidências: considerações sobre entrevista investigativa aplicado na investigação criminal

Evidence based Interview and Interrogation: Considerations from Investigative Interviewing applied into criminal investigation

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Resumo: Policiais realizam entrevistas com vítimas, testemunhas, e suspeitos para obter informações, sendo a acurácia e a quantidade destas informações diretamente relacionadas às técnicas de entrevista

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utilizadas. Uma entrevista com técnicas inadequadas tende a gerar poucas informações e potencialmente imprecisas, prejudicando o processo investigativo e o sistema de justiça. Já uma entrevista com técnicas adequadas é capaz de resultar em um maior número de informações confiáveis, preservando os direitos dos entrevistados. Neste artigo de revisão narrativa são apresentadas técnicas de entrevista investigativa e sua importância para a obtenção de informações confiáveis em oitivas e interrogatórios. Em seguida, apresenta-se um exemplo de como a entrevista investigativa foi implementada no Reino Unido, demonstrando como a aproximação entre pesquisadores e policiais pode auxiliar no processo de implementação e avaliação de treinamento.

Palavras-chave: Entrevista; Memória; Treinamento; Policial.

Abstract: *Police officers interview victims, witnesses and suspects to obtain information, and the quality and quantity of this information are directly related to the techniques used. An interview with inappropriate techniques tends to generate little accurate information, impairing the investigative process and the justice system. An interview with appropriate techniques, however, can result in more reliable information, preserving the rights of interviewees. In this paper we present investigative interview techniques and their importance for obtaining reliable information from witnesses, victims, and suspects. Then, we present the example of how this change was made in the United Kingdom, demonstrating how the dialogue between researchers and law enforcement can assist in the process of training implementation and evaluation.*

Keywords: *Interview; Memory; Training; Police.*

Introdução

A memória humana é uma importante fonte de informação para a investigação e julgamento de um crime, em especial quando tratamos de entrevistas realizadas em oitivas de vítimas e testemunhas e interrogatórios de suspeitos. Policiais possuem um papel importante, pois são os primeiros a terem contato com pessoas que possam relatar o ocorrido. Por meio de técnicas de entrevista adequadas é possível obter um

relato detalhado que forneça informações confiáveis sobre o aconteceu, quem foram os evolvidos, suas motivações, entre outros. Entretanto, a memória de um crime não é estática, sendo sujeita ao esquecimento e sugestionabilidade, e técnicas de entrevista inadequada tendem a resultar em relatos limitados ou, até mesmo, falsos (ex: falsas memórias, falsas confissões; MEISSNER; KELLY; WOESTEHOFF, 2015; OXBURGH; MYKLEBUST; GRANT, 2010).

No Brasil atualmente inexistem diretrizes específicas para a realização de entrevistas ou capacitações regulares nas técnicas de entrevista investigativa para a Polícia Civil, responsável pela investigação criminal. Ainda que policiais considerem importante utilizar técnicas recomendadas pela literatura para estimular o relato do entrevistado (BALLARDIN; STEIN; MILNE, 2013), o treinamento destas técnicas não é unânime nas academias de polícia brasileiras. Um levantamento feito com policiais civis e militares das cinco regiões do Brasil verificou a carência de treinamento adequado, levando estes profissionais a aprender com a própria experiência, ou copiar exemplos de colegas, que também não receberam treinamento em técnicas com embasamento científico (STEIN; ÁVILA, 2015). Devido à falta de capacitação, pesquisas recentes tem apontados que técnicas de entrevista inadequadas são observadas em todas as regiões do Brasil, prejudicando a investigação policial e o sistema de justiça como um todo (ABREU, 2019; MOSCATELLI, 2020; STEIN; ÁVILA, 2015).

Recentemente o cenário de entrevista policial começou a mudar a partir de esforços específicos sendo realizados por academias de polícia, como é o caso da Academia de Polícia de Santa Catarina, que tem implementado a Entrevista Investigativa por meio de treinamentos (PACHECO; HOFFMANN, 2021). Entretanto, devido à escassez de material em lingua portuguesa acerca de quais técnicas de entrevista possuem embasamento científico, e como estas podem ser treinadas, este artigo versa sobre os benefícios de capacitar e supervisionar policiais em entrevistas investigativas. Por meio de uma revisão narrativa de estudos teóricos e empíricos (advindos de experimentos e análises de casos reais), inicialmente serão abordadas as diferenças entre técnicas de entrevista inadequadas e adequadas, para então tratar da necessidade de capacitação em técnicas de entrevista. Ao final, é apresentado o caso do Reino

Unido, pioneiro na mudança dessas práticas há quase três décadas. Ao longo do artigo é proposto o diálogo entre pesquisa e prática como uma forma de contribuir para a obtenção de informações fidedignas e evitando erros de justiça a partir de condenações injustas de pessoas inocentes ou resultados inconclusivos de investigações criminais.

1. Implicações das técnicas de entrevistas no relato obtido

Entrevistas com vítimas, testemunhas, e suspeitos têm estado no cerne da investigação criminal há décadas, todavia, têm sido alvo de críticas e seus resultados muitas vezes são vistos como pouco confiáveis (GRIFFITHS; MILNE, 2006). A fonte de informação de uma entrevista é o entrevistado, seja ele uma criança vítima de violência ou um adulto suspeito de cometer um ato ilícito, pois é ele quem tem memória sobre os fatos ocorridos (MILNE; SHAW; BULL, 2007). Assim, como o nome sugere, a entrevista investigativa visa investigar/explorar informações que o (a) entrevistador(a) não sabe, pois não estava lá no momento do crime, portanto, o objetivo do(a) entrevistador(a) é utilizar técnicas que favoreçam a obtenção do relato do entrevistado (GRIFFITHS; MILNE, 2006, 2018).

A Entrevista é um processo de comunicação, em que o (a) entrevistador(a) busca obter informações da pessoa entrevistada a partir da memória para eventos vividos ou presenciados, nomeada memória episódica. A memória episódica pode ser rica em informações e possibilita recordar detalhadamente um evento, mesmo que sucedido há tempo (ex: a ida em um parque de diversões quando criança). Entretanto, a memória não é como um registro filmado e é sujeita ao esquecimento devido ao decorrer do tempo, além de passível de ser alterada devido à inserção de informações, por exemplo, ao conversar com outras pessoas sobre o evento em questão (LOFTUS, 2005). O relato de um entrevistado não é um fim em si mesmo, mas um produto das técnicas utilizadas, de forma que métodos inadequados resultam em um menor número de informações confiáveis. Contudo, há um consenso acerca de técnicas adequadas a serem utilizadas antes, durante e após a entrevista (GRIFFITHS; MILNE, 2006, 2018; LAMB *et al.*, 2007b; MILNE, R; SHAW; BULL, 2007; PAULO; ALBUQUERQUE; BULL, 2014). Nesta seção apresentaremos brevemente

algumas das principais técnicas que permitam compreender a estrutura de uma entrevista investigativa.

As crenças e vieses do entrevistador podem prejudicar a entrevista. As informações que o(a) entrevistador(a) busca em uma entrevista derivam do que ele acredita que aconteceu e quem foram os envolvidos, portanto, uma entrevista não inicia apenas quando o(a) entrevistado(a) começa a falar (FAHSING, 2016). Em um caso de alegação de abuso sexual, por exemplo, se o(a) entrevistador(a) acredita que o abuso não ocorreu, pode examinar apenas relatos que indiquem que a vítima estava mentindo (ex: "se isto aconteceu porque você não relatou para alguém antes?"). Da mesma forma, se o(a) entrevistador(a) acredita que o abuso ocorreu e sabe quem são os envolvidos (ex: o abuso foi cometido pelo pai da criança), pode deixar de explorar outras hipóteses (ex: o abuso não ocorreu, ou foi cometido por outra pessoa).

Outro exemplo do impacto da mentalidade do(a) entrevistador(a) é observado em entrevistas com suspeitos, na qual se adota uma postura acusatória e coercitiva, consubstanciando-se em práticas conhecidas como interrogatórios (KASSIN *et al.*, 2010; MEISSNER *et al.*, 2014). Comumente o objetivo do interrogatório é obter uma confissão, e consequentemente perde-se a oportunidade de investigar/explorar outras informações que o suspeito traz (KASSIN *et al.*, 2010; MOSCATELLI, 2020). Desse modo, um interrogatório cujo foco é obter uma confissão tende a resultar em poucas informações confiáveis e, até mesmo, a levar inocentes a confessarem um crime que não cometeram, devido à coerção psicológica causada pelo interrogador.

Se ao invés de buscar uma confissão o(a) entrevistador(a) explora informações trazidas pelo entrevistado, tende a obter um maior número de informações relevantes para a investigação (MEISSNER *et al.*, 2014; MEISSNER; KELLY; WOESTEHOFF, 2015). Por exemplo, caso a pessoa suspeita negue o crime dizendo que estava jantando com amigos, é possível explorar o relato (ex: pedir para que fale sobre percurso desde sair de casa até chegar ao local), e posteriormente corroborar com outras informações (ex: câmera do estabelecimento, câmeras de semáforo do trajeto entre a casa e o estabelecimento). Ao explorar o relato da pessoa suspeita, possibilita-se corroborar ou negar hipóteses alternativas, aumentando a credibilidade da hipótese remanescente (FAHSING, 2016).

Dentre as recomendações fundamentais da área de técnicas de entrevista está a gravação da entrevista em áudio e vídeo, pois esta é a única forma de manter um registro fiel das informações e da forma como foram obtidas (LASSITER *et al.*, 2002; LIDEN; GRANS; JUSLIN, 2018; WESTERA; KEBBELL; MILNE, 2011). Se o(a) entrevistador(a) realiza registros (ex: boletim de ocorrência) no decorrer da entrevista, sua atenção fica dividida entre as tarefas de escrever e de escutar, comprometendo o processo de comunicação, bem como sua capacidade para pensar de forma estratégica e técnica em como conduzir a entrevista. Por outro lado, se o registro ocorre após o término da entrevista, sem o auxílio de gravação, está sujeito a falhas da própria memória do(a) entrevistador(a), uma vez que é praticamente impossível alguém recordar com exatidão todas as palavras ditas. O único tipo de registro que possibilita preservar o que foi perguntado e o que foi relatado é o arquivo original em áudio e vídeo (WESTERA; KEBBELL; MILNE, 2011).

Sendo a entrevista um processo de comunicação, é importante que seja realizado em local adequado, preservando a privacidade do entrevistado, e favorecendo seu processo de recordação. Se o ambiente possui distrações (ex: telefone) ou pouca privacidade (entrada e saída de outras pessoas), pode prejudicar o relato do entrevistado. Assim, recomenda-se que a entrevista seja realizada em um ambiente privativo e com poucos estímulos que possam distrair a pessoa entrevistada (VESSEL, 1998). Isto também inclui o caso de crianças, no qual não se recomenda a presença de brinquedos, pois podem distrair e até mesmo sugestionar o relato da pessoa entrevistada (POOLE; BRUCK; PIPE, 2011).

O sucesso de uma entrevista investigativa vai depender em grande parte do clima estabelecido entre a pessoa entrevistada e o policial. Desde o primeiro minuto da entrevista é fundamental o estabelecimento de um clima favorável para que a pessoa entrevistada possa relatar as informações que possui e empreender esforços para buscar lembrar o maior número de informações acuradas (ABBE; BRANDON, 2013; WALSH; BULL, 2012).

Em um caso de abuso sexual, por exemplo, a vítima necessita relatar acerca de um momento traumático que vivenciou para o(a) entrevistador(a), para um entrevistador o qual acabou de conhecer. A pessoa suspeita do crime, ao ser solicitada a dar seu relato, pode acreditar que o policial já acredita que é culpada e qualquer informação que forneça irá

apenas aumentar as chances de que venha a ser condenado. Assim, desde o início da entrevista é preciso buscar o estabelecer o *rapport*, processo pelo qual o(a) entrevistador(a) busca criar e manter uma aliança de trabalho e respeito com o entrevistado. O *rapport* é composto por três elementos: atenção mútua (demonstrar ao(a) entrevistado(a)que há um interesse em ouvi-lo), positividade (diminuir a tensão do ambiente e mostrar-se como aliado do entrevistado) e coordenação (demonstrar um perfil empático para o entrevistado, indicando que é capaz de entender o que ele tem a dizer) (ALISON *et al.*, 2013; VALLANO; SCHREIBER COMPO, 2015). É por meio do *rapport* que o(a) entrevistador(a) busca demonstrar à pessoa entrevistada que é um profissional que buscará escutar, compreender e respeitar o que tem a dizer. O *rapport* possibilita o engajamento do entrevistado, diminuindo sua ansiedade e levando a pessoa entrevistada, seja ela testemunha ou suspeita a trazer mais esclarecimentos (WALSH; BULL, 2012). Desse modo, o *rapport* tem sido apontado como o "fio condutor" da entrevista, um dos componentes mais importantes para a obtenção de informações fidedignas (KIECKHAEFER; VALLANO; SCHREIBER COMPO, 2014; VALLANO; SCHREIBER COMPO, 2015).

Após estabelecer e manter o rapport inicia-se o processo de obtenção do relato acerca do fato de interesse. As informações mais acuradas que alguém pode recordar acerca do que aconteceu são as relatadas de forma ininterrupta em suas próprias palavras, sendo este processo denominado de relato livre (e.g., solicitar que o entrevistado descreva o que recorda sobre o evento, com a maior quantidade de detalhes possível). Ao possibilitar o relato livre, o(a) entrevistador(a) diminui suas interferências durante a entrevista, resultando em maior quantidade e qualidade das informações obtidas (MILNE, R; SHAW; BULL, 2007). Assim, é preciso realizar intervenções de encorajamento para que a pessoa entrevistada siga relatando, estendendo ao máximo o relato livre de interrupções ou perguntas, por exemplo após uma pausa pedir detalhes adicionais acerca de algo já relatado (ex: "o que mais você recorda sobre este homem que você descreveu?"). Evitar interferências e interrupções no relato da pessoa entrevistada é importante para favorecer o processo de comunicação e a obtenção de informações fidedignas.

Após estimular o relato livre, é possível que algumas informações relevantes para o caso ainda não tenham sido obtidas e o(a)

entrevistador(a) necessite realizar perguntas. Entretanto, há diferentes tipos de perguntas que podem alterar a quantidade e a qualidade das informações obtidas. Por exemplo, após a vítima relatar que o abusador "passou a mão na minha perna", o(a) entrevistador(a) pode realizar uma pergunta aberta (ex: "Você falou que ele passou a mão na sua perna, fale mais sobre isto") e caso não tenha a resposta obtida, pode realizar uma pergunta específica (ex: como ele passou a mão em sua perna?). O(a) entrevistador(a) deve priorizar perguntas abertas, pois estas resultam em informações mais precisas e detalhadas (GRIFFITHS; MILNE, 2006; LAMB *et al.*, 2007a; OXBURGH; MYKLEBUST; GRANT, 2010). Perguntas mais fechadas (e.g., "Quantas vezes ele passou a mão em sua perna?") levam a uma menor quantidade de informações e podem ser utilizadas apenas se o relato livre, perguntas abertas e específicas não resultaram em informações cruciais para a entrevista (MYKLEBUST; BJØRKLUND, 2006).

Perguntas sugestivas (ex: "ele foi agressivo quando tocou em sua perna?") nunca devem ser utilizadas, pois sugerem uma informação não relatada à pessoa entrevistada e podem induzir a equívocos ou mesmo a relatos falsos (CECI; BRUCK, 1995; ROEBERS; SCHNEIDER, 2000). Frente a uma pergunta sugestiva, a pessoa entrevistada pode concordar ou negar informações, podendo resultar em um relato falso sobre o ocorrido (LAMB *et al.*, 2007a; MACDONALD; SNOOK; MILNE, 2017; POWELL; FISHER; WRIGHT, 2005). Por exemplo, se o(a) entrevistador(a) pergunta "ele tinha uma tatuagem no pescoço?", a testemunha pode apenas concordar com a informação (ex: "acho que sim") e vir posteriormente a alterar sua memória para o evento (ex: passar a recordar que o criminoso tinha uma tatuagem, quando na verdade não a possuía). Assim, quanto menor a influência das perguntas na obtenção do relato maior a quantidade e a fidedignidade das respostas obtidas.

Depois de esgotado a etapa de ouvir o relato livre seguido de perguntas de esclarecimento, segue-se para a etapa de encerramento da entrevista. Para manter o processo de comunicação adequado, a entrevista não pode ser finalizada de forma abrupta. Isto significa agradecer a pessoa entrevistada pelo seu tempo, seu esforço e pela disponibilidade em relatar informações, além de manter em aberto um canal de comunicação, caso a pessoa entrevistada queira relatar mais informações posteriormente. Ao final da entrevista, a gravação permite que seja realizada a avaliação

da entrevista, na qual pode verificar avaliar quais as informações obtidas como estas se relacionam com as hipóteses para o ocorrido (FAHSING, 2016). Além disto, o(a) entrevistador(a) juntamente com outros profissionais podem avaliar as técnicas utilizadas na entrevista, visando o aperfeiçoamento da prática (GRIFFITHS; MILNE, 2006).

Entrevistas com procedimentos inadequados são contraprodutivas, uma vez que as informações obtidas por meio de métodos indutivos podem ser invalidadas e, muitas vezes, levar inocentes a serem condenados. Neste sentido, técnicas de entrevista são uma ferramenta importante para o(a) entrevistador(a), à medida em que são baseadas em evidências científicas testadas tanto em pesquisas mais realizadas em experimentos de laboratório quanto em estudos de casos reais. Além de entender quais as melhores práticas de entrevista, pesquisadores têm investigado quais as formas mais efetivas de transmitir estes conhecimentos para a prática de entrevistadores.

Para desenvolver um programa de capacitação e supervisão é importante estabelecer quais as técnicas que se espera de um entrevistador (CLARKE; MILNE; BULL, 2011; HILL; MOSTON, 2011; WALSH; KING; GRIFFITHS, 2017). Entretanto, mais do que intervenções pontuais, é necessária uma mudança estrutural visando a capacitação de entrevistadores investigativos em níveis regionais e nacionais, como é o caso de países como Reino Unido, Austrália e Noruega (FAHSING; RACHLEW, 2009; GRIFFITHS; MILNE, 2006; HILL; MOSTON, 2011). Na próxima seção será apresentado o caso do Reino Unido, pioneiro em implementar estas mudanças para todos os policiais que realizam entrevistas. Ao final serão apresentadas algumas considerações para a implementação de treinamentos em técnicas de entrevista do Brasil.

2. Treinamento em técnicas de entrevista: o exemplo do Reino Unido e possibilidades para o Brasil

Uma mudança estrutural é não apenas necessária, mas possível, visto que já tem sido implementada com sucesso em outros países há cerca de 40 anos (GRIFFITHS; MILNE, 2006) (GRIFFITHS; MILNE, 2006; MILNE; SHAW; BULL, 2007). A seguir será apresentada mais detalhadamente como a mudança na capacitação de entrevistas investigativas é

possível, a partir do exemplo do Reino Unido, pioneiro na implementação de treinamentos regulares em entrevistas investigativas.

A realidade atual do Brasil se assemelha ao cenário do Reino Unido até o início dos anos 1980, quando não havia treinamento formal para entrevistas investigativas. Policiais desenvolviam sus práticas com base na tentativa e erro ou baseando-se na conduta de colegas mais experientes, que também não possuíam treinamento pautado em técnicas. Neste cenário, bons interrogadores eram aqueles capazes de "extrair confissões" de um suspeito, o que resultou em diversos problemas e erros de justiça, em especial em função de falsas confissões (GRIFFITHS; MILNE, 2006). Estas práticas de interrogatório, e seus resultados desastrosos em termos, por exemplo, de condenações injustas, acabaram sendo alvo de contundentes críticas da opinião pública britânica levando a uma perda de confiança no poder judiciário e na própria polícia. Frente a essas críticas e desafios, policiais se uniram a pesquisadores para buscar soluções baseadas em evidência científicas e em direitos humanos, a fim de tornar mais eficazes as entrevistas investigativas mais técnicas, profissionais e eficientes.

Como resultado da parceria entre policiais e pesquisadores, foi estabelecido um modelo teórico e prático acerca dos objetivos da entrevista e das competências a serem desenvolvidas por um entrevistador. Foram traçadas diretrizes a fim de estabelecer os preceitos a serem alcançados em entrevistas investigativas com vítimas, testemunhas e suspeitos. O governo criou um regulamento endereçado a todos os policiais do país, recomendando práticas adequadas para diferentes públicos como suspeitos ou pessoas em situação de vulnerabilidade. Desse modo, ao invés de confrontar suspeitos buscando uma confissão ou buscar informações de vítimas e testemunhas mediante perguntas especificas e fechadas, entrevistadores passaram a adotar uma postura de obtenção de informações por meio do relato livre e de perguntas abertas (MILNE, R; SHAW; BULL, 2007; MILNE, Rebecca; BULL, 2003).

Desde sua criação, o as diretrizes de entrevista já forma ampliadas, incluindo tópicos como: quais crimes requerem uma entrevista mais meticulosa e quais os procedimentos para gravação de áudio ou vídeo de entrevistas. Ainda que elaborar leis e diretrizes seja uma etapa fundamental, ela não garante que os entrevistadores implementarão as

melhores práticas em uma entrevista. Verificou-se então a necessidade de estabelecer uma estrutura de capacitação regular de entrevistadores estabelecendo como as técnicas devem ser ensinadas, e como avaliar se as práticas estão sendo implementadas de forma adequada (MACDONALD; SNOOK; MILNE, 2017).

Em 1992, a parceria entre policiais e pesquisadores em Manchester resultou em um modelo de entrevista sob o acrônimo PEACE, em que cada letra representa uma etapa a ser seguida na entrevista: P) Planejamento e preparação (*Planning and Preparation)*; E) Engajar e explicar o processo de entrevista (*Engage and Explain)*; A) Obtenção do relato (*Account*); C) Fechamento da entrevista (*Closure*); e E) Avaliação da entrevista (*Evaluation*). O treinamento do modelo PEACE mostrou bons resultados e assim iniciou-se uma operação para capacitar todos os policiais do Reino Unido (CLARKE; MILNE, 2001; GRIFFITHS; MILNE, 2006).

Após algum tempo foi percebido que um único treinamento não supriria as diferentes demandas da realidade policial. Foram, então, estruturados diferentes treinamentos de acordo com o tempo de atuação e conforme a especialização do policial para os diferentes tipos de crime. Os cursos foram divididos em cinco diferentes estágios (chamados *Tiers*). Desde 1992, todos os policiais do Reino Unido são capacitados no *Tier 1* como parte de sua formação inicial, possibilitando que realizem entrevistas simples para obtenção de informações relativas a crimes comuns (ex: vítimas de furto), estabelecendo o *rapport* e encorajando a narrativa livre. No *Tier* 2 o(a) entrevistador(a) é capacitado para entrevista de crimes mais complexos (e.g., homicídios). No *Tier* 3, os entrevistadores são especializados em públicos mais específicos, tornando-se especialistas em entrevistas com suspeitos, ou vítimas vulneráveis (ex: crianças, pessoas com algum transtorno mental), por exemplo (GRIFFITHS; MILNE, 2006; MILNE, R; SHAW; BULL, 2007).

No Reino Unido, entrevistas em casos de crimes complexos são, além de gravadas em vídeo, supervisionadas em tempo real, de modo que o supervisor possa verificar as técnicas utilizadas e sugerir novas abordagens ao(a) entrevistador(a). Desse modo, foram elaboradas capacitações para supervisores de entrevistas no *Tier* 4. Por sua vez, no *Tier* 5 policiais são capacitados para coordenar equipes de entrevistas em casos complexos (ex: atentado terrorista e sequestro; GRIFFITHS; MILNE, 2006).

O treinamento de *Tier* 1 costuma ser realizado com grupos maiores, por exemplo, policiais ingressantes na corporação. Ao longo do primeiro ano de atuação, suas entrevistas são supervisionadas por policiais *Tier 4* de sua jurisdição. Para participar dos demais *Tiers*, os policiais necessitam ser recomendados por superiores. Os treinamentos dos *Tiers* 2-5 são realizados com grupos pequenos, de até oito policiais, de forma a garantir que todos possam praticar entrevistas e serem supervisionados durante o treinamento. Os alunos são individualmente avaliados mediante simulações nas quais entrevistam (*Tier* 2-3) ou supervisionam uma entrevista (*Tier* 4-5) realizada por outro aluno no papel de entrevistador ou supervisor. O aluno no papel de testemunha assiste a um vídeo de um crime (ex: um filme em primeira pessoa de uma testemunha de um homicídio) e é submetido à entrevista investigativa. Ao passo que o aluno no papel de testemunha pode experienciar as dificuldades inerentes a relatar um crime, o(a) entrevistador(a) pode ser supervisionado pelo instrutor do curso, a fim de apontar aspectos positivos e aspectos a serem aprimorados (ST-YVES *et al.*, 2014). Ao final do curso, o instrutor elabora um relatório avaliativo que serve de *feedback* para o aluno e para seu superior hierárquico indicando quais técnicas ainda precisam ser supervisionadas em sua prática profissional, a fim de garantir o desenvolvimento do(a) entrevistador(a) (CLARKE; MILNE; BULL, 2011; GRIFFITHS; MILNE, 2006; MILNE,; SHAW; BULL, 2007).

A análise de interrogatórios de suspeitos de fraude verificou que o uso dos passos propostos pelo PEACE esteve associado a um maior número de informações relevantes ou confissões, enquanto a ausência destes levou um maior número de suspeitos a negar envolvimento ou não prover informações (WALSH; BULL, 2010). Resultados semelhantes foram encontrados em populações como suspeitos de terrorismo, suspeitos de crimes sexuais, e vítimas e testemunhas de diferentes tipos de crimes, indicando que a abordagem da entrevista investigativa resulta na obtenção de um maior número de informações relevantes para a investigação (e.g., pessoas envolvidas, lugares, objetos). (ALISON et al., 2013; CLARKE; MILNE, 2001; CLARKE; MILNE; BULL, 2011; KIECKHAEFER; VALLANO; SCHREIBER COMPO, 2014; MILNE; BULL, 2008; READ et al., 2009; VALLANO; SCHREIBER COMPO, 2015; WALSH; BULL, 2010, 2015).

Atualmente, o Reino Unido é referência mundial em treinamento e prática de entrevistas investigativas, cujo modelo já foi adaptado para diferentes países como Nova Zelândia, Líbano, Malásia, Vietnã, (ainda que tais países não se encontram no mesmo nível de desenvolvimento e ambrangencia do programa de capacitação do Reino Unido; (CLARKE; MILNE, 2017). A eficácia do treinamento do modelo PEACE continua sendo estudada por pesquisadores, visando expor os resultados obtidos e permitir identificar necessidades de mudança (CLARKE; MILNE, 2001; CLARKE; MILNE; BULL, 2011). Ainda que existam adaptações do PEACE, há uma estrutura comum em diferentes treinamentos, que tem se mostrado consolidada para a capacitação em entrevista investigativa, que podem ajudar no planejamento de capacitação em entrevista investigativa para a Polícia Civil brasileira.

Entrevista consiste numa técnica que necessita ser aprendida: caso não haja um treinamento formal, principiantes tendem a adaptar técnicas observadas em policiais mais experientes ou adaptar formas de conversação utilizadas no dia a dia. Entretanto, nem sempre os exemplos observados ou adaptados do cotidiano correspondem a técnicas adequadas de entrevista. Entrevistadores que não receberam adequada capacitação podem incorrer em práticas ineficazes, por exemplo, aquelas que lançam mão de perguntas fechadas na busca de informações (MEMON *et al.*, 1994; STEIN; ÁVILA, 2015).

Diferentes formas de capacitar entrevistadores têm sido desenvolvidas mediante treinamentos. Estes podem ser de vários formatos, diferindo conforme os objetivos e a duração. Há treinamentos intensivos, realizados ao longo de poucos dias; há os espaçados, realizados ao longo de diversos meses; existem os presenciais e os *online;* há também treinamentos para técnicas específicas (ex: uso de perguntas) ou protocolos estruturados de entrevista (LAMB, 2016). Ainda que haja diferentes formas de realizar treinamentos de entrevista investigativa, eles partilham de uma estrutura que consiste em estabelecer as técnicas a serem aprendidas, realizar práticas e supervisionar entrevistadores.

Um treinamento precisa estabelecer qual o objetivo e a estrutura das entrevistas. Um primeiro passo é identificar quais as leis já vigentes a serem observadas em uma entrevista e as práticas atualmente utilizadas pelos entrevistadores (MEISSNER; KELLY; WOESTEHOFF, 2015).

A partir disto podem ser estabelecidas diretrizes, por meio de governos ou organizações. É também possível adaptar protocolos de entrevistas já consolidados (ex: NICHD, Entrevista Cognitiva), para que sejam estabelecidos os passos a serem seguidos em uma entrevista (CLARKE; MILNE, 2001; FISHER; GEISELMAN, 1992; LAMB *et al.*, 2007a). Com objetivos claros acerca de quais as práticas a serem alcançadas, é possível estruturar um treinamento para os profissionais responsáveis em aplicá-las em seu dia a dia de trabalho.

Enquanto o relato de um crime tem como base a memória episódica, o ato de entrevistar tem como base a memória procedural, cuja consolidação advém, principalmente, mediante a prática. Assim como saber ler partituras não garante que alguém se tornará um bom músico, estudar técnicas de entrevista não garante que alguém saberá utilizá-las, sendo imprescindível a prática de entrevistas durante o ensino. Uma forma de praticar técnicas de entrevista é possibilitar que sejam exercitadas no decorrer do curso de capacitação. Por exemplo, um participante pode ser designado ao papel de testemunha e assiste a um vídeo de uma encenação de crime. Então é entrevistado por outro aluno no papel de entrevistador, que busca aplicar as técnicas aprendidas durante o curso (ST-YVES *et al.*, 2014). O instrutor do curso e os demais alunos assistem à entrevista, fazendo anotações acerca de pontos positivos e negativos, para após concluída a entrevistas poder dar *feedback* construtivo para o(a) entrevistado(a). Estas práticas durante o curso de capacitação permitem que o aluno experimente as técnicas aprendidas e que o supervisor reforce as técnicas adequadas que foram por este aluno utilizadas, apontando aspectos a serem melhorados (LAMB, 2016).

O(a) entrevistador(a) precisa avaliar seu próprio desempenho na entrevista, embora a autoavaliação seja sujeita a limitações da memória e a vieses pessoais. Se o(a) entrevistador(a) acredita que deu o máximo de si em sua entrevista, por exemplo, é possível que recorde principalmente dos momentos em que acredita que teve um desempenho positivo, não atentando para os aspectos que ainda necessitam ser aprimorados (GRIFFITHS; WALSH, 2018; WALSH; KING; GRIFFITHS, 2017). Assim, é comum que a autoavaliação da entrevista seja mais positiva do que a avaliação dos pares ou supervisores. Neste sentido, a supervisão se revela uma atividade de magna importância, pois apresenta o olhar de uma terceira

pessoa sobre aspectos que podem ser aprimorados, levando a melhores desempenhos futuros (CLARKE; MILNE; BULL, 2011; WALSH; KING; GRIFFITHS, 2017). Novamente, faz-se relevante a gravação da entrevista pois possibilita que a supervisão ocorra avaliando como a entrevista ocorreu, e não o que o(a) entrevistador recorda sobre a entrevista.

Ainda que o treinamento inicial intensivo (por exemplo, de quatro ou cinco dias) seja fundamental, ele não assegura que um policial irá realizar entrevistas eficazes por toda sua carreira (CLARKE; MILNE, 2001). Mesmo que entrevistadores sejam submetidos a treinamentos e sejam capacitados acerca das melhores técnicas, poderão não utilizá-las em suas práticas posteriores (MYKLEBUST; BJØRKLUND, 2006; OXBURGH; MYKLEBUST; GRANT, 2010). Além da capacitação dos entrevistadores, é preciso que haja algum tipo de avaliação e atividades de reforço, como monitoramento ou treinamentos de atualização, para que os policiais mantenham um bom desempenho em suas entrevistas.

O Reino Unido representa um exemplo de como é possível aderir a práticas avançadas baseadas em evidências e direitos humanos. Entretanto, o Brasil possui leis, demandas e necessidades diferentes, de forma que a simples transposição do método empregado pelo Reino Unido não contemplaria a realidade brasileira. Por exemplo, quais investigações são consideradas prioritárias e que requerem entrevistadores com maior expertise? Quais são os requisitos esperados dos entrevistadores e qual precisa ser a estrutura de um treinamento condizente com a realidade enfrentada? Quais as hierarquias dos profissionais de entrevista a serem configuradas, tendo em vista a complexidade das diferentes investigações? Como estas mudanças precisam emergir do diálogo entre pesquisadores e profissionais do sistema de justiça, este artigo não apresenta um protocolo brasileiro pronto ou impor quais aspectos devem ser aprimorados e/ou como fazê-los. Entretanto, como explanado neste artigo, existem questões estruturantes e básicas de uma boa entrevista investigativa que são comuns a toda situação que o objetivo é informações detalhadas e confiáveis. Assim, é possível utilizar o Reino Unido como referência dos passos necessários para a implementação de uma mudança: promover o diálogo entre policiais e pesquisadores para identificar as demandas, implementar capacitações e avaliar as práticas de entrevista.

Conclusões

O relato de testemunhas, vítimas e suspeitos consiste numa das principais fontes de informação para o sistema de justiça. Atualmente ainda não existem, no Brasil, diretrizes para a capacitação em entrevistas investigativas ou um protocolo a ser seguido pelo(a) entrevistador(a). Esta falta de capacitação para entrevistadores pode fazer com que até mesmo entrevistadores dedicados incorram em práticas equivocadas. Para tanto, é importante identificar diretrizes para oitivas e entrevistas, no intuito de estabelecer os objetivos a serem alcançados nessas práticas, criando programas de capacitação para tal.

A realidade brasileira atual enseja a necessidade de treinamentos regulares para entrevistadores, bem como a criação e a adaptação de ferramentas adequadas para avaliação e supervisão dos aprendizes. É preciso diminuir a distância entre o conhecimento já disponível sobre entrevista investigativa e o que vem sendo praticado no País. A parceria entre pesquisadores e entrevistadores é um caminho frutífero a ser trilhado, visando identificar problemas e procurar soluções, por meio de técnicas baseadas em evidências e alicerçado nos princípios dos direitos humanos.

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